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 to the United States Court of Appeals for the Fourth Circuit

BRIEF OF OKLAHOMA AND 14 OTHER STATES AS AMICI CURIAE 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. Can a university reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

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INTERESTS OF AMICI CURIAE[1]

The *Amici* States are home to thousands of students who are subject to the discriminatory policy challenged in this suit. It is important to *Amici* that their students have equal access to the Nation's educational institutions, including the University of

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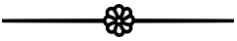
1 Amici notified the parties of the intention to file this brief ten days in advance, and Amici submit this brief pursuant to Sup. Ct. Rule 37.4.

North Carolina ("UNC"). *Amici*'s interest is especially heightened in this case because UNC's discriminatory practices fall especially hard on out-of-state students. *See* Pet.App.69-70, 77, 95-96.

Moreover, as further explained below, some of *Amici* States have prohibited racial classifications in university admissions and yet successfully maintain diverse campuses that are inclusive and equally open to students of any race. *Amici*'s perspective will therefore be useful in evaluating Respondent's claim in this case that such diversity is impossible without engaging in racial discrimination. That claim is contradicted by the experience of *Amici*'s state and private universities, which provide the highest quality education to all without regard to skin color or ethnicity.



SUMMARY OF THE ARGUMENT

This case presents the Court a strong second vehicle to examine a timely and important question: whether *Grutter*'s sanction of racial discrimination in university admissions should be reconsidered. In addition to the reasons offered by Petitioner, reexamining *Grutter* is justified by several factors that weigh against *stare decisis*: *Grutter*'s inconsistency with related decisions, developments since the decision, and the workability of the rule *Grutter* established. The facts of this case show why all these things are true. To the extent this case shows *Grutter* abandoned true strict scrutiny for racial discrimination, it should be overruled; to the extent *Grutter* is consistent with

strict scrutiny, the district court decision below should be reversed.

I. While *Grutter* claimed fidelity to strict scrutiny, the deference it affords to university decisions to discriminate based on race is inconsistent with how the Court applies strict scrutiny in other contexts. The decision below highlights that inconsistency. The district court applied something markedly less than strict scrutiny's narrow tailoring when evaluating UNC's need to engage in race-based evaluation of applicants. It rejected Petitioner's race-neutral alternative for reasons that are not compelling enough to justify continued race-based decisionmaking, including a potential slight decrease of average SAT scores that UNC in other contexts characterizes as immaterial and marginal changes in racial composition that amount to nothing more than departures from UNC's preferred racial quota. These would not pass strict scrutiny in any other area of law outside of *Grutter*'s outlier standard. If UNC's reasons for rejecting Petitioner's race-neutral alternatives were enough to satisfy strict scrutiny, it is hard to see how any plaintiff would prevail when their individual rights have been violated. But this is precisely the sort of lax scrutiny *Grutter* permits.

II. UNC also claimed it could not implement race-neutral alternatives because they have not been successfully implemented anywhere else. But data from the *Amici* states that have prohibited race-conscious admissions shows that universities can remain both diverse and academically competitive without resorting to racial discrimination. Nine states now prohibit racial distinctions in university admissions. The University of Oklahoma, for example, remains just as diverse today (if not more so) than it was when Oklahoma banned

affirmative action in 2012. States like Oklahoma and Nebraska have similar Hispanic populations as North Carolina, Massachusetts, and Maryland, and all five states' flagship public universities—including UNC—have similar Hispanic enrollment despite the former two states prohibiting race-consciousness and the latter three not doing so. The same is true of universities in states that have high Hispanic populations like Florida and Arizona, which have banned affirmative action, when compared with universities in states like Nevada and Colorado, which have not. Nor does the University of Oklahoma have a meaningfully lower African-American student population than universities in comparable discriminating states like Massachusetts, Minnesota, and Wisconsin. These factual developments since *Grutter* justify reviewing the district court decision below and reconsidering whether *Grutter* correctly decided there is no workable alternative to maintaining campus diversity other than open racial discrimination.

III. *Grutter* should also be reconsidered because it has proven unworkable, as the decision below demonstrates. UNC in this case is forced to take multiple contradictory positions because *Grutter* requires a delicate dance to justify engaging in some—but not too much—racial discrimination. UNC, for example, makes the assertion that its consideration of race is both not a "dominant" consideration but also "decisive" for some applicants. It therefore acknowledges race has only the most marginal of effects, yet rejects race-neutral alternatives because the effects would be too large. That UNC cannot show its admissions practices actually advance their asserted interest in making minority students feel welcome is also confirmed by UNC's

claims that, even despite its policies, its minority students continue to feel unwelcome.

