No. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals For The First Circuit

AMICI CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch files amicus curiae briefs in cases involving issues it believes are of public importance, including cases involving race-based affirmative action programs in higher education. *See*, *e.g.*, Brief of Amicus Curiae Judicial Watch, Inc. in Support of Plaintiffs-Appellants and Reversal of the District Court's Judgment in the First Circuit, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* No. 19-2005; and Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioner, *Fisher v. Univ. of Tx. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981).

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files amicus curiae briefs as a means to advance its purpose and has

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[1] Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Amici sought and obtained the consent of all parties to the filing of this amici curiae brief.

appeared as an amicus curiae in this Court on many occasions.

Amici has an interest in jurisprudence concerning race-based education policies, particularly as they relate to the Fourteenth Amendment's Equal Protection Clause. The First Circuit's adoption of Harvard's explicit race-based criteria is fundamentally at odds with precedent of this Court, notably where the college's interest could be achieved with a race-neutral objective, and this case presents an excellent vehicle to address a fundamental problem in this Court's Equal Protection jurisprudence.

Amici curiae respectfully request this Court grant Petitioner's Writ of Certiorari and reverse the court of appeals' judgment.

SUMMARY OF ARGUMENT

In this case Petitioner Students For Fair Admissions ("SFFA") filed suit against Harvard in 2014 under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. Therein it alleged that Harvard's admissions program intentionally discriminated against Asian American applicants based on their race. Harvard's admissions program gives preference to African Americans and Hispanics, but it does not afford such preference to Asian Americans. Accordingly, Harvard's race-based admissions program plays an integral part in the admission or rejection of Asian American applicants.

Amici curiae first note that, in past landmark cases where this Court ruled that racial classifications did not violate the Equal Protection Clause of the Fourteenth Amendment, this Court determined later that such rulings were in error and reversed them. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537 (1896).

Race-based admissions programs for higher education have been the subject of this Court's attention in five major cases in the last 43 years. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013) (*Fisher I*); and *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (*Fisher II*). In each of these cases this Court has grappled with the issue of whether the Equal Protection Clause allows schools of higher learning to take race into account in admissions decisions and, if so, what test(s) were applicable for identifying permissible race-conscious decision making.

These rulings have generated numerous opinions, pluralities, concurrences, and dissents, many of which conflict in fundamental and significant ways. These decisions achieved little consensus regarding whether race-based admissions programs can be implemented without violating equal protection principles and have not provided a workable construct for the lower courts and school officials in reviewing and implementing race-based

admissions programs. The *Bakke* line of cases'[2] use of the strict scrutiny test has not meaningfully assisted courts and schools in identifying admissions programs that are constitutionally impermissible. Instead, encouraged by the possibility of meeting the strict scrutiny standard under that line of cases, schools have camouflaged, or been less than candid, about their desire to simply increase their number of minority students, as Justice Ginsburg predicted they might. *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting) (affirmative action will be achieved "through winks, nods, and disguises"). This Court should grant Petitioner's writ of certiorari to reconsider whether race-based admissions programs should ever be permitted – and not simply to try (again) to adjust the strict scrutiny standard in a way that permits such programs.

In addition, this Court should grant certiorari to consider whether Respondent carried its burden to prove that race-neutral alternatives to admission program did *not* exist. Unless Respondent carried this burden, Petitioner is entitled to a reversal of the judgment of the First Circuit on this issue alone.

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[2] The term "*Bakke* line of cases" or "*Bakke* and its progeny" refers to the five precedents of this Court that specifically address the constitutionality of race-based school admissions programs at the higher education level, *i.e., Bakke, Gratz, Grutter, Fisher I and Fisher II.*

ARGUMENT

I. Past Rulings That Failed To Enforce The Equal Protection Clause's Prohibition Against Racial Classifications Have Not Stood The Test of Time.

