No. 20-1199

In the
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
PRESIDENT AND
FELLOWS OF HARVARD COLLEGE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, REASON FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, INDIVIDUAL RIGHTS FOUNDATION, CHINESE AMERICAN CITIZENS ALLIANCE - GREATER NEW YORK, COALITION FOR TJ, AND YI FANG CHEN IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

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IDENTITY AND INTEREST OF AMICI CURIAE

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit legal foundation that defends the principles of liberty and limited government, including equality before the law.[1] For over 40 years, PLF has litigated in support of the rights of individuals to be free of racial discrimination. PLF is currently litigating to vindicate the equal protection rights of children in Connecticut and New York. PLF has also participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The Center for Equal Opportunity (CEO) is a research and education organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code and

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. All parties received notice of Amici Curiae's intent to file this brief at least 10 days prior to the due date. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies do not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. *E pluribus unum*: out of many, one. CEO supports colorblind policies and seeks to block the expansion of racial preferences in all areas. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved*, 551 U.S. 701; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Reason Foundation (Reason) is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets" and equality before the law, Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

The Individual Rights Foundation (IRF) was founded in 1993 and is the legal arm of the David

Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and equality of rights. To further these goals, the IRF has filed amicus curiae briefs in cases involving fundamental equal protection issues, including *Fisher I*, 570 U.S. at 297; *Fisher II*, 136 S. Ct. at 2198; *Ricci*, 557 U.S. at 557, and *Grutter*, 539 U.S. at 306.

The Chinese American Citizens Alliance–Greater New York (CACAGNY) is a chapter of the Chinese American Citizens Alliance, the oldest Asian American Advocacy group in the country. CACAGNY's mission is to empower Chinese Americans, as citizens of the United States of America, by advocating for Chinese-American interests based on the principles of fairness and equal opportunity, and guided by the ideals of patriotism, civility, dedication to family and culture, and the highest ethical and moral standards.

Yi Fang Chen is a mother of a third grader at P.S. 102 in Brooklyn. Ms. Chen was born in China and moved to the United States in 1996. Although she came to this country speaking little English, she eventually obtained a doctorate in statistics from Stanford University, and now works as a data scientist in Manhattan. PLF currently represents Ms. Chen and CACAGNY in a lawsuit challenging New York City's discriminatory changes to its admissions program for the City's specialized schools. *See Christa McAuliffe Intermediate School PTO, Inc., et al. v. De Blasio, et al.*, 1:18-cv-11657 (S.D.N.Y. filed Dec. 13, 2018).

The Coalition for TJ is a group of parents, students, alumni, and community members of Thomas Jefferson High School for Science and Technology, known as "TJ." The coalition's approximately 5,000 supporters are primarily Asian American parents, who regularly attend and speak at school board meetings, organize rallies, engage legislators, and educate their community on the value of merit-based admissions for specialized schools like TJ. PLF currently represents the Coalition for TJ in its challenge to Fairfax County's discriminatory changes to its admissions policy for Thomas Jefferson High School for Science and Technology. *See Coalition for TJ v. Fairfax Cty. Sch. Bd., et al.*, 1:21-cv-00296 (E.D. Va. filed Mar. 10, 2021).

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

"In the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring). Both the Constitution and the Civil Rights Act of 1964 enshrines the important principle that we are equal under the law. The Equal Protection Clause prohibits the government from denying "any person . . . the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. Title VI extends that prohibition to private universities that receive federal financial assistance. *See* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.").