UNC also says it considers each applicant holistically and individually, yet rejects race-neutral alternatives that would change its current racial balance without first taking into account individualized considerations. And it refuses to give preferences to Asian-American students even though those students experience the same harm of isolation at UNC that other minorities face and that UNC's affirmative action policy purports to prevent. Finally, *Grutter*'s 25-year expiration date has proven unworkable since, short of this Court's intervention, there appears to be no voluntary end in sight for university race-based admission practices, at UNC or elsewhere.

IV. All of UNC's weak justifications and contradictory assertions chronicled above are also present in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199 ("*Harvard*"). Because of the tight factual similarities between these cases, this case should be considered alongside *Harvard*. And because *Harvard* is now fully briefed on certiorari, granting certiorari before judgment in this case is warranted. Granting certiorari in both these cases and adjudicating them together will allow the Court to address their shared compelling questions in both the public university and private university context.

ARGUMENT

While *Grutter* claimed that affirmative action is subject to the same strict scrutiny given to other acts of *de jure* racial discrimination, both *Grutter* and the district court's decision below show that its standard is strict in name only. *Grutter*'s attempt to craft a standard that is simultaneously "strict scrutiny" and deferential to a university's attempts at social engineering has also left the law completely unworkable.

Meanwhile, the experience in *Amici* States shows that racial discrimination is not strictly necessary to advance the interests *Grutter* endorsed. This confirms that the policies sanctioned in *Grutter* cannot survive the searching inquiry normally provided to racial distinctions. Because the *Harvard* case, this case, and our experience since *Grutter* shows *Grutter*'s inconsistency with strict scrutiny, its inability to be consistently applied, and the race-neutral alternatives available to universities, this Court should grant certiorari to reexamine *Grutter*. At the very least, the record in this case shows UNC's policies cannot survive strict scrutiny, even if *Grutter* is maintained.

I. THE DECISION BELOW SHOWS THE FLAW IN *GRUTTER*'S NARROW TAILORING APPROACH.

The language "of the Equal Protection Clause[ ] is majestic in its sweep." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 284 (1978). But the strict scrutiny applied under *Bakke* and *Grutter* fails to live up to that majesty.

In *Grutter*, the Court decided to "defer" to the university's judgment on the need for its race-conscious admissions practices, noting that "universities occupy a special niche in our constitutional tradition," and that despite making racial distinctions among applicants, "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" 539 U.S. at 328-29 (quoting *Bakke*, 438 U.S. at 318-19). Justice Powell's opinion in *Bakke*, which *Grutter* endorsed, similarly granted a "presumption of legality" to university admissions where race is taken into account. 438 U.S. at 319 n.53. Meanwhile, *Grutter* endorses the idea that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," but necessitates only "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339.

This deferential review is in stark contrast with how the Court approaches strict scrutiny in other contexts. *See Grutter*, 539 U.S. at 361-67 (Thomas, J., concurring in part); *id.* at 380 (Rehnquist, J., dissenting); *id.* at 387-89, 394 (Kennedy, J., dissenting). That "[in]consistency with related decisions" on strict scrutiny, which "sits uneasily" with this Court's other precedent on racial equality, warrants *Grutter*'s reconsideration. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1404-05 (2020).

1. Whether campus diversity is a compelling interest that justifies open racial discrimination has been dubious from the start. *See* Pet.15-17; *Grutter*, 539 U.S. at 347-48 (Scalia, J., concurring in part); *id.* at 351-61 (Thomas, J., concurring in part); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-21 (1989) (Scalia, J.,

concurring). But perhaps most problematic is *Grutter*'s narrow tailoring *lite*. It looks nothing like how this Court has scrutinized impositions on free speech or free exercise of religion, or even how this Court has evaluated racial classifications in other contexts.

This is evident from the opinion below: while paying lip-service to strict scrutiny, the district court gave UNC deference and the benefit of the doubt at every turn. *See, e.g.*, Pet.App.158-161. Applying *Grutter*, the district court accepted every excuse UNC gave for rejecting race-neutral alternatives, no matter how minor, because the proposed alternative would require some modifications in UNC's operations. *See, e.g.*, Pet. App.141-144, 182; *cf. Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting) (criticizing *Grutter*'s scrutiny as "nothing short of perfunctory").