Rulings by this Court which held that under the Equal Protection Clause individuals may be treated differently based on race have been wrongfully decided. [3] Indeed, amici respectfully submit that these cases number among the most famous missteps in the history of Supreme Court jurisprudence. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the petitioner challenged a Louisiana law that required all passenger railroads to "provide equal but separate accommodations for the white, and colored races." *Id.* at 540. In upholding this segregation law, this Court reasoned that the "object of the [Fourteenth] amendment" was to enforce the equality of the two races before the law, "but in the nature of things it could not have been intended to abolish distinctions based upon color," or to require "the commingling of the two races." *Id.* at 544.

Plessy's approval of the "separate but equal doctrine" stayed in effect for 58 years, providing legal justification for a multitude of Jim Crow segregation

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[3] Since Harvard is a private institution, this case was decided under §601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. Title VI is coextensive with the Equal Protection Clause of the Fourteenth Amendment. *Bakke*, 438 U.S. at 287 (Powell, J., opinion of the Court).

laws that thwarted the racial integration of American society. This Court finally rejected *Plessy* in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place."). However, by failing to uphold the core guarantee of the Equal Protection Clause, *Plessy* did immense damage to the very concept of equal protection of the laws.[4]

Two other decisions that the Court later overturned involved the rights of Japanese Americans. In *Korematsu v. United States*, 323 U.S. 214 (1944), a U.S. citizen of Japanese descent was convicted of remaining in a military area from which all Japanese Americans had been excluded. *Id.* at 215-16. Relying on *Hirabayashi v. United States*, 320 U.S. 81 (1943), which approved a curfew order applying to those of Japanese ancestry, this Court reasoned that "exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage." *Korematsu*, 323 U.S. at 218. Importantly, the government did not claim that "petitioner's loyalty to the United States" was at issue, only his race. *Id.* at 216. The majority in *Korematsu* determined that this race-based program had to satisfy strict scrutiny (*id.*) but went on to conclude that national security needs

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[4] Only one justice dissented in *Plessy*, stating that upholding the constitutionality of such racial segregation laws "will encourage the belief that it is possible . . . to defeat the beneficent purposes" of the Equal Protection Clause and warning that those laws would "permit the seeds of race hate to be planted under the sanction of law." 163 U.S. at 560 (Harlan, J., dissenting).

during a time of war were sufficient constitutional justification to sanction this race-based confinement of American citizens. *Id*. at 223-24. These two cases, like *Plessy*, have not withstood the test of time. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu*).

In each of these three cases, the Court ruled that treating individuals differently based on a racial classification did not violate the Equal Protection Clause. In each of these cases, the Court found that the government had justified its disparate treatment under the strict scrutiny test. These infamous cases demonstrate how misguided it is for this Court to sanction discriminatory racial classifications. Certiorari is necessary here so that the Court may determine whether racial classifications in higher education admissions are ever sanctioned under the Equal Protection Clause.

II. Universities And Lower Courts Have Struggled For Forty-Three Years To Reconcile This Court's Precedent On Race-Based Admission Programs.

The *Bakke* line of cases has failed to provide guidance to lower courts and university administrators about what constitutes a permissible race-based admission program. *Bakke* has led to five rulings over 43 years, in which there are 26 separate opinions. In each, the Court attempts to explain the constitutional rationale for allowing race-based preferences – even though these plainly conflict with

the original meaning and text of the Equal Protection Clause.

In *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), this Court addressed the constitutionality of a university admissions program that used race for the purpose of increasing minority student admissions. *Bakke* produced six separate opinions, but no majority. A plurality agreed that the respondent's admission application for medical school had been illegally rejected and that he was entitled to the injunctive relief – admission to the school – granted to him by the lower court. *Id.* at 284-324, 408-21.

Justice Powell wrote an extensive opinion that included a detailed explanation of how he believed schools could devise constitutionally acceptable admissions programs that used racial classifications for the purpose of achieving student body diversity. *Id.* at 319-24, n.55. He attached a copy of Harvard's admissions plan in effect in 1978, a predecessor program to the one under challenge in this case. That plan, unlike the admissions program challenged in *Bakke*, was based on the need for student body diversity to achieve educational benefits. But four justices dissented from the portion of Justice Powell's opinion which concluded that a program aimed at student body diversity could be a constitutionally acceptable admissions program while incorporating race as one of its factors. *Id.* at 408-21; *see id.* at 411 (Stevens, J., concurring in the judgment in part and dissenting in part) ("It is therefore perfectly clear that the question whether race can ever be used as a factor

in admissions is not an issue in this case, and that discussion of that issue is inappropriate.").