Harvard receives federal funds, Pet. App. 235, but it does not comply with the antidiscrimination mandate of Title VI. Harvard "intentionally provides tips in its admissions process based on students' race," *id.*, and "its admissions officers may take an applicant's race into account when making an admissions decision even when the applicant has not discussed their racial or ethnic identity in their application." *Id.* at 236. Under a race-neutral admissions program, Asian Americans would make up 27 percent of Harvard's incoming class. *Id.* at 69 n.29. But Harvard's racial preferences push that number down to 24 percent. *Id.*

Title VI's protections are coextensive with the Equal Protection Clause of the Fourteenth Amendment. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Neither the Constitution nor Title VI countenances racial preferences in admissions decisions. The First Circuit's decision to the contrary rested upon an outlier in this Court's equal protection jurisprudence: *Grutter v. Bollinger*, 539 U.S. 306 (2003). The First Circuit invoked *Grutter* repeatedly throughout its opinion, and concluded that "Harvard's limited use of race in its admissions process in order to achieve diversity" was consistent with this Court's precedents. Pet. App. 98.

Grutter should be overruled. From the day on which it was decided, *Grutter* has been "grievously wrong." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part). The Equal Protection Clause contains a categorical statement: no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.

Const. amend. XIV, cl. 1. Yet the thrust of *Grutter* is that "not every decision influenced by race is equally objectionable." 539 U.S. at 327. As a result, *Grutter* announced a compelling interest in furthering diversity in the limited context of higher education. *See id.* at 328–30.

This diversity rationale is unsound. It rests upon arbitrary racial classifications. The term "Hispanic," for instance, does not describe a common background, designate a common language, or even describe gross physical appearance. *See* Peter Wood, *Diversity: The Invention of a Concept* 25 (2003). And "Asians" make up roughly 60 percent of the world's population and encompass people of Chinese, Indian, Filipino, and many more backgrounds. David E. Bernstein, *The Modern American Law of Race* 9–10 (May 2020).[2] Although state-sponsored treatment of individuals as members of arbitrary racial groups is reason enough to overrule *Grutter*, the decision's practical effects provides added cause for pause. *Grutter*'s diversity rationale perpetuates harmful stereotypes against Asian applicants and exacerbates a long and sordid history of discrimination against Asians in the United States. *Grutter* is also unworkable. As the record in this case illustrates, universities have treated the decision as an unqualified endorsement of racial preferences. Such preferences not only deny students their right to equal justice before the law, but harm the very students they purportedly benefit. This Court should grant the petition, and overrule *Grutter*.

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[2] bit.ly/3nBMhhL.

REASONS TO GRANT THE PETITION

I. *Grutter* Should Be Overruled Because It Is Grievously Wrong

A. There Is No Higher Education Exception to Equality Under the Law

Grutter is an outlier in equal protection jurisprudence. Both the Equal Protection Clause and Title VI provide a categorical bar on discrimination on the basis of race. *See* U.S. Const. amend. XIV, cl. 1. (prohibiting the government from denying "any person . . . the equal protection of the laws."); *see* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."). Earlier congressional records confirm that the Fourteenth Amendment contains an unqualified mandate: The "abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). This Court has enforced that mandate in its subsequent decisions. In *Adarand Constructors, Inc. v. Pena*, this Court explained that because racial distinctions are "odious to a free people," racial classifications are always subject to strict scrutiny. 515 U.S. 200, 214 (1995). And in *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), this Court observed that "race is treated as a forbidden classification" because "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." 528 U.S. 495, 517 (2000).

The *Grutter* Court fashioned a strange exception to these important principles. It announced that the

Court would countenance racial discrimination if it were narrowly tailored toward a university's interest in "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. Of course, a truly diverse student body may produce a number of benefits. It might teach tolerance, acceptance, and open-mindedness. But none of those purported benefits can justify the harm of racial preferences: racial discrimination.

Grutter's faulty conclusion stems from faulty premises. The *Grutter* Court provided two reasons for deferring to a university's judgment about whether educational benefits are sufficient to justify racial preferences. First, it did so in light of what the Court viewed as the "important purposes of public education and the expansive freedoms of speech and thought associated with the university environment." *Grutter*, 539 U.S. at 328–29. Second, the Court observed that a university is typically entitled "make its own judgments as to . . . the selection of its student body." *Id.* at 329. None of those reasons provide a basis to carve out an exception for universities to flout antidiscrimination mandates. Surely, public education has not become significantly more important in the decades since *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954). Yet that decision rejected race-based decisionmaking in school assignments. Further, the "expansive freedoms of speech and thought associated with the university environment" have little to do with the Equal Protection Clause. Freedom of speech allows students to express their views, wise or ignorant, about race. The Equal Protection Clause prohibits administrators from discriminating on the basis of

race in college admissions. Finally, nothing in Title VI or the Constitution cabins the substantial leeway that universities have to craft their own admissions policies. But both Title VI and the Constitution forbids universities that fall under their purview from drawing distinctions between students on the basis of race.