True strict scrutiny would not permit racial discrimination merely because abandoning discrimination would require some attendant changes. There is no compelling interest in ensuring that everything else remains the same when giving up racial discrimination. *See Grutter*, 539 U.S. at 362 (Thomas, J., concurring in part); *Gratz*, 539 U.S. at 275; *J.A. Croson*, 488 U.S. at 508. Indeed, in our Nation's history, ending racial discrimination has always been accompanied by adjustments some found difficult.

If institutions were able to avoid such changes, the narrow tailoring requirement would become dead-letter because *any* race-neutral alternative will inevitably have ripple effects. Instead, strict scrutiny requires the university to prove that it has a compelling interest in avoiding the changes that it believes make the alternative to racial discrimination infeasible. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279 (1986);

J.A. Croson, 488 U.S. at 519 (Kennedy, J., concurring in part).

2. This is the sort of "skepticism" and "most searching examination" that true strict scrutiny requires. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995) (citation omitted). But the district court below did not believe *Grutter* demands such rigor. Instead, it gave UNC the widest of latitudes.

For example, the district court accepted testimony that 60 points on the SAT "isn't a material difference" when UNC treats candidates of different races differently, *see* Pet.App.73-78 & n.25, but then held that a race-neutral alternative was unacceptable because it would lower average SAT scores of admittees by about 60 points, accepting conclusory statements about why the law should tolerate this incongruity, *see* Pet.App. 115-116. Nor did the district court seriously examine whether such modest decreases in academic achievement satisfy strict scrutiny—it is hardly a "dramatic sacrifice of . . . the academic quality of all admitted students" that would force UNC "to abandon [its] academic selectivity." *Grutter*, 539 U.S. at 340. Indeed, the district court blessed UNC's rejection of another race-neutral alternative that "resulted in the same percentage of in-state URMs (16.0%), including an increase in African American students from 9% to 10%," while decreasing average SAT scores by only around 30 points ("and GPA dropped marginally"). Pet.App.139-140. Why? Because with little analysis it deemed that race-neutral alternative "largely impractical" and "unprecedented . . . in higher education." Pet.App.141. That is not strict scrutiny. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Wygant*, 476 U.S. at 279.

Similarly, UNC rejects these race-neutral alternatives because, at the margins, they might "meaningfully change[ ] the [racial] composition of the income class." Pet.App.141. But if UNC is truly committed to an *individualized* diversity focusing on *holistic* measures, *see* Pet.App.9, 12, 28—and not raw quotas or racial balancing—how does it know that more students of one race will not *as individuals* "have greater potential to enhance student body diversity over" their peers of another race? *Grutter*, 539 U.S. at 341. The district court found compelling UNC's interest in the "educational benefits of diversity" rather than in a specified racial distribution, but it rejected race-neutral alternatives not because there was any specific finding they would cause greater racial isolation and harassment or lessened cross-racial understanding and diversity of viewpoints, but instead because of the unvarnished conclusion race-neutral alternatives would impact the racial composition of the class, Pet.App.141-44, 182. Refusing an alternative because it would fail "to assure within its student body some specified percentage of a particular group" can only be called "racial balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 329-30 (quoting *Bakke*, 438 U.S. at 307). This shunning of nondiscriminatory options without individualized consideration thereby impermissibly deems the "single characteristic" of race as "automatically ensur[ing] a specific and identifiable contribution to a university's diversity." *Gratz*, 539 U.S. at 271. Even under *Grutter*, that is unlawful.

3. In short, UNC's rejection of race-neutral alternatives based on racial bean-counting fails strict scrutiny and reveals where its commitments lie. Those commitments are inconsistent with our laws and

Constitution. To the extent UNC's practices are consistent with *Grutter*, *Grutter* should be overruled.

II. THE EXPERIENCE OF STATES THAT HAVE PROHIBITED RACIAL DISCRIMINATION IN ADMISSIONS DEMONSTRATES *GRUTTER*'S ERRONEOUS ASSUMPTIONS ABOUT THE LACK OF ALTERNATIVES TO RACE-BASED POLICIES.

Nine states have resisted the temptations of race-based admissions and, often by popular referendum, legally barred universities in their state from engaging in such discrimination.[2] Data from these states, many of which banned affirmative action after *Grutter* was decided, challenges *Grutter*'s claim that diversity cannot be achieved by any other means. It also undermines UNC's claim that no similar schools have been able to implement any race-neutral alternatives "that worked well." Pet.App.115. Accordingly, the experiences in the states that have committed to race-neutral alternatives both disproves UNC's excuse and undermines the factual assumptions that led the court in *Grutter* to (temporarily) endorse race-conscious admissions. Such developments counsel in favor of reconsidering *Grutter*. *See Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2482-83 (2018); *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096-98 (2018).