Four other justices in *Bakke* concurred with the part of Justice Powell's opinion that described what a race-conscious affirmative action program would need to pass strict scrutiny. On the other hand, these four justices dissented from the portion of the Powell opinion that appeared to agree with the lower court ruling prohibiting race from ever being used as a factor in school admissions. *Id.* at 355-79.

Thus, the *Bakke* line of cases was born 43 years ago in a state of confusion arising from conflicting opinions on the issue of whether and to what extent the race or ethnicity of an individual applicant may be constitutionally considered in the area of higher education admissions. The notion that the Equal Protection Clause allows individuals to be treated differently because of their race in school admissions in order to achieve student body diversity for educational purposes split this Court, as reflected by the "fractured decision in *Bakke*." *Grutter*, 539 U.S. at 325.

Twenty-five years after *Bakke*, this Court heard two University of Michigan school admission cases, one arising at the undergraduate college and the other at the law school. *See Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Gratz*, it was undisputed that the University gave each minority applicant twenty additional points in order to "admit 'virtually every

qualified . . . applicant' from . . . [minority] groups" to its undergraduate school. 539 U.S. at 253-55.

The majority in *Gratz* stated "that the University's use of race in its . . . admission program [must] employ[] 'narrowly tailored measures that further compelling governmental interests,' " *Id.* at 270, quoting *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). In striking down the race-based admissions program in *Gratz*, the majority held that the undergraduate school's policy of "distributing . . . one-fifth of the points needed to guarantee admission" to every minority applicant "solely because of race, is *not* narrowly tailored to achieve the interest in educational diversity," on which the undergraduate school had relied. 539 U.S. at 270. (emphasis added). *Gratz* produced seven divergent opinions: the majority, two concurrences, a concurrence in the judgment, and three dissents.

In *Grutter*, the University of Michigan Law School's admissions program claimed it considered race or ethnicity in order to enroll a "critical mass" of minority students so as to produce a diverse student body that, "promotes learning outcomes," and prepares students to work in an increasingly diverse workforce. 539 U.S. at 316, 319, 330. However, these aspirational goals, while admirable, may have little, if anything to do, with what is actually occurring on college campuses.[5] Such speculative hopes clearly

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[5] *See Grutter*, 539 U.S. at 349 (Scalia, J. concurring in part and dissenting in part) (criticizing universities that "talk of multiculturalism and racial diversity," but support "tribalism

should not be justifications for the use of race-based admissions plans.

Grutter generated six written opinions: the opinion of the Court, a concurring opinion, two dissenting opinions, and two opinions concurring in part and dissenting in part. The five-to-four majority held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.* at 325. *Grutter* did apply the strict scrutiny test to Michigan Law School's racial classifications in its admissions program. *Id.* at 326. *Grutter* then concluded that this program passed the strict scrutiny test and was constitutionally permissible. *Id.* at 337-44.

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and racial segregation on their campuses," including "minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority only graduation ceremonies"). In addition, recent student demands for the establishment of "safe-zones" on campuses where students are assured of *not* hearing statements with which they disagree, and student protests that shut down speakers who have been invited to campus to speak about racial issues do not reflect tolerance for the articulation of diverse thoughts on campuses. *See* Heather Mac Donald, *The Diversity Delusion: How Race and Gender Pampering Corrupt the University and Undermine Our* Culture (New York: St. Martin's Press, 2018, pp. 1-33).

College and university administrators might promote greater cross-racial understanding and tolerance in their students, not by racially discriminating against applicants for admission to their schools, but by working to make their schools more tolerant of the expression of different points of view. Admissions programs that intentionally discriminate on the basis of race may themselves be negatively affecting the level of racial understanding and tolerance on today's college campuses.

