

20-1199

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

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

**BRIEF OF AMICI CURIAE 25 HARVARD
STUDENT AND ALUMNI ORGANIZATIONS IN
SUPPORT OF RESPONDENT PRESIDENT
AND FELLOWS OF HARVARD COLLEGE**

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<i>Allen v. Wright</i> , 468 U.S. 737 (1984), abrogated on other grounds by <i>Lexmark Int’l, Inc.</i> <i>v. Static Control Components, Inc.</i> , 572 U.S. 118 (2014)	31
<i>Briggs v. Elliott</i> , 342 U.S. 350 (1952)	2
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954)	5, 29
<i>Fisher v. Univ. of Tex.</i> , 570 U.S. 297 (2013)	18, 19
<i>Grutter v. Bollinger</i> , 288 F.3d 732 (6th Cir. 2002) (Clay, J., concurring), <i>aff’d</i> , 539 U.S. 306 (2003)	11
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	<i>passim</i>
<i>Kennedy v. Bremerton Sch. Dist.</i> , 142 S. Ct. 2407 (2022)	5
<i>Peters v. Kiff</i> , 407 U.S. 493 (1972)	26
<i>Regents of Univ. of Cal. v. Bakke</i> , 438 U.S. 265 (1978) (Powell, J.)	17

<i>Stout v. Jefferson Cnty. Bd. of Educ.</i> , 882 F.3d 988 (11th Cir. 2018)	28
<i>Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.</i> , 980 F.3d 157 (1st Cir. 2020).....	19
<i>Trimble v. Gordon</i> , 430 U.S. 762 (1977)	15
Other Authorities	
Amanda Lewis & John B. Diamond, <i>Despite the Best Intentions: How Racial Inequality Thrives in Good Schools</i> (2015).....	9
Angela Duckworth et al., <i>Grit: Perseverance and Passion for Long- Term Goals</i> , 92 J. Personality & Soc. Psych. 1087 (2007).....	16
Anne E. Casey Foundation, <i>Race for Results: Building a Path to Opportunity for All Children</i> (2018), https://www.aecf.org/resources/2017- race-for-results	8

- Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions in America's Untapped Resource: Low-Income Students in Higher Education* (Richard D. Kahlenberg ed., 2004), <https://cew.georgetown.edu/socioeconomic-status-raceethnicity-and-selective-college-admissions/>..... 7
- Bas Hofstra et al., *The Diversity-Innovation Paradox in Science*, 117 PNAS 9284 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7196824/pdf/pnas.201915378.pdf> 26
- Bedoor K. AlShebli et al., *The Preeminence of Ethnic Diversity in Scientific Collaboration*, Nature Comm's, 2018, <https://doi.org/10.1038/s41467-018-07634-8>..... 25
- Beverly Tatum, *Why Are All the Black Kids Sitting Together in the Cafeteria? And Other Conversations About Race* (3d ed. 2017)..... 6
- Brown v. Board: The Landmark Oral Argument Before the Supreme Court* (Leon Friedman ed., 2004) 2
- Bryan McKinley Jones Brayboy & Margaret J. Maaka, *K-12 Achievement for Indigenous Students*, J. Am. Indian Educ., Spring 2015..... 6

<i>Celebration of Black Alumni</i> , Harvard Law Today (Sept. 12, 2000), https://today.law.harvard.edu/celebration-of-black-alumni/	27
Chang-Tai Hsieh et al., <i>The Allocation of Talent and U.S. Economic Growth</i> , 87 <i>Econometrica</i> 1439 (2019)	25
<i>Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary</i> , 115th Cong. (2018) (Statement of Brett Kavanaugh)	4
David B. Wilkins & Bryon Fong, <i>Harvard Law School Report on the State of Black Alumni II: 2000–2016</i> (2017), https://clp.law.harvard.edu/assets/HLS-Report-on-the-State-of-Black-Alumni-II-2000-2016-High-Res.pdf	27
David B. Wilkins et al., <i>Harvard Law School Report on the State of Black Alumni: 1896–2000</i> (2002), https://clp.law.harvard.edu/assets/Report-on-the-State-of-Black-Alumni-I-1869-2000.pdf	27