Grutter remains an outcast in equal protection jurisprudence. An analogy from employment law elucidates this point. An employer can conjure up some "benefits that flow from a diverse [workforce]," just as universities can surmise educational benefits that flow from a diverse student body. *Grutter*, 539 U.S. at 328. But Title VII does not allow an employer to achieve those supposed benefits by resorting to racial preferences. *See, e.g.*, *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1557–58 (3d Cir. 1996) (en banc). And a finding that the number of Asian American employees in the workforce "would increase from 24% to 27%" absent an employer's consideration of race in hiring would undoubtedly by an open-and-shut case under Title VII. Pet. App. 69 & n.29. Because *Grutter* conflicts with this Court's broader equality jurisprudence, it must be overruled. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177 (2019).

B. The Diversity Rationale Relies Upon Arbitrary Racial Classifications

The diversity interest put forth by universities routinely rests on arbitrary racial classifications. Here, Harvard admissions officers use summaries containing demographic information throughout the

admissions process. Pet. App. 24. These "one-pagers" contain racial statistics, and are "periodically shared with the full admissions committee" in part "to ensure that there is not a dramatic drop-off in applicants with certain characteristics—including race—from year to year." *Id.* As is typical, the one-pager contains broad racial categories, such as Hispanic, African American, White, and Asian American. *See* Pet. App. 25.

Racial labels, whether state-mandated or state-sponsored, are "inconsistent with the dignity of individuals in our society." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). That is because racial labels require their creator to "first define what it means to be of a race." *Id.* In that process, they impinge on the right of every individual to "find his own identity," and "define her own persona, without state intervention that classifies on the basis of his race or the color of her skin." *Id.*

The racial classifications that Harvard uses in this case are both common and crude. Members of the same racial group may have vastly different backgrounds, skills, and aspirations. The use of race in admissions policies presents the risk that Harvard evaluates applicants not as individuals but as members of a broadly defined racial group. *See Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) ("Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.") (internal citation and quotation marks omitted).

There is nothing intrinsic in these broad racial categories that assures a commonality of experience. *See* Wood, *supra,* at 25. As one scholar explained, contemporary group classifications such as "black," "Asian," and "Hispanic" fail to identify any common factor inherent to individuals within those groups. *Id.* The term "Hispanic," for instance, covers people of different backgrounds. "The Mexican Americans of the southwest, the northeast's Puerto Ricans, and Florida's Cubans had rarely thought of themselves, or been thought of by others, as constituting a single group until somebody decided to lump them into a single statistical category of 'Spanish Americans.'" Sean A. Pager, *Antisubordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. Davis L. Rev. 289, 303–04 (Nov. 2007). The same problems plague the definition of "Asian," which includes individuals of Chinese, Indian, Japanese, Vietnamese, and other origins. *Id.* at 305.

Amicus Coalition for TJ has experienced the effects of crude racial lumping first-hand. The Asian American student population at TJ comprises of students whose families hail from thirty countries, including India, Pakistan, South Korea, Japan, Vietnam, China, and the Philippines. Altogether, Asian American students make up 73% of the Class of 2024. As a result of the perceived overrepresentation of Asian American students, the school board implemented changes to the admissions system to eliminate a test that the board claims "squeezed out diversity in our system." As a result, the Coalition of TJ expects a sharp decline in the number of Asian American students in future classes at TJ. *See Coal.*

for TJ, 1:21-cv-00296, Compl. ¶ 52 (projecting that "Asian-American student enrollment at TJ will drop from 73% under the merit-based race-blind admissions system to 31% under the new racial-balancing admissions system for the Class of 2025"). It is indeed a "sordid business, this divvying us by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