Fisher v. Univ. of Tex., 570 U.S. 297, 300-15 (2013) (*Fisher I*) concerned a challenge to the legality of the University of Texas' undergraduate admissions plan. While the program did not assign a "numerical value for each applicant" on the basis of race, it did have a goal of creating a "critical mass" of minority students. *Id.* at 301. This Court determined that the court of appeals' ruling at issue in *Fisher I* must be vacated and remanded because that court had not held "the University to the demanding burden of strict scrutiny articulated in *Grutter*." *Id.* at 303.

Importantly, this Court reasoned that "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Id.* at 312. In addition, *Fisher I* stated that "[s]trict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Id.* at 313. After the case was heard on remand by the Fifth Circuit, it returned to this Court on a second grant of certiorari. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2205 (2016) (*Fisher II*).

Fisher II ruled in favor of the University of Texas by a 4-3 margin. There were three opinions in *Fisher II*: the opinion of the Court, and two dissenting opinions. The majority in *Fisher II* stated that "a university may institute a race-conscious admissions program as a means of obtaining 'the educational

benefits that flow from student body diversity.'" *Id.* at 2210. The four-person majority found that "enrolling a diverse student body 'promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.'" *Id.*, quoting *Grutter*, 539 U.S. at 330. *Fisher II* determined that the University had carried its burden of proving that the use of the admissions plan enacted by the Texas Legislature in 1998 (the Top Ten Percent Plan)[6] had not achieved sufficient racial diversity." *Id.* at 2210-12.

The *Fisher II* majority concluded that the University had "met its burden of showing that the admissions policy it used was narrowly tailored," and therefore held the school's admissions program constitutional. *Id.* at 2212-15. *But see*, *id.* at 2232 (Alito, J. dissenting) (referring to the university's purported need for "affirmative action to admit privileged minorities," rather than disadvantaged minorities, as "affirmative action gone wild.").

The splintered rulings in *Bakke, Gratz, Grutter, Fisher I*, and *Fisher II*, show that the law regarding race-conscious school admissions is both in a state of considerable conflict and ambiguity. These

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[6] The Top Ten Percent Law, which guaranteed that individuals graduating from a Texas high school in the top ten percent of their class would be admitted to the University of Texas was used as a principal part of the admission process for the university through 2004. *Id.* at 2205. As a result of *Grutter*, the admissions process at the University of Texas began to rely on race explicitly in allocating approximately 25 percent of the seats in any given incoming class. *Fisher II*, 136 S. Ct. at 2205-06.

convoluted precedents do not constitute a clear road map for schools or lower courts to follow regarding the constitutionality of race-conscious admissions plans.

III. Given The Conflict And Ambiguity Produced By The *Bakke* Line Of Cases, This Court Should Grant Certiorari To Consider Whether It Should Reverse This Line Of Precedent.

The *Bakke* line of cases was a well-intended effort by this Court to address the issue of minority student admissions in higher education. Notwithstanding this effort, *Bakke* and its progeny have not provided a method to meaningfully distinguish between the goal of increasing minority student numbers and that of creating educational benefits flowing from diversity. The Courts' strict scrutiny inquiry is *not working*. Quite simply, the strict scrutiny defense provides an opportunity for schools to camouflage their desire to use race-conscious programs to increase minority student admissions. This strict scrutiny analysis looks at school rationales that are both subjective and unquantifiable, [7] and thus cannot meaningfully determine whether race-based programs are narrowly tailored. This reason alone is sufficient to

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[7] For example, how does one objectively correlate the amount of "cross-racial" educational benefit with the percentages of minority students in a class? Such relationships are subjective and cannot be quantified. But the strict scrutiny review provides schools a way to avoid the prohibitions of the Equal Protection Clause by claiming such subjective benefits.

grant review and to reconsider the validity of the *Bakke* line of cases.