David M. Lee et al., <i>Academic Needs and Family Factors in the Education of Southeast Asian American Students: Dismantling the Model Minority Myth</i> , J. Se. Asian Am. Educ. & Advancement, 2017, https://docs.lib.purdue.edu/jsaaea/vol12/iss2/2	10
Devon W. Carbado & Cheryl I. Harris, <i>The New Racial Preferences</i> , 96 Cal. L. Rev. 1139 (2008).....	29
Elise Boddie, <i>The Indignities of Color Blindness</i> , 64 UCLA L. Rev. Discourse 64 (2016)	29
Erika K. Wilson, <i>Monopolizing Whiteness</i> , 134 Harv. L. Rev. 2382 (2021)	5
Frank Hobbs & Nicole Stoops, <i>Demographic Trends in the 20th Century: Census 2000 Special Reports</i> (2002), https://grist.org/wp-content/uploads/2005/04/censr-4.pdf	13
Harriet R. Tenenbaum & Martin D. Ruck, <i>Are Teachers' Expectations Different for Racial Minority Than for European American Students? A Meta-Analysis</i> , 99 J. Educ. Psych. 253 (2007)	8

- Heather G. Peske & Kati Haycock.,
*Teaching Inequality: How Poor and
 Minority Students Are Shortchanged
 on Teacher Quality* (2006),
[https://1k9gl1yevnfp2lpq1dhrqe17-
 wpengine.netdna-ssl.com/wp-
 content/uploads/2013/10/TQReportJu
 ne2006.pdf](https://1k9gl1yevnfp2lpq1dhrqe17-wpengine.netdna-ssl.com/wp-content/uploads/2013/10/TQReportJune2006.pdf) 7
- Isabel Wilkerson, *Caste: The Origins of
 Our Discontents* (2020) 24, 28
- Jay Rosner, *The SAT: Quantifying the
 Unfairness Behind the Bubbles in
 SAT Wars: The Case for Test-
 Optional College Admissions* (Joseph
 A. Soares ed., 2012) 13
- Jim Loewen, *Here We Go Again: Tests
 for the Common Core May Be Unfair
 to Some and Boring to All*, Hist.
 News Network (Nov. 18, 2014),
[https://historynewsnetwork.org/blog/
 15354](https://historynewsnetwork.org/blog/15354)..... 12, 13
- Jo Freeman, *The Legal Basis of the
 Sexual Caste System*, 5 Val. Univ. L.
 Rev. 203 (1971) 24
- Joel McFarland et al., U.S. Dep't of
 Educ., Nat'l Ctr. for Educ. Stat.,
The Condition of Education 2018
 (2018), [https://nces.ed.gov/pubs2018/
 2018144.pdf](https://nces.ed.gov/pubs2018/2018144.pdf) 7

- John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America* (2011) 8
- Jonathan P Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 1 Utah L. Rev. 59 (2019)..... 30
- Kaisa Snellman et al., *Inequity Outside the Classroom: Growing Class Differences in Participation in Extracurricular Activities*, Voices Urb. Educ., 2015, <https://files.eric.ed.gov/fulltext/EJ1056739.pdf> 7, 10
- Katherine W. Phillips, *How Diversity Makes Us Smarter*, Sci. Am. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/> 26
- Kirsten Hextrum, *Reproducing Sports Stars: How Students Become Elite Athletes*, Tchrs. Coll. Rec., Apr. 2019, <https://ou.edu/content/dam/Education/19-fall-bridges/Hextrum%202019%20TCR.pdf>..... 9
- Krista M. Malott, *Being Mexican: Strengths and Challenges of Mexican-Origin Adolescents*, J. Sch. Counseling, 2010, at 1, <https://files.eric.ed.gov/fulltext/EJ885087.pdf> 9

<i>Margaret M. Chin</i> , Hunter Coll. Socio., https://www.hunter.cuny.edu/sociology/faculty/margaret-m.-chin (last visited July 19, 2022)	15
Maria Veronica Santelices & Mark Wilson, <i>Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning</i> , 80 Harv. Educ. Rev. 106 (2010)	12
Nat'l Endowment for the Arts, <i>A Decade of Arts Engagement: Findings from the Survey of Public Participation in the Arts, 2002–2012</i> (2015), https://www.arts.gov/sites/default/files/2012-sppa-feb2015.pdf	10
Nat'l Endowment for the Arts, <i>Arts Education in America: What the Declines Mean for Arts Participation</i> (2011), https://www.arts.gov/sites/default/files/2008-SPPA-ArtsLearning.pdf	10
Nick Assendelft, <i>Investing in Diversity</i> , Alumni Ass'n of the Univ. of Mich. (Spring 2017), https://alumni.umich.edu/michigan-alum/investing-in-diversity/	23