C. The Diversity Rationale Routinely Discriminates Against Asian Americans

1. Racial Classifications Perpetuate Harmful Stereotypes

"Race-based assignments embody stereotypes that treat individuals as the product of their race." *Miller*, 515 U.S. at 912 (citation omitted). This case is illustrative. Harvard's admission officials assigned Asian American applicants the lowest personal ratings—a subjective assessment of whether the applicant has character traits such as "helpfulness, courage, [and] kindness," or is an "attractive person to be with," or is a "widely respected" person with good "human qualities." *See* Pet. App. 19, 173.[3] Yet alumni interviewers—who actually meet the students—assigned the same applicants significantly higher

[3] Notably, Harvard's Office of Institutional Research found that even taking personal ratings into account, Asian American students should have comprised 26% of students admitted to Harvard over 10 years—higher than the 19% of Asian American students actually admitted during that period. Althea Nagai, *Harvard Investigates Harvard: "Does the Admissions Process Disadvantage Asians?,"* Center for Equal Opportunity, Aug. 30, 2018.

personal ratings than the admissions officers. Pet. App. 292. This is hardly surprising. Asian American applicants to Harvard received not just stronger academic scores, but also had higher extracurricular ratings than the rest of the applicant pool. Pet. App. 172. Yet Harvard's race-based admissions policies have entrenched the incorrect stereotype that Asian American students are one-dimensional and lacking in personal attributes such as helpfulness, courage, and kindness.[4] As one Harvard admissions officer noted in an Asian American applicant's file: "quiet and of course wants to be a doctor." Pet. App. 157.

These pernicious stereotypes extend beyond campus. College guidebooks like the Princeton Review advise Asian American applicants to "be careful about what [they] say and don't say in [their] application." Princeton Review, *Cracking College Admissions*, 174 (2d ed. 2004). Asian students who aspire to attend Harvard are encouraged to take steps to "avoid being an Asian Joe Bloggs." *Id.* at 175. Asian American applicants must "distance [themselves] as much as possible from" stereotypes about Asians. *Id.* at 176. The guide implores Asian American students to disavow any aspiration of being a doctor or an

[4] Empirical analysis from other universities further undercut Harvard's assertions. Professor Richard Sander's analysis of the publicly available data, which covers over 100,000 applicants to University of California-Los Angeles over three years, shows that there is essentially no correlation between race and "personal achievement," as measured by admissions file readers. *See* Peter Arcidiacono et al., *A Conversation on the Nature, Effects, and Future of Affirmative Action in Higher Education Admissions*, 17 U. Pa. J. Const. L. 683, 695 (Feb. 2015). Instead, the only strong predictor of personal-achievement scores in the data was academic achievement. *Id.*

engineer, and to "get involved in activities other than math club, chess club, and computer club." *Id.* at 175.

The principle of equal protection before the law embodies the promise that race will not stand in the way between an individual and her dreams. Yet Asian American students who want to attend Harvard are incentivized to forgo a career in medicine, math, and sciences—all because there happens to be "too many Asians" in those programs. This leads to devastating consequences. As one Chinese-American student at Yale recounted, "I quit piano, viewing the instrument as a totem of my race's overeager striving in America. I opted to spend much of my time writing plays and film reviews—pursuits I genuinely did find rewarding but which I also chose so I wouldn't be pigeonholed." Althea Nagai, *Too Many Asian Americans: Affirmative Discrimination in Elite College Admissions*, Center for Equal Opportunity, May 22, 2018.[5]

Amici have felt the sting of pernicious racial stereotypes in school admissions. In the meetings preceding efforts to racially balance Thomas Jefferson High School at the expense of Asian American students, one school board member referred to the culture at TJ as "toxic." *See Coal. for TJ*, 1:21-cv-00296, Compl. ¶ 45. A Virginia state delegate, as part of a working group to address diversity and equity, made baseless claims of "unethical ways" Asian American parents "push their kids into [TJ]," when those parents are "not even going to stay in America," but instead are "using [TJ] to get into Ivy League