The voters of *Amicus* Oklahoma, for example, amended their Constitution via referendum in Novem-

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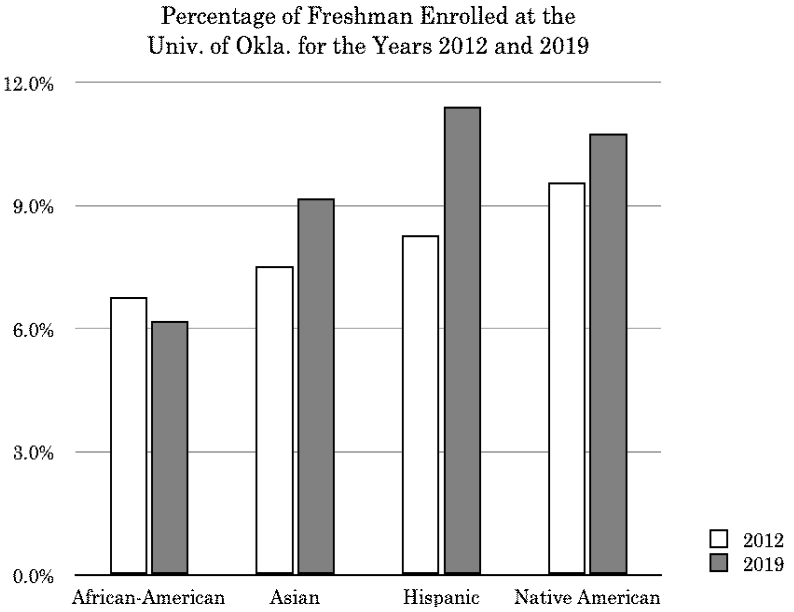
[2] *See* Idaho Code Ann. § 67-5909A (2020); OKLA. CONST. art. II, § 36A (2012); N.H. Rev. Stat. Ann. § 187-A:16-a (2012); ARIZ. CONST. art. II, § 36 (2010); NEB. CONST. art. I, § 30 (2008); MI CONST. Art. 1, § 26 (2006); Fla. Executive Order 99-281 (1999); Wash. Rev. Code Ann. § 49.60.400 (1998); CAL. CONST. art. I, § 31 (1996).

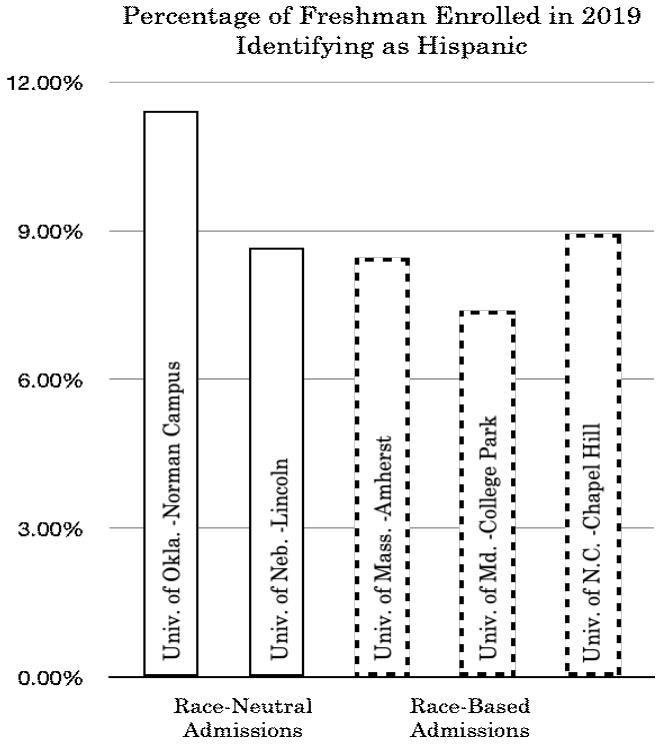
ber 2012 to say: "The state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education or public contracting." OKLA. CONST. art. II, § 36A. Since that time, there has been no long-term severe decline in minority admissions at the University of Oklahoma:[3]



The flagship public universities of states that have banned consideration of race in university admissions are no less diverse than comparable universities in