Off. for C.R., U.S. Dep’t of Educ., <i>2013–2014 Civil Rights Data Collection: A First Look</i> (2016), https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf	6
Off. for C.R., U.S. Dep’t of Educ., <i>2015–2016 Civil Rights Data Collection: STEM Course Taking</i> (2018), https://www2.ed.gov/about/offices/list/ocr/docs/stem-course-taking.pdf	6
Paul Marthers, <i>Looking at Student “Grit” and Resilience – from Recruitment to Retention</i> , Academic Impressions (June 16, 2017), https://www.academicimpressions.com/looking-at-student-grit-and-resilience-from-recruitment-to-retention/	16
<i>Prop 209 Lands on UC</i> , L.A. Times (Apr. 1, 1998), http://articles.latimes.com/1998/apr/01/local/me-34867	22
<i>QuickFacts: Michigan</i> , U.S. Census Bureau, https://www.census.gov/quickfacts/MI (last visited July 19, 2022).....	23
Richard O. Lempert et al., <i>Michigan’s Minority Graduates in Practice: The River Runs Through Law School</i> L. & Soc. Inquiry 395 (2000)	14

- Roby Chatterji et al., Ctr. for Am. Progress, *Closing Advanced Coursework Equity Gaps for All Students* (2021), <https://americanprogress.org/wp-content/uploads/2021/07/AdvancedCoursework-report1.pdf>..... 9
- Roy O. Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 Harv. Educ. Rev. 1 (2003) 11, 12
- Russell J. Skiba & Natasha T. Williams, The Equity Project at Ind. Univ., *Are Black Kids Worse? Myths and Facts About Racial Differences in Behavior: A Summary of the Literature* (2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf..... 9
- Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psych. 507 (2006) 26
- Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 Am. Socio Rev. 487 (2007) 24

Tyler Kepner, *Baseball Rights a Wrong by Adding Negro Leagues to Official Records*, N.Y. Times (Dec. 16, 2020), <https://www.nytimes.com/2020/12/16/sports/baseball/mlb-negro-leagues.html> 25

Univ. of Cal. Off. of the President, *Underrepresented Groups (URG) as a Percentage of California Public High School Graduates and UC Applicants, Admits, and New Freshmen, Systemwide, Fall 1989 to Fall 2016*, https://www.ucop.edu/academic-affairs/_files/prop209-gap-analysis-chart.pdf (last visited July 19, 2022) 22

University of Michigan-Ann Arbor, Data USA, <https://datausa.io/profile/university/university-of-michigan-ann-arbor#enrollment> (last visited July 19, 2022) 23

William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 Santa Clara L. Rev. 131 (2002)..... 12, 13, 14

William C. Kidder, UCLA C.R. Project, *Restructuring Higher Education Opportunity? African American Degree Attainment After Michigan's Ban on Affirmative Action* (2013) 23

INTEREST OF *AMICI CURIAE*¹

Amici Curiae are 25 Harvard student and alumni organizations,² comprised of thousands of Asian American, Black, Latinx³, Native/Indigenous, and white Harvard students, alumni, faculty, and alumni interviewers. *Amici*'s alumni members' graduation

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

² *Amici* include Association of Black Harvard Women, Coalition for a Diverse Harvard, First Generation Harvard Alumni, Fuerza Latina of Harvard, Harvard Asian American Alumni Alliance, Harvard Asian American Brotherhood, Harvard Black Alumni Society, Harvard Islamic Society, Harvard Japan Society, Harvard Korean Association, Harvard Latino Alumni Alliance, Harvard Minority Association of Pre-Medical Students, Harvard Phillips Brooks House Association, Harvard Progressive Jewish Alumni, Harvard South Asian Association, Harvard University Muslim Alumni, Harvard Vietnamese Association, Harvard-Radcliffe Asian American Association, Harvard-Radcliffe Asian American Women's Association, Harvard-Radcliffe Black Students Association, Harvard-Radcliffe Chinese Students Association, Kuumba Singers of Harvard College, Native American Alumni of Harvard University, Natives at Harvard College, and Task Force for Asian American Progressive Advocacy and Studies at Harvard College. See Mot. to Participate as Amici Curiae, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA v. Harvard*"), No. 1:14-cv-14176 (D. Mass. 2018), ECF No. 455 (describing 21 *amici*); Mot. of Additional Harvard Student & Alumni Organizations to Participate as Amici Curiae, *SFFA v. Harvard*, No. 1:14-cv-14176 (D. Mass. 2018), ECF No. 503 (describing four *amici*).

³ The gender-neutral term "Latinx" is used to refer collectively to Latinos, Latinas, and non-binary persons of Latin American background.

years span at least eight decades. *Amici* include many longstanding organizations, some of whom have served the Harvard community for more than a century. *Amici* offer the Court vast institutional knowledge pertinent to this case.

Amici submit this brief to explain that it is essential for Harvard to continue to provide its students with the educational benefits of diversity by considering race as one of many factors in its holistic admissions process. Due to their expertise, *Amici* similarly provided evidence, argument, and briefing to the District Court and the First Circuit Court of Appeals in this case.