[5] http://www.ceousa.org/attachments/article/1209/AN.Too%20Many%20AsianAms.Final.pdf.

schools and then go back to their home country." *Id.* ¶ 38. CACAGNY, Yi Fang Chen, and others have had similar experiences in New York, where Mayor de Blasio referred to the racial composition of the specialized high schools as a "monumental injustice."[6] Administrators at the specialized high schools see the matter differently. *See* ECF No. 414-3 at 150–55 (Stuyvesant assistant principal in tears when shown the numbers of Asian American acceptance rates "[b]ecause these numbers make it seem like there's discrimination, and I love these kids and I know how hard they work").

2. Racial Classifications Exacerbate a Long and Sordid History of Discrimination Against Asians

Harvard's race-based admissions policy exacerbates a long history of discrimination against Asians. American history is replete with laws banning the entry of immigrants of Asian descent. *See, e.g.*, Chinese Exclusion Act, Law of May 6, 1882, Ch. 126, 22 Stat. 58 (repealed 1943) (banning Chinese immigration); Immigration Act of 1924, Ch. 190, 43 Stat. 153 (repealed 1952) (banning Japanese immigration); Exec. Order No. 589 (1907) (banning Japanese and Korean immigration). Alien land laws in various states restricted the ability of Asian immigrants to own property. *See, e.g.*, 1913 Cal. Stat. 113. And the separate-but-equal doctrine routinely

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[6] Bill de Blasio, *Our Specialized Schools Have a Diversity Problem. Let's Fix It.*, Chalkbeat (June 2, 2018), https://chalkbeat.org/posts/ny/2018/06/0 2/mayor-bill-de-blasio-new-york-city-will-push-for-admissions-changesat -elite-and-segregated-specialized-high-schools/ (last visited Mar. 29, 2021).

applied to Asian students, who were forbidden from going to "white" schools. *Gong Lum v. Rice*, 275 U.S. 78, 81–82 (1927).

This nation's sad history of discrimination against Asians is attributable to the "unthinking stereotypes" the Supreme Court mentioned in *Croson*. In *People v. Hall*, the California Supreme Court invalidated the testimony of Chinese witnesses. The Chinese, the court reasoned, were "people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point." 4 Cal. 399, 404-05 (Cal. 1854). In *Plessy v. Ferguson*, the Supreme Court infamously upheld the constitutionality of racial segregation under the "separate but equal" doctrine. 163 U.S. 537, 550-51 (1896), overruled by *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494-95 (1954). Yet even Justice Harlan's much-celebrated dissent in that case contained his unfortunate views that Asians were "a race so different from our own that we do not permit those belonging to it to become citizens of the United States." *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

In all, Harvard's use of race in admissions, whether out of desire to promote diversity or to remedy past discrimination, continues a long history of past discrimination against Asians with respect to immigration, property rights, and education. Because Asian American students are "overrepresented" at Harvard, the school's admissions policies harm Asian American applicants who "have not made [Harvard's] list" of favored groups. *Metro Broadcasting, Inc. v.*

FCC, 497 U.S. 547, 632 (1990) (Kennedy, J., dissenting).

II. *Grutter* Should Be Overruled Because It Is Unworkable

Grutter was "egregiously wrong when decided," and should be overruled for that reason alone. *Ramos v. Louisiana*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring). The Equal Protection Clause demands "equal justice under law," a venerable principle etched on the building of the Supreme Court. The Fourteen Amendment prohibits racial discrimination; *Grutter* allows it. A rule that permits racial preferences should not be countenanced even if it were workable. But *Grutter* is anything but workable. It was meant to permit only a sliver of racial discrimination, but universities have long viewed it as an unqualified endorsement of racial preferences.