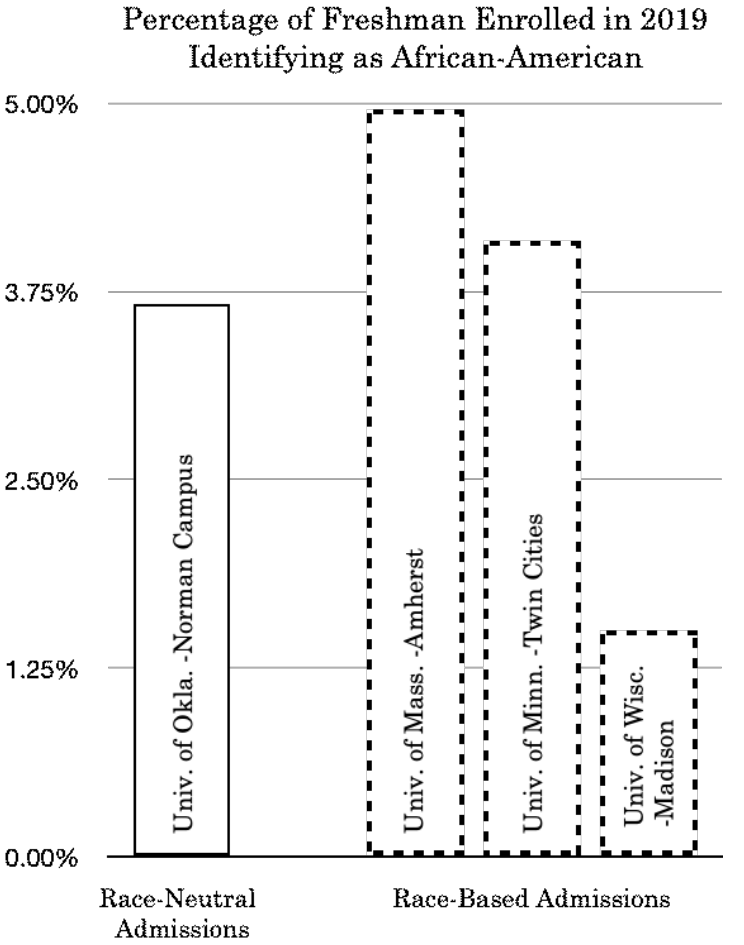
[3] Institutional Research and Reporting, *Annual Reports: First-Time Freshman Analysis*, University of Oklahoma, https://www.ou.edu/irr/data-center/annual-reports. Students that enrolled in 2012 were the last cohort to have been admitted under race-conscious policies. This data reflects self-identified race that includes students that identify with the listed race alone or in combination with one or more other race.

states that still permit such discrimination, including UNC. For example, the Hispanic population in Oklahoma (11.9%) and Nebraska (12%)—states that have banned race-based admissions—is similar to that of North Carolina (10.7%), Maryland (11.8%) and Massachusetts (12.6%), and the share of Hispanic students in each of those state's flagship public universities is also similar:[4]

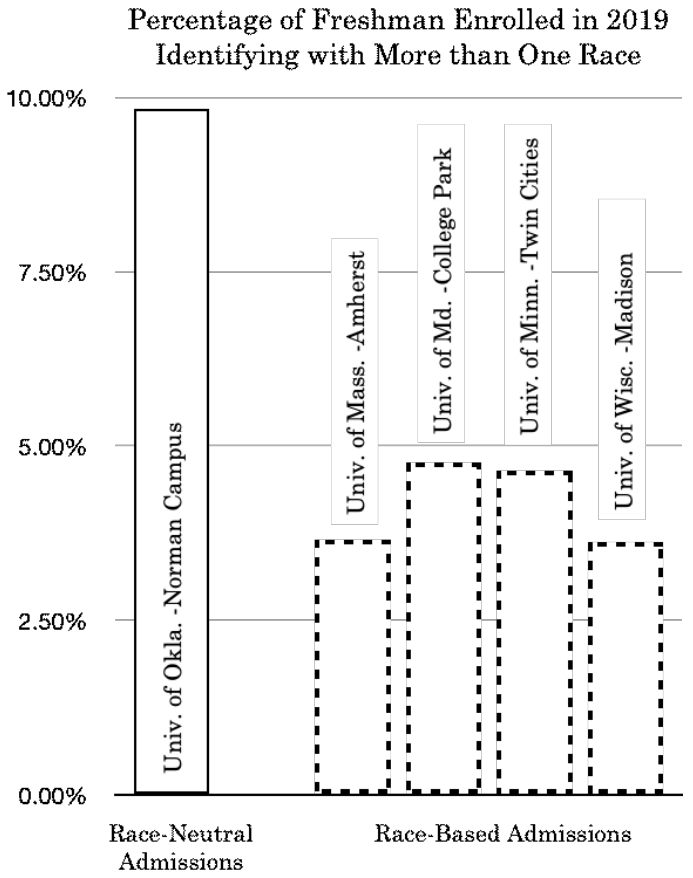


[4] Unless otherwise noted, data for university admissions for a state's flagship university was obtained from the Integrated Postsecondary Education Data System. https://nces.ed.gov/ipeds/, *and does not include students that identify with two or more races*. Data for a state's total population demographics was derived from the 2020 U.S. Census, combining figures for those that identify with one race alone and with two races.