Another reason this Court should reconsider *Bakke* and its progeny is the textual language of the Equal Protection Clause itself. It commands, "no state shall . . . deny *to any person* [8] within its jurisdiction the equal protection of the laws." (emphasis added). The Fourteenth Amendment contains no exceptions to the Equal Protection Clause's prohibition against the use of race. This Court has repeatedly stated that the equal protection prohibition against racial discrimination adversely affecting an individual is at the very core of the Equal Protection Clause. *See e.g.*, *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in judgment); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.") (citation and internal quotation marks omitted)).

Nor does the text of the Fourteenth Amendment refer to strict scrutiny tests or any defenses that may justify the use of racial

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[8] If Ohio Congressman John Bingham and other framers of the Fourteenth Amendment had wanted to limit the protections of the Equal Protection Clause to African Americans and other racial minorities, the framers would not have used the term "any person" in the text of the Amendment.

classifications. Indeed, the acceptance of a strict scrutiny defense for the use of race in school admissions (*i.e.*, the purported educational benefits from increased minority diversity) was judicially created and can be judicially abrogated.[9]

Second, the *Bakke* line of cases' rationale for allowing consideration of race to be used has now been in effect for 43 years. Indeed, several of the justices of this Court who were instrumental in developing the student diversity for educational purposes defense incorrectly envisioned that this use of race would not become a long-term or permanent feature of this area of the law. *See Bakke*, 438 U.S. at 403 (Blackman, J., concurring in the judgment in part and dissenting in part) ("I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most."); *Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.")

It has become clear that race-based admissions preferences will not become "a relic of the past" any time soon. Demands for such preferences have shown no signs of abating. These demands will not end, it is

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[9] In making this argument, amici curiae do not challenge the power of this Court to create interpretive rules for claims brought under federal statutes and provisions of the Constitution itself. Amici curiae only ask that this Court reconsider whether the strict scrutiny defense should continue to be used in school admission cases as a justification for treating applicants differently on the basis of their race.

respectfully submitted, until this Court unequivocally declares that race discrimination in school admissions programs is violative of the Equal Protection Clause. *See Gratz,* 539 U.S. at 281 (Thomas, J., concurring) ("I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause").

Third, in some of the school admission cases, the positions advanced by the universities and the testimony offered in support of their strict scrutiny defenses have been quite dubious. *See e.g., Fisher II*, 136 S. Ct. at 2215 (Alito, J., dissenting) ("To the extent that [the University of Texas] has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been *shifting, unpersuasive, and, at times, less than candid*.") (emphasis added).

For example, as noted in *Fisher II*, the University of Texas' officials had argued in *Fisher I* that they needed to admit minority children of "successful professionals;" however, in *Fisher II*, the same school "attempted to disavow ever making the argument." 136 S. Ct. at 2216 (Alito, J., dissenting). To this, Justice Alito responded that the university *did* make the argument in *Fisher I* and that "the argument turns affirmative-action on its head. Affirmative-action programs were created to help disadvantaged students." *Id.* (emphasis added). These "shifting and unpersuasive" representations undercut the credibility of the very university administrators who are requesting that courts allow them to use race-conscious admissions programs,

notwithstanding the clear command of the Equal Protection Clause.

Likewise here, Harvard's pre-trial failure to disclose material facts revealed apparently disingenuous behavior. Shortly before the trial began, Harvard changed its procedures for reviewing applications for admission to "make sure its admissions officers did not fall prey to implicit bias or racial stereotyping about Asians." JA.3287:18-3288-23. This highly relevant evidence only came to light because one of Harvard's witnesses inadvertently mentioned it at trial and not because Harvard produced this evidence pre-trial. App. 106 n.2., App. 121-22.

Given such examples, it is not surprising that Justice Ginsburg predicted that schools might be less than candid if courts attempted to take away their race-based affirmative action programs. *See Gratz*, 539 U.S. at 304-05 (Ginsburg, J., dissenting) (colleges and universities "may resort to camouflage" or "disguise[]" to protect their race-conscious programs from attack).