SUMMARY OF ARGUMENT

In *Brown v. Board of Education*, this Court recognized that racial segregation in education “deprives [Black children] of equal status in the school community” and “stamps [them] with a badge of inferiority.”⁴ This same system of racial apartheid—and the badge of inferiority it placed upon Black students and other students of color—also existed in private educational institutions like Harvard. Following this Court’s rejection of public school segregation as unconstitutional in *Brown*, Harvard and other private institutions followed suit and opened their doors to previously-excluded applicants. Yet, Students for Fair Admissions (“SFFA”) now seeks to turn *Brown* on its head, invoking that seminal ruling

⁴ Oral Argument, *Briggs v. Elliott*, 342 U.S. 350 (1952), in *Brown v. Board: The Landmark Oral Argument Before the Supreme Court* 38 (Leon Friedman ed., 2004).

to ask the Court to turn back the clock and cause Harvard to be out of reach to many students of color who, due to persistent inequalities in K-12 educational opportunities and despite being eminently qualified, are not able to gain that competitive edge to assure their admission.

For almost 85% of its nearly 400-year history, Harvard maintained a near-categorical exclusion of Black, Latinx, Native/Indigenous, Asian American, and other students of color as it provided white students with all the educational and professional advantages that a Harvard education affords. Indeed, given centuries of racial subordination, white students continue to receive unearned advantages in a highly selective admissions process. Given persistent inequalities in access to educational opportunities, an end to race-conscious admissions would artificially inflate the value of credentials that white students generally have a far greater opportunity to earn and that Black, Latinx, and certain other students of color generally have far less of an opportunity to earn. Moreover, far from creating a penalty, race-conscious admissions can and do help many Asian American applicants and students.

Should this Court rule in SFFA's favor, it would give legal sanction to selective universities' becoming mere vessels for the generational reproduction of unearned advantages. Such a result undermines any concept of merit and would prevent many Black, Latinx, Native/Indigenous, Hawaiian, Asian American, and Pacific Islander students from being able to compete for admission on an equal footing, thus artificially depressing their admission rates, causing a steep decline in the share of students admitted from

those groups, stamping them with a “badge of inferiority,” and signaling this Court’s abandonment of its commitment to equal opportunity. Given how foundational education is to the development of good citizenship, the elimination of race-conscious admissions not only undermines the legitimacy of this Court but also the promise of our multiracial, multi-ethnic democracy.

ARGUMENT

I. RACE-CONSCIOUS ADMISSIONS ARE NECESSARY BECAUSE, GIVEN OPPORTUNITY GAPS, TRADITIONAL INDICIA OF MERIT UNDERPREDICT THE POTENTIAL OF MANY APPLICANTS OF COLOR.

All students should have an equal chance to gain admission to highly selective colleges and universities, regardless of their race or ethnicity. However, as Justice Kavanaugh has correctly pointed out, “we are still seeking to achieve racial equality. The long march for racial equality is not over.”⁵ Due to vastly unequal K-12 educational opportunities, it is difficult for universities to identify talented students of all races and ethnicities. This absence of equal educational opportunities undermines democracy because it “allow[s] a subset of the population to either hoard or be deprived of the kinds of educational opportunities

⁵ *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 179 (2018) (Statement of Brett Kavanaugh).

that allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy.”⁶ Democracy is further jeopardized by the “social isolation that den[ies] white students the ability to gain the skills they need to function in a racially diverse country.”⁷ As this Court stated in *Kennedy v. Bremerton School District*, there is “a long constitutional tradition” acknowledging the importance of “learning how to live in a pluralistic society.” 142 S. Ct. 2407, 2431 (2022) (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)). Overruling *Grutter v. Bollinger*, 539 U.S. 306 (2003), would undermine this tradition. Indeed, this Court has repeatedly recognized “the importance of education to our democratic society,” explaining that education “is required in the performance of our most basic public responsibilities” and “is the very foundation of good citizenship.”⁸

No racial group has a monopoly on talent, but some students enjoy a monopoly on opportunity. For many students of color in the United States, there is a negative correlation between race and their opportunity to earn competitive test scores, the highest grades, extracurricular and artistic accolades, and teacher recommendation letters irrespective of family income, ability, or work ethic.⁹ These

⁶ Erika K. Wilson, *Monopolizing Whiteness*, 134 Harv. L. Rev. 2382, 2416 (2021).

⁷ *Id.*

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁹ See *Amici Curiae Br.* at 8–15, *SFFA v. Harvard*, No. 1:14-cv-14176 (D. Mass.), ECF No. 471; *Amici Curiae Br. in Opp’n to SFFA’s Mot. Summ. J.* at 11–23, *SFFA v. Harvard*, No. 1:14-cv-14176 (D. Mass. 2018), ECF No. 504.

disadvantages prevent colleges and universities like Harvard from identifying equally talented students who simply did not have the opportunities to amass the credentials that would give them a competitive edge within a highly selective admissions process.