This case is illustrative. As Harvard's Office of Institutional Research concluded, "Asian high achievers have lower rates of admission." ECF No. 414-3, SFFA's Statement of Undisputed Facts ¶ 509. The Office found that athletes with high academic ratings are admitted over 80 percent of the time, legacies with high academic ratings are admitted over half the time, low-income applicants with high academic ratings are admitted about a quarter of the time, but Asian applicants with high academic ratings are only admitted 12 percent of the time. *Id.* ¶ 508. The Office also found that the strongest "positive associations" with being admitted to Harvard were having a high personal rating, being African American, being a legacy, or being Native American.

Id. ¶ 449. By contrast, there was only one racial group who had a negative association with being admitted to Harvard: Asian Americans. *Id.* ¶¶ 450–51.

The rise of mismatch theory after *Grutter* was decided also counsels in favor of revisiting that decision. *See Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring) (listing "changed facts" as a factor to consider in cases implicating stare decisis). The basic principle underlying "mismatch" theory is intuitive: most students learn best if they are in a class with others at the same level of preparation. This effect holds regardless of the student's race.

Racial preferences implicate mismatch theory. By definition, they give underqualified applicants a boost to further the university's goal in achieving a diverse class. A few years before *Grutter*, Rogers Elliott and his colleagues at Dartmouth conducted an empirical study that revealed that racial preferences were deterring racial and ethnic minority students from majoring in science, technology, engineering, and mathematics. Rogers, Elliott et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Admissions*, 37 Res. Higher. Ed. 681 (1996). Another study published a year after *Grutter* came to the same conclusion. *See* Frederick L. Smyth & John J. McArdle, *Ethnic and Gender Differences in Science Graduation Rates at Selective Colleges with Implications for Admissions Policy and College Choice*, 4 Res. Higher Educ. 353 (2004). Stephen Cole and Elinor Barber similarly found that African American students at elite colleges were less likely to persist with an initial interest in academic careers than their counterparts at less elite schools because of

academic mismatch. *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Students* 124, 212 (2003). The following year, law professor Richard Sander published a study indicating that students who received racial preferences in admissions were less likely to pass the bar exam. *See generally* Richard H. Sander, *A Systemic Analysis of Affirmative Action in Law Schools*, 57 Stan L. Rev. 367 (2004.)

Although some scholarship on mismatch existed prior to *Grutter*, the principle was popularized more widely after the decision. Since Professor Sander's Stanford Law Review article, the United States Commission on Civil Rights published two reports—*Affirmative Action in American Law Schools* and *Encouraging Minority Students in Science Careers*—intended to make this research more accessible to a wider audience of policymakers, and Richard Sander co-authored a book on his research to the same end. A new report published this year by Amicus Center for Equal Opportunity provides more on the point. *See* Althea Nagai, *Campus Diversity and Student Discontent: The Cost of Race and Ethnic Preferences in College Admissions*, Center for Equal Opportunity, Jan. 27, 2021.[7] Summarizing the current research, the report concludes that racial preferences harm the very students they purportedly benefit. *Id.* at 29-30. Students who "benefit" from racial preferences end up transferring more frequently, take longer to graduate, and were more dissatisfied compared to others in their class. *Id.*

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[7] http://gator4245.temp.domains/~ceousa40/wp-content/uploads/2021/01/Costs-of-Diversity-1-27-2021.pdf

The post-*Grutter* research on mismatch counsels in favor of granting the petition. Many who support racial preferences in education rest their support of such programs not on diversity, but on an interest in remedying past discrimination. *See* Wencong Fa, *The Trouble with Racial Quotas in Disparate Impact Remedial Orders*, 24 WM. & Mary Bill Rts. J. 1169, 1198–1200 (2016). Yet mismatch theory confirms that "[i]f the need for the racial classifications . . . is unclear, . . . the costs are undeniable." *Parents Involved*, 551 U.S. at 745 (plurality op.). All students, regardless of race, bear the burden of racial preferences.

CONCLUSION

For the reasons stated herein, and those stated by Petitioner, Amici respectfully request that this Court grant the petition for certiorari.

DATED: March 2021.

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