No. 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH 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. and Allied Educational Foundation in Support of Petitioner in the Supreme Court of the United States, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* No. 20-1199; 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

[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. Amici believe race-based criteria for university admission are antithetical to the Fourteenth Amendment and fundamentally at odds with text of the Equal Protection Clause. Amici respectfully submit this case presents an excellent opportunity to address the fundamental problems with this Court's Equal Protection jurisprudence.

Amici respectfully request this Court grant Petitioner's Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fourth Circuit.

SUMMARY OF ARGUMENT

In this case Petitioner Students for Fair Admissions ("SFFA") filed suit against the University of North Carolina and other defendants in 2014 under 42 U.S.C. §§ 1981, 1983, alleging that the University's use of race in its undergraduate admissions process violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. ("Title VI"). Therein it alleged that UNC's admissions process incorporated impermissible racial considerations violating the Equal Protection Clause.

Amici 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*).[2] 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

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[2] These five cases, which address the constitutionality of race-based school admissions programs in higher education, are referred to throughout this brief as the "*Bakke* line of cases."

officials in reviewing and implementing race-based admissions programs. The *Bakke* line of cases' 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.

ARGUMENT

I. Prior Equal Protection Rulings Upholding Racial Classifications Have Not Stood The Test of Time.

Rulings by this Court allowing individuals to be treated differently based on race under the Equal Protection Clause have been wrongfully decided. Amici respectfully submit that three such cases account for some of the most famous missteps in this Court's jurisprudence. These rulings show the troubling outcomes that spring from judicially-created exceptions to the Equal Protection Clause's strict prohibition against racial classifications.

In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court upheld a Louisiana law that required railroads to "provide equal but separate accommodations for the white, and colored races." *Id.* at 540. The 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." [3] *Id.* at 544. *Plessy*'s "separate but equal doctrine" was in effect for 58 years, paving the

[3] 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).

way for countless segregationist laws and delaying integration. By the time the Court finally rejected *Plessy* in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), there had already been immeasurable damage to the very concept of equal protection under the law.

Two other decisions affirming dubious racial classifications involved 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, the 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. The majority in *Korematsu* ruled that the race-based program had to satisfy strict scrutiny but concluded that wartime national security needs were sufficient justifications to support a race-based confinement of U.S. citizens. *Id.* at 223-24. Like *Plessy*, these two cases have not withstood the test of time. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu*).

In each of these infamous rulings, the Court determined that the racial classification did not violate the Equal Protection Clause and that the government had justified its disparate treatment under the strict scrutiny test. And, in the case of *Plessy* and *Korematsu*, decades later the Court

famously reversed its earlier decisions upholding racial classifications. Certiorari is necessary in the instant case so the Court can again reconsider earlier rulings that sanctioned racial classifications under the Equal Protection Clause.

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

Consisting of five rulings, totaling 26 separate opinions, the *Bakke* line of cases has failed to provide clear guidance about what constitutes permissible racial considerations in higher education admissions. Indeed, over the years each new addition to the line of cases is a tacit acknowledgment of the difficulty in determining what constitutes a constitutionally permissible admissions program. The inconsistent rationale in each separate opinion has only compounded this problem. The difficulty reconciling the holdings from *Bakke* and its progeny is obvious: No constitutional method has been found that would resolve the conflict between *Bakke*'s permissible racial classifications and the Equal Protection Clause's prohibition against such classifications.

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, race or ethnicity may be considered in higher education admissions. In *Bakke*, this Court addressed the constitutionality of a university admissions program that used race to increase

minority admissions. 438 U.S. 265. 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. *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. *Bakke*, 438 U.S. 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. That plan, unlike the admissions program before the Court 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. However, 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.

The Court had an opportunity to clarify *Bakke* twenty-five years later when it heard cases involving admissions to the University of Michigan's undergraduate college and 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 undergraduate applicant twenty additional points in order to "admit 'virtually every qualified . . . applicant' from . . . [minority] groups[.]" 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, 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 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.[4] Such speculative hopes clearly

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[4] *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 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"). 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 diverse discourse 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 different points of view. Indeed, existing racial preferences in admissions may themselves be perpetuating and negatively affecting the level of racial understanding and tolerance on college campuses.

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

Again, a fractured Court in *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.

More recently, two rulings involving the University of Texas failed to reconcile the conflict created by *Bakke*'s college admission exception to the Equal Protection Clause. In *Fisher v. Univ. of Tex.*, 570 U.S. 297, 300-15 (2013) (*Fisher I*), the Court reviewed a challenge to the legality of the 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. The Court remanded the case back to the Fifth Circuit Court of Appeals because the University had not been held to "the demanding burden of strict scrutiny articulated in *Grutter*." *Id.* at 303.

The Court emphasized 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. Further, the Court explained 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*).

In *Fisher II*, this Court 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) [5] had not achieved sufficient racial diversity." *Id.* at 2210-12.

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[5] 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

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 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 admissions in higher education. However, *Bakke* and

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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.

its progeny have not provided a method to distinguish between the goal of increasing minority enrollment and the educational benefits flowing from diversity. The Court's 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 analysis depends on school rationales that are both subjective and unquantifiable, [6] and thus cannot meaningfully determine whether race-based programs are narrowly tailored. This alone is sufficient reason to 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 obvious conflict between those holding and the text of the Equal Protection Clause itself. It commands, "no state shall . . . deny *to any person* [7] 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

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[6] 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.

[7] If the 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.

of race. This Court has repeatedly stated that the 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 exempt racial classifications from this prohibition. Indeed, the strict scrutiny defense was judicially created and can be judicially abrogated.

Third, the *Bakke* rationale for allowing consideration of race to be used has now been in effect for 43 years. Throughout this time, members of this Court hoped that racial preferences would not be a long-term or permanent fixture in the admissions process. *See Bakke*, 438 U.S. at 403 (Blackmun, 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 is clear now 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 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").

Fourth, in some of the 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 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.

Given such examples, it is not surprising that Justice Ginsburg predicted that schools would 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).

One of the core purposes of the Equal Protection Clause is to guarantee that individuals will be free from racial discrimination. Thus, it should come as no surprise that permitting the use of race in admissions has caused nationwide conflict, as well as among members of this Court. *See Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 325 (2014) (Scalia, J., concurring) ("The 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.[8] Achieving racial diversity in education 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.*,[9] 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, exacerbates racial tension, and 'provoke[s] resentment,'" citing *Adarand*, 515 U.S. at 241).

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[8] 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 racial discrimination should not be deemed constitutionally acceptable, particularly where race-neutral methods exist to achieve that goal.

[9] 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.

CONCLUSION

For all these reasons, amici curiae respectfully request the Court grant certiorari to consider whether it should continue to allow universities to defend race-based admissions programs by relying upon schools' purported educational needs for increased diversity.

Respectfully submitted,

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