A. Certain Racial Groups Do Not Have an Equal Opportunity to Earn Academic, Athletic, Extracurricular, and Artistic Accolades.

Approximately 75% of Black K-12 students and 80% of Latinx K-12 students attend racially segregated schools.¹⁰ Schools with high Black, Latinx, and Native/Indigenous enrollment are less likely to offer advanced courses.¹¹ Black, Latinx, and Native/Indigenous students are also twice as likely as white students to attend a school where more than 20% of the teachers are in their first year of teaching or where more than 20% of the teachers have not met state certification or licensing requirements.¹² Moreover,

¹⁰ Beverly Tatum, *Why Are All the Black Kids Sitting Together in the Cafeteria? And Other Conversations About Race* 7–8 (3d ed. 2017).

¹¹ See Off. for C.R., U.S. Dep’t of Educ., *2015–2016 Civil Rights Data Collection: STEM Course Taking* 5 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/stem-course-taking.pdf>; Bryan McKinley Jones Brayboy & Margaret J. Maaka, *K–12 Achievement for Indigenous Students*, *J. Am. Indian Educ.*, Spring 2015, at 63, 75; JA1641 (“Majority white schools are 2x as likely to offer a significant number of advanced placement classes as majority Black or Latino schools.”).

¹² Off. for C.R., U.S. Dep’t of Educ., *2013–2014 Civil Rights Data Collection: A First Look* 9 (2016) (“First Look”), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

nearly one-half of Black and Latinx students, more than one-third of Native/Indigenous students, and one-quarter of Pacific Islander students attend high-poverty schools, compared to 8% of white students.¹³ Black, Latinx, Native/Indigenous, and Pacific Islander students are three to six times more likely than white students to attend a high-poverty K-12 school, where students are more likely to be taught by “out-of-field” teachers and less likely to have access to extracurricular activities.¹⁴

This persistent opportunity gap deprives many students of color from accessing equal educational opportunities regardless of income.¹⁵ “The average

¹³ Joel McFarland et al., U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Stat., *The Condition of Education 2018* 82 (2018), <https://nces.ed.gov/pubs2018/2018144.pdf>. The National Center for Education Statistics defines a “high-poverty school” as one where more than 75% of the students are eligible for a free or reduced-price lunch. *See id.* at xxx n.1.

¹⁴ *Id.*; Heather G. Peske & Kati Haycock., *Teaching Inequality: How Poor and Minority Students Are Shortchanged on Teacher Quality* 2 (2006), <https://1k9gl1yevnfp2lpq1dhrqe17-wpengine.netdna-ssl.com/wp-content/uploads/2013/10/TQReportJune2006.pdf>; Kaisa Snellman et al., *Inequity Outside the Classroom: Growing Class Differences in Participation in Extracurricular Activities*, *Voices Urb. Educ.*, 2015, at 7, 13, <https://files.eric.ed.gov/fulltext/EJ1056739.pdf>.

¹⁵ *See* Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in *America’s Untapped Resource: Low-Income Students in Higher Education* 132 (Richard D. Kahlenberg ed., 2004), <https://cew.georgetown.edu/socioeconomic-status-raceethnicity-and-selective-college-admissions/> (“Our findings are analogous to many others showing that the inequality in educational opportunity among African Americans and Hispanics cannot be completely accounted for by socioeconomic status or by school variables.”).

affluent [B]lack or Hispanic household lives in a poorer neighborhood than the average lower-income white resident.”¹⁶ Furthermore, 84% of white children live in areas with a poverty rate less than 20%, compared to 45% of Black children.¹⁷ Studies have found that the racial biases of educators negatively impact expectations of Black, Latinx, and Southeast Asian students relative to their white classmates, even in middle-class, integrated schools, regardless of those students’ socioeconomic status. Research on implicit bias shows that educators are less likely to call on Black, Latinx, and Southeast Asian students in class, or to encourage and recommend them for college preparatory courses.¹⁸ Even Black, Latinx, Southeast Asian, and Native/Indigenous students attending

¹⁶ John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks, Hispanics and Asians in Metropolitan America* 1 (2011).

¹⁷ Anne E. Casey Foundation, *Race for Results: Building a Path to Opportunity for All Children* 28 (2018), <https://www.aecf.org/resources/2017-race-for-results>.