In its opinion, the court of appeals noted that "eliminating race as a factor in admissions . . . would reduce African American representation at Harvard from 14% to 6% and Hispanic representation from 14% to 9%." *SFFA v. President and Fellows of Harvard Coll.*, 980 F.3d 157, 180 (1st Cir. 2020). The First Circuit also observed that "at least 10% of Harvard's class would not be admitted if Harvard did not consider race and that race is a *determinative* tip

for approximately 45% of all admitted African American and Hispanic students." *Id.* Given the dramatic impact that Harvard's use of race has upon the racial composition of its student body, Harvard's argument that it is using race merely as "a plus" or "one part of [a] whole-person review," JA.651:18-652:21, is implausible[10] and should not have been credited by the First Circuit. The First Circuit's conclusion that Harvard's use of race is *not* grounded on the school's desire to increase and racially balance minority representation, *SFFA*, 980 F.3d at 187, is both clear factual error and a misapplication of this Court's precedents.

As noted, one of the core purposes of the Equal Protection Clause is to guarantee that individuals will be free from discrimination based upon race. It should come as no surprise to anyone that legalizing the use of race in deciding who is admitted to schools of higher learning has caused enormous conflict, including among members of this Court. *See Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 325 (2014) (Scalia, J., concurring) ("The

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[10] If 10% of a Harvard class or 45% of its African American and Hispanic admittees would not have been admitted had their race not been considered, it is irrational to conclude that the use of race is not a substantial factor driving its admissions process. Looked at from the point of view of non-preferred applicants, this 45% means that a substantial number of applicants from non-preferred racial groups were not admitted to Harvard because of their race. Harvard's use of race was not merely a "plus" for the preferred group; it was a minus that discriminated against applicants from non-preferred racial groups who were not admitted.

Equal Protection Clause 'cannot mean one thing when applied to one individual and something else when applied to another color. If both are not accorded the same protection it is not equal'"), quoting *Bakke*, 438 U.S. at 289-290; *see also, Fisher II*, 136 S. Ct. at 2221 (Alito, J. dissenting).

It is simply wrong to interpret the Equal Protection Clause to give greater importance to increasing the number of minority students at institutions of higher learning based on race than to preventing intentional discrimination against individual applicants because of race.[11] Achieving racial diversity does not compensate for the constitutional injury inflicted on innocent individual applicants from non-preferred racial groups and the harm that that injury does to race relations generally. *See Parents Involved in Cnty. Sch. v. Seattle Sch. Dist.,*[12] 551 U.S. 701, 759 (2007) (Thomas, J. concurring) ("This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another,

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[11] Increased racial diversity in student bodies is a laudable goal; however, a laudable goal does not justify the use of *any* means to achieve that goal. Means that are violative of the Equal Protection Clause's core purpose of prohibiting discrimination on the basis of race should not be deemed constitutionally acceptable, particularly where, as here, race-neutral methods exist to achieve that goal.

[12] This ruling addressed the constitutionality of race-based student assignment plans for K-12 schools. *Parents Involved*, 551 U.S. at 709-10. It did not concern admissions programs for higher education. However, some of its language is applicable to issues in this case.

exacerbates racial tension, and 'provoke[s] resentment,'" citing *Adarand*, 515 U.S. at 241).

For all these reasons, amici curiae respectfully request that this Court grant certiorari in order for it to reconsider whether it should continue to allow educational institutions to defend their race-based admissions programs by relying upon the school's purported educational needs for increased student body diversity.

IV. In the Alternative, This Court Should Grant Certiorari To Determine Whether Harvard's Race-Based Admissions Program Fails Strict Scrutiny Because A Workable Race-Neutral Alternative Exists.

Even if this Court is satisfied that the *Bakke* line of cases is consistent with the requirements of the Equal Protection Clause, the First Circuit erred in finding that Harvard's admission plan satisfied strict scrutiny review. Specifically, Harvard failed to comply with this Court's rulings in the *Bakke* line of cases which require Harvard to carry its burden of showing that there was *no* workable race-neutral alternative to its raced-based program. That failure alone is enough of a reason to grant certiorari and reverse the judgment of the First Circuit.