Similarly, States with similar African-American populations as Oklahoma (8.8%) that have not prohibited race-conscious admissions, like Massachusetts (7.9%), Minnesota (8%), and Wisconsin (7.2%), do not admit substantially more African-American students:



Notably, this data underreports representation at the University of Oklahoma because OU has a high number of students reporting more than one race:



Thus, when African-Americans who report two or more races are included, the share of 2019 freshman enrollment identifying as African-American at the University of Oklahoma increases to 6.2%.[5]

The same ability to maintain diversity shows when looking at states with very high Hispanic populations,

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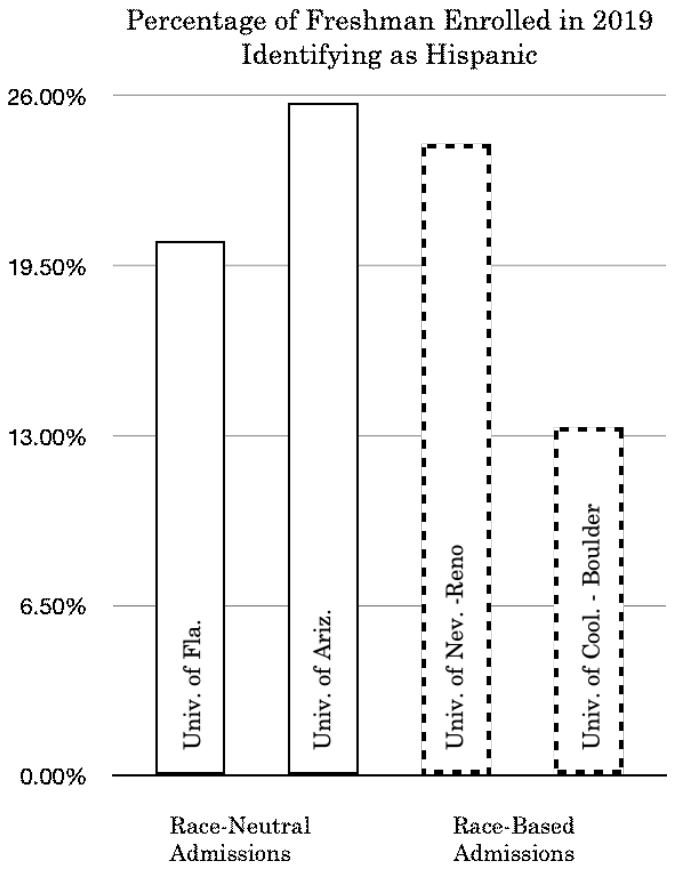
[5] Institutional Research and Reporting, *First-Time Freshman Analysis Fall 2019*, University of Oklahoma, https://www.ou.edu/content/dam/irr/docs/Annual%20Reports/First%20Time%20Freshmen/FTF_Analysis_Fall_2019_revised%2010-15-20.pdf.

e.g. comparing Florida (26.5%) and Arizona (30.7%), which have prohibited affirmative action, with Nevada (28.7%) and Colorado (21.9%), which have not:



In all, the data shows that universities are no less capable of maintaining and growing diverse student bodies when they give up race-conscious admissions and instead adopt race-neutral alternatives.

Even elite universities need not sacrifice academic excellence when giving up race-based policies. As Justice Thomas noted, the University of California at Berkeley has not lost its luster after it was prohibited

from considering race in admissions by the voters. *See Grutter*, 539 U.S. at 367 (Thomas, J., concurring in part). In *Grutter*, the University of Michigan Law School entering class of 2000 was 14.5% "underrepresented minority," 539 U.S. at 320; today, after Michigan voters outlawed race-based admissions, underrepresented minorities are 18% of the law school's class of 2023.[6] Yet Michigan Law has somehow managed to remain one of the best law schools in the country without indulging in racial discrimination.

The experience in *Amici* States that have banned affirmative action in university admissions show academic institutions like UNC need not evaluate their applicants based on race in order to thrive. *Grutter* itself pointed to three states "where racial preferences in admissions are prohibited by state law" in which universities "are currently engaged in experimenting with a wide variety of alternative approaches." 539 U.S. at 342. Since then, six more states have been added to the list, each with their own race-neutral approaches and degree of on-campus diversity. Under *Grutter*, these developments end the need for affirmative action because "[u]niversities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." *Id.* That race-neutral alternatives have now been demonstrated to be available and workable provides this Court yet another reason to grant certiorari to rule the Constitution can no longer abide by racial discrimination in university admissions.