¹⁸ Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers’ Expectations Different for Racial Minority Than for European American Students? A Meta-Analysis*, 99 *J. Educ. Psych.* 253, 271 (2007) (finding that educators were less likely to offer encouragement and pose questions to Black and Latinx students than white students); Anna Chiang et al., *(Mis)Labeled: The Challenge of Academic Capital Formation for Hmong American High School Students in an Urban Setting*, *J. Se. Asian Am. Educ. & Advancement*, 2015, at 1, 10 (“Some researchers have found that Hmong American students have been tracked into lower level courses and were held to low expectations by their teachers”); Krista M. Malott, *Being Mexican: Strengths and Challenges of Mexican-Origin Adolescents*, *J. Sch. Counseling*, 2010, at 1, 16, <https://files.eric.ed.gov/fulltext/EJ885087.pdf> (finding counselors had lower expectations of Mexican students’ success in rigorous courses and selective colleges).

middle-class, racially integrated schools are frequently tracked away from college preparatory coursework.¹⁹ Moreover, while Black, Latinx, and Native/Indigenous students are no more likely to misbehave than students of other races, educators are more likely to discipline these students more frequently and more harshly, depriving them of instructional time.²⁰

Black, Latinx, Native/Indigenous, Pacific Islander, and Asian American K-12 students also have less of an opportunity to become a skilled athlete. A 2019 study found “a broad correspondence between White middle-class communities and the sports-track-to-college pipeline.”²¹ In contrast, the high-poverty schools that many students of color attend are less likely to offer extracurricular activities. “[T]he percentage of students receiving free or reduced-price lunch in the overall student body is negatively associated with the total number of extracurricular activities, sports teams, and service opportunities offered by the

¹⁹ See, e.g., Chiang et al., *supra*, at 1, 10; Amanda Lewis & John B. Diamond, *Despite the Best Intentions: How Racial Inequality Thrives in Good Schools* 95–96 (2015); Roby Chatterji et al., Ctr. for Am. Progress, *Closing Advanced Coursework Equity Gaps for All Students* 4, 31 (2021), <https://americanprogress.org/wp-content/uploads/2021/07/AdvancedCoursework-report1.pdf>.

²⁰ Russell J. Skiba & Natasha T. Williams, The Equity Project at Ind. Univ., *Are Black Kids Worse? Myths and Facts About Racial Differences in Behavior: A Summary of the Literature* 4 (2014), http://www.indiana.edu/~atlantic/wpcontent/uploads/2014/03/African-American-Differential-Behavior_031214.pdf; First Look, *supra*, at 3.

²¹ Kirsten Hextrum, *Reproducing Sports Stars: How Students Become Elite Athletes*, Tchrs. Coll. Rec., Apr. 2019, at 1, 21, <https://ou.edu/content/dam/Education/19-fall-bridges/Hextrum%202019%20TCR.pdf>.

school.”²² As one survey found, “61 percent of middle and high school students nationwide were charged a pay-to-play fee”²³ in which a student has to pay to participate in an extracurricular activity, a fee that many families of color cannot afford.

Black and Latinx students also have less access to arts instruction.²⁴ A National Endowment for the Arts study found that while 58% of white respondents ages 18–24 reported having received arts education in childhood, only 26% of Black respondents ages 18–24 and 28% of Latinx respondents ages 18–24 reported the same.²⁵

²² Snellman et al., *supra*, at 13. *See also* David M. Lee et al., *Academic Needs and Family Factors in the Education of Southeast Asian American Students: Dismantling the Model Minority Myth*, J. Se. Asian Am. Educ. & Advancement, 2017, at 1, 8, <https://docs.lib.purdue.edu/jsaaea/vol12/iss2/2> (noting that many Southeast Asian students do not have access to after-school activities).

²³ Snellman et al., *supra*, at 13.

²⁴ Nat’l Endowment for the Arts, *A Decade of Arts Engagement: Findings from the Survey of Public Participation in the Arts, 2002–2012* 66 (2015), <https://www.arts.gov/sites/default/files/2012-sppa-feb2015.pdf> (finding that children of Black and Latinx parents were less likely to receive music and art instruction in school).

²⁵ Nat’l Endowment for the Arts, *Arts Education in America: What the Declines Mean for Arts Participation* 16 (2011), <https://www.arts.gov/sites/default/files/2008-SPPA-ArtsLearning.pdf>.

B. Certain Racial Groups Do Not Have an Equal Opportunity to Earn Competitive Test Scores.

The persistent disparities in K-12 education are compounded by standardized tests, which underpredict the potential of many students of color.²⁶ According to Roy Freedle—who served for 31 years as a cognitive psychologist for Educational Testing Service, the creator of the SAT—Black and Latinx examinees consistently outperformed white students on hard questions (which use vocabulary taught at school), while white students outperformed Black and Latinx examinees on easy questions (which use words with varying colloquial meanings, with the exam crediting answers that reflect the meaning most frequently used in white, middle-class homes like those of the test creators).²⁷ Because correct answers on easy questions—those infected with cultural bias—yielded the same amount of credit as correct answers to hard questions, test scores for Black examinees were artificially depressed by as much as 200 or 300

²⁶ Research on the biased nature of the SAT led at least one Sixth Circuit Judge to recognize that standardized test scores are not objective measures of merit, stating that “the record indicates that LSAT scores are neither race-neutral or gender-neutral criteria for admissions decisions.” *Grutter v. Bollinger*, 288 F.3d 732, 771 (6th Cir. 2002) (Clay, J., concurring), *aff’d*, 539 U.S. 306 (2003).