Under *Fisher I*, strict scrutiny required the court of appeals to consider whether a race-based admissions program is necessary. 570 U.S. at 312. *See also, Parents Involved,* 551 U.S. at 734-35 (narrow tailoring requires proof that the racial classification is

"necessary" to achieve the compelling interest and that race is a "last resort"). It is not necessary to use race if "workable race-neutral alternatives" exist. *Fisher I*, 570 U.S. at 312.

At trial, Petitioner offered Simulation D into evidence as a workable race-neutral alternative. Under Simulation D, Harvard's *racial* preferences would be eliminated. Its preferences for children of large donors, of alumni (legacies), and of faculty/staff [13] would also be eliminated while its preferences for socio-economically disadvantaged individuals would be increased. JA.5987; JA.1491:15-1505:18. Simulation D would increase the combined African American and Hispanic percentage of admittees and would result in greater racial diversity without using race as a factor affecting admission. JA.5988; JA.5789. African American representation alone would be reduced from 14% to 10%. *SFFA*, 980 F.3d at 194. White admissions would also decrease, but Hispanic, Asian-American, and socio-economic diversity would increase. JA.5988; JA.5789.

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[13] Harvard gives preference to legacies, to the children of large donors, and to the children of faculty/staff. The effect of these well-connected preferences combined with Harvard's racial preferences lowers admission requirements for the Harvard professor's son and the African American surgeon's daughter. However, some admittees must pay the price for these preferences. As a result, admission requirements become higher for the son of an Asian American truck driver or the daughter of a white waitress, even though these latter applicants are more likely to be socio-economically disadvantaged. Harvard's insistence on continuing its well-connected preferences, while requesting a constitutional exemption from the requirements of equal protection purportedly to achieve educational benefits through diversity, is at best self-serving and contradictory.

Moreover, academic characteristics such as high school GPAs and SAT scores would remain almost the same. *Id.*

Harvard rejected Simulation D and the First Circuit upheld this rejection, stating that Simulation D was not an acceptable race-neutral alternative, because "considering race . . . prevents diversity from plummeting. Harvard's race-conscious admissions program ensures that Harvard can retain the benefits of diversity it has already achieved." *SFFA*, 980 F.3d at 194. That decline or, as the First Circuit described it, "plummeting," only applied to the 14% to 10% drop in African American admittees.[14]

Under the ruling in *Parents Involved*, schools can pay attention to the number of minority admittees in the past in order to determine the number that is needed to provide a "pedagogic concept of the level of diversity needed to obtain the asserted educational benefits." 551 U.S. at 726. "Working forward from some demonstration of the level of diversity that provides the purported benefits" is allowable; "working backward to achieve a particular type of racial balance" is constitutionally impermissible. *Id.* at 729. But the First Circuit adopted Harvard's constitutionally impermissible approach when the court rejected Simulation D. *SFFA*, 980 F.3d at 194. By doing so, the court ensured that Harvard could continue the 14% level of African American admittees it had "*already achieved*." *Id.*

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[14] The use of Simulation D would increase Asian American admittees from 24% to 31% and "Hispanic and Other" admittees from 14% to 19%. *Id.* at 193.

(emphasis added). Without question, therefore, both Harvard and the First Circuit were "looking backward" in demanding that the 14% level not be decreased.

Harvard has a duty under strict scrutiny review to adopt a workable race-neutral alternative if one exists. Petitioner proved that such an alternative did exist. However, the ruling by the First Circuit leads to only one conclusion – once a certain level of minority representation is achieved using race, Harvard should be permitted to continue to use race to maintain that level. It was clear legal error for the First Circuit to conclude that a workable race-neutral alternative could be rejected because that alternative did not maintain the previous 14% racial percentage.[15]

[15] Importantly, colleges and universities are also involved in "racial balancing" when they attempt to achieve or maintain a specific percentage of admittees from a racial group. *Grutter* 539 U.S. at 329. Racial balancing is also prohibited by strict scrutiny. *Fisher I*, 570 U.S. at 311. Harvard's demand not to decrease the African American percentage from the 14% level achieved in the past is impermissible on the related ground of "racial balancing" as well.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that this Court grant Petitioner's writ for certiorari.

Respectfully submitted,

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