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[6] Michigan Law, *2023 Class Profile*, https://www.law.umich.edu/prospectivestudents/Pages/classstatistics.aspx.

III. THIS CASE CONFIRMS *GRUTTER* IS UNWORKABLE.

Certiorari is also warranted to reconsider *Grutter* because it has proven unworkable, as demonstrated by this case. *See Janus*, 138 S. Ct. at 2481-82; *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178-79 (2019). *Grutter* forces courts and universities alike into intractable paradoxes in order to justify *de jure* racial discrimination that somehow satisfies strict scrutiny.

The district court, for example, found that UNC's use of race was permissible because it was not a "dominant" factor nor does it even "meaningfully drive" admissions decisions, Pet.App.53 n.16, 80, although it was "decisive" for some number of applicants, Pet. App.96, 101-106, 110-113, 175. But if engaging in racial discrimination yields only the smallest and most imperceptible of benefits, how can UNC show it "actually advance[s]" its purported compelling interests, as strict scrutiny requires? *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015). Indeed, UNC admits that it still has "much work to do" in promoting diversity given the high amounts of bias, isolation, and racial harm occurring on its campus. Pet.App.19-22, 60-62, 185. This is even true among Asian-Americans, *see id.*, despite being overrepresented in UNC's view. Clearly, their race-based practices are not making a meaningful enough difference in advancing the benefits of diversity to be maintained under a strict scrutiny regime.

This tension only becomes worse as one walks forward in the strict scrutiny analysis to narrow-tailoring, where UNC's claims that its racialized admissions policies have little import do not square with its rejection of racial-neutral alternatives based on an alleged unacceptably large change in the racial makeup of its student body. *See* Pet.App.115-117,

134-136, 141. Unfortunately, UNC's contradictory arguments are a direct result of *Grutter*'s hopelessly contradictory standard. *See Grutter*, 539 U.S. at 348-49 (Scalia, J., concurring in part).

Examples of this paradox abound. UNC stresses that each applicant is evaluated holistically as an individual rather than as a means to achieve a racial quota, but also rejects proposed race-neutral alternatives because of their effects on the racial balance at UNC, without any evaluation about how the individuals who would and would not be admitted in the proposed alternatives would contribute to UNC's community. *See supra* 10; *see also* Pet.App.36. Their affirmative action policy therefore devolves into the very tokensim that they claim to be trying to combat. *See* Pet.App.20, 61-62. This is likely because *Grutter* allows UNC to engage in racial discrimination to achieve a "critical mass," but paradoxically forbids UNC from using racial quotas or balancing. *See Grutter*, 539 U.S. at 354-55 (Thomas, J., concurring in part).

UNC does not even explicitly pursue any given "critical mass," instead focusing on vaguer notions of "the educational benefits of diversity," such as making sure students don't feel isolated or tokenized. Pet. App.2, 54-56. That only leads to its own contradictions. Asian-American students at UNC, for example, report feeling isolated, tokenized, and the victims of bias, as well as report feeling the need to suppress their racial identity. *See* Pet.App.21. Yet, UNC's "diversity" policies show no preference for admitting more Asian-American students, instead prioritizing only "underrepresented minorities." *See* Pet.App.37-41. On the flip side, UNC claims to specifically face challenges admitting sufficient African-American males, but not females, and

yet there's no indication that its racial preferences towards African Americans are limited to males. *See* Pet.App.19-20. Indeed, UNC's singular preference for underrepresented minorities—defined as those "whose percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina," Pet.App.15 n.7—shows that their efforts at racial discrimination are targeted more towards racial quotas than towards the educational benefits of diversity. After all, there is no evidence in the record to show that admitting more Asian students would not increase the benefits of diversity or make other Asian students feel less isolated.

This also illustrates why *Grutter* is unworkable on a more conceptual level. *Grutter* simultaneously claims "diversity" is an interest of the highest order and yet also categorically limits the means by which that interest can be pursued. That is, *Grutter* forbids universities from pursuing diversity through quotas, racial balancing, and other systems of mechanical, non-individualized treatment. But if diversity was truly compelling, and a university could show that adequate diversity can only be achieved by these means (*e.g.* a quota), why would strict scrutiny nonetheless disallow such practices? That's not how strict scrutiny normally works. This tension in *Grutter*, like so many others, is not easily resolved.