²⁷ See generally Roy O. Freedle, *Correcting the SAT’s Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 Harv. Educ. Rev. 1, 28–29 (2003); see also *id.* (noting that there is “evidence for this bias pattern across a wide span of tests” and mentioning evidence of cultural bias on Advanced Placement exams, the GRE, and high school vocabulary exams).

points.²⁸ A 2010 study replicated Freedle’s findings, showing that the SAT “favors one ethnic group over another” and calling into “question the validity of SAT verbal scores for [Black] examinees.”²⁹

Test makers’ efforts to ensure “reliability”—meaning that new questions produce findings consistent with the findings of existing questions³⁰—also significantly disadvantage certain examinees of color. Test manufacturers deem a question reliable when “high ability” examinees are more likely than “low ability” examinees to answer correctly.³¹ But test manufacturers fail to use any independent measure of “ability.”³² Instead, they define “high ability” as performing well on the overall test and will discard—as “unreliable”—questions on which high scorers do not outperform low scorers.³³ If the test itself is biased and unfairly depresses the scores of some examinees—perhaps because those examinees are unfamiliar with

²⁸ *Id.* at 12–13.

²⁹ Maria Veronica Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 *Harv. Educ. Rev.* 106, 126, 128 (2010).

³⁰ William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 *Santa Clara L. Rev.* 131, 146, 156–57 (2002).

³¹ *Id.* at 157.

³² Jim Loewen, *Here We Go Again: Tests for the Common Core May Be Unfair to Some and Boring to All*, *Hist. News Network* (Nov. 18, 2014), <https://historynewsnetwork.org/blog/153543>.

³³ *Id.*; Kidder & Rosner, *supra*, at 157.

the semantics used in white homes—test makers’ reliability check will reproduce that bias.³⁴

“Like most other ‘standardized’ tests given widely in the U.S., researchers originally validated the SAT on affluent white students.”³⁵ As a consequence, “[a]ffluent white students have always done better on [the SAT] than have African Americans, Hispanics, Native Americans, Filipino Americans, or working-class whites.”³⁶ Since the “ability” of an examinee is measured by the yardstick of affluent white individuals’ performance, experimental test questions are systematically discarded as “biased” when more Black or Latinx students answer correctly than white students, resulting in a scored test comprised entirely (or almost entirely) of questions that favor white students, sometimes by large margins.³⁷ In fact, research has shown that “99% of SAT math questions chosen to appear on scored sections ha[d] to be answered correctly [in pre-testing] by . . . a higher percentage of whites than Mexican Americans[] and a higher percentage of whites than [B]lacks,

³⁴ Kidder & Rosner, *supra*, at 146, 156–57; Loewen, *supra*; Jay Rosner, *The SAT: Quantifying the Unfairness Behind the Bubbles in SAT Wars: The Case for Test-Optional College Admissions* 115 (Joseph A. Soares ed., 2012).

³⁵ Loewen, *supra*. Both the SAT, created in 1926, and the ACT, created in 1959, were developed when the United States’ population was 90% white. See Figure 3-3. Distribution of Total Population by Race: 1900 to 2000 in Frank Hobbs & Nicole Stoops, *Demographic Trends in the 20th Century: Census 2000 Special Reports* 77 (2002), <https://grist.org/wp-content/uploads/2005/04/censr-4.pdf>.

³⁶ Loewen, *supra*.

³⁷ *Id.*; Kidder & Rosner, *supra*, at 133–72.

*simultaneously.*³⁸ Reliability checks have “the ultimate effect of contributing to—even guaranteeing—the lower performance of African Americans and Chicanos on the SAT.”³⁹ If equally valid questions—but with a less racially disparate impact—were used, the Black-white score gap could be closed by 40%, while the Chicano-white score gap could be reduced by 25%.⁴⁰

In addition to the racial bias embedded in standardized tests like the SAT, they are not a reliable measure of merit because they do not accurately predict an applicant’s likelihood of success. A study of Black, Latinx, and Native American graduates from the University of Michigan law school’s classes of 1970–96 found that, despite having lower standardized test scores, they were as successful as their white classmates in their professional lives in terms of income, career satisfaction, and civic contributions.⁴¹ *Amici*’s own experiences affirm the unreliability of standardized tests. For example, Margaret Chin, who is a founding board member of *Amicus Curiae* Coalition for a Diverse Harvard, was admitted to Harvard despite not having “outstanding” test scores and is now a Professor of Sociology at Hunter College, City University of New York and the

³⁸ Rosner, *supra*, at 115.