Finally, *Grutter*'s unworkability is perhaps most obviously revealed by its hope that race-conscious admissions will soon fade away. *Grutter*, 539 U.S. at 342-43. Our national experience has since proven *Grutter*'s optimism grievously wrong. As we near *Grutter*'s 25-year expiration date, any honest observer will acknowledge there is no prospect that universities will

voluntarily give up racial discrimination in admissions. Affirmative action programs, in other words, have failed "the acid test of their justification," which is "their efficacy in eliminating the need for any racial or ethnic preferences at all." *Id.* at 343 (citation omitted).

Indeed, while the University of Michigan at least feigned that its race-based program was temporary, *id.*, UNC gives up any pretense that it has a sunset provision, a termination date, or any other concrete plans to eliminate it, Pet.App.164-165. Racial classifications have cemented as a chronic feature of our academic system, without "logical stopping point." *Wygant*, 476 U.S. at 275. As a result of a "deferential" and "watered-down version of equal protection review," *Grutter* "effectively assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decision-making such irrelevant factors as a human being's race will never be achieved." *J.A. Croson*, 488 U.S. at 495 (cleaned up); *Adarand Constructors*, 515 U.S. at 229.

So it will remain until this Court intervenes. *See Grutter*, 539 U.S. at 394-95 (Kennedy, J., dissenting). To the extent that our laws and Constitution tolerate a timeline for considering race in education, it is this: such considerations must end with "all deliberate speed." *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 301 (1955). History has taught us even that is not fast enough.

IV. CERTIORARI BEFORE JUDGMENT IS WARRANTED BECAUSE THIS CASE MERITS CONSIDERATION ALONGSIDE THE *HARVARD* CASE.

The *Harvard* case is now fully briefed on petition for a writ of certiorari. Given the striking (or, frankly,

disturbing) similarities between the race-based admission policies in this case and the *Harvard* case, certiorari before judgment is warranted in this case to make it a public-school companion to the private-school *Harvard* case. Moreover, taking these two cases together will enable the Court to resolve the questions presented in both the Fourteenth Amendment context and the Title VI context, limiting the need for future cases on these issues.

In both this case and the *Harvard* case, the lower courts gave deferential, rather than searching, review of the challenged race-based admissions policies and the universities' rejection of race-neutral alternatives. *Compare* Pet.App.116, 141-144, 158-161, 182 *with Harvard*, Pet.App.75-79. Both UNC and Harvard are willing to sacrifice some level of student academic quality (measured, for example, by SAT scores) in order to pursue its racial preferences, but are unwilling to accept similarly small academic sacrifices in pursuit of race neutrality. *Compare* Pet.App.73 n.25, 115-116, 141 *with Harvard*, Pet.App.68-69, 76, 172. Both universities claim to engage in only holistic admissions and to evaluate candidates as individuals, not as those who could fill racial quotas, but reject race-neutral alternatives because of their potential effect on the racial makeup of the student body rather than because of any individualized considerations. *Compare* Pet.App.9, 12, 28, 141 *with Harvard*, Pet.App.62 n.27, 75, 77-79.

The similarities continue. Both UNC and Harvard make contradictory claims about race not being a decisive factor but also being determinative for some candidates. *Compare* Pet.App.53 n.16, 80, 96, 101-106, 110-113, 175 *with Harvard*, Pet.App.46, 68. They

impose affirmative action to achieve the benefits of diversity, but acknowledge that their minority students still feel alienated and isolated, demonstrating the ineffectiveness of their discriminatory policies. *Compare* Pet.App.19-22, 60-62 *with Harvard*, Pet.App.23 n.12. Both race-based policies disproportionately harm Asian-American students that have higher academic credentials than their admitted peers of other races, and both attempt to mask that discrimination behind lower ratings on "personal" measures for these students. *Compare* Pet.App.71, 76-77, 98 *with Harvard*, Pet.15-16; Pet.App.68-69, 210 n.51. And both UNC and Harvard have no plans to end their racialized admissions practices any time soon. *Compare* Pet.App. 164-165 *with Harvard*, Pet.App.72-73.

Given the parallel factual contexts arising in the two relevant legal contexts—private schools under Title VI and public schools under the Equal Protection Clause and Title VI—judicial efficiency and national clarity counsel in favor of considering this case and the *Harvard* case together. The Court should grant certiorari in *Harvard* and then grant certiorari before judgment in this matter.

CONCLUSION

For the reasons stated, this Court should grant Petitioner the writ of certiorari.

Respectfully submitted,

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