³⁹ Kidder & Rosner, *supra*, at 156.

⁴⁰ *Id.* at 172; *Hidden Biases Continue to Produce Powerful Headwinds for College-Bound Blacks Aiming for Higher Scores on the SAT*, J. Blacks Higher Educ., Autumn 2003, at 90, 92.

⁴¹ Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & Soc. Inquiry 395, 468–79, 485–90 (2000).

author of two award-winning books about Asian Americans in the workplace.⁴²

C. Pursuant to This Court’s Longstanding Guidance, the Limited Consideration of Race Allows Harvard to Identify Qualified Students of Color Who Are at an Unfair Competitive Disadvantage.

As Justice Rehnquist explained, “equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly.” *Trimble v. Gordon*, 430 U.S. 762, 780 (1977). Many students of color are not similarly situated to white applicants when it comes to (a) access to K-12 educational, extracurricular, arts, and athletic opportunities, and (b) the opportunity to earn a score on the relevant standardized tests (e.g., SAT, ACT) that is not artificially depressed by racial bias. Accordingly, universities should not be forced to view all students with the same lens. Rather, universities should be permitted to consider race, as one of many factors, in admissions to at least partially neutralize the way traditional indicia of merit underpredict the potential of many students of color.

SFFA and its *amici* erroneously suggest that applicants on the losing end of the opportunity gap are categorically unqualified and should be relegated to

⁴² Decl. of Margaret M. Chin, PhD, (Coalition for a Diverse Harvard) at 5, *SFFA v. Harvard*, No. 1:14-cv-14176 (D. Mass. 2018), ECF No. 455-13; *Margaret M. Chin*, Hunter Coll. Socio., <https://www.hunter.cuny.edu/sociology/faculty/margaret-m.-chin> (last visited July 19, 2022). *See also infra* at 26–27.

less competitive institutions. *See, e.g.*, Pet'r's Br. at 69, Br. of *Amicus* Nat'l Ass'n of Scholars, Br. of *Amicus* Richard Sander. Because talent lives everywhere, but opportunity does not, there are undoubtedly talented students with great academic potential who have simply not had the opportunity to attain the traditional indicia of merit that provide a competitive edge in the admissions process.

That a student has long been denied equal opportunities does not necessarily mean they do not possess the talent and work ethic to excel when given a chance to attend a well-resourced and selective school. On the contrary, students who show academic, artistic, extracurricular, or athletic promise despite having to work harder to overcome adversity are arguably even more talented than their more advantaged peers. Traits such as the ability to persevere in the face of difficulty (*i.e.*, "grit"), resilience, creativity, and persistence contribute to student achievement.⁴³ Grit has been found to demonstrate "incremental predictive validity of success measures over and beyond IQ and conscientiousness," suggesting that the "achievement of difficult goals entails not only talent but also the sustained and focused application of talent over time."⁴⁴

⁴³ Paul Marthers, *Looking at Student "Grit" and Resilience – from Recruitment to Retention*, Academic Impressions (June 16, 2017), <https://www.academicimpressions.com/looking-at-student-grit-and-resilience-from-recruitmentto-retention/>.

⁴⁴ Angela Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 *J. Personality & Soc. Psych.* 1087, 1087 (2007).

This under-identification of talented students, due to persistent racial inequalities, engenders the need for race-conscious admissions. In *Bakke*, Justice Powell recognized that the limited consideration of race in admissions could help ensure the “fair appraisal of each individual’s academic promise in the light of some cultural bias in grading or testing procedures.”⁴⁵ Justice Powell further recognized that, “[t]o the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no ‘preference’ at all.”⁴⁶

This Court’s subsequent decisions affirmed Justice Powell’s reasoning in *Bakke*, permitting the limited consideration of race so that selective universities can identify talented students of color so they can assemble a diverse student body that will enable them to reap the educational benefits of diversity that are so essential to a healthy democracy. Indeed, the Court in *Grutter* endorsed Justice Powell’s admonition in *Bakke* that “nothing less than the ‘nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.’” *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313) (citation and internal quotation marks omitted); *see also id.* at 325 (“[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).

⁴⁵ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978) (Powell, J.).

⁴⁶ *Id.*

While SFFA may overvalue grades and test scores and greatly undervalue the educational benefits of diversity, the Court should not accept SFFA's invitation to compel universities to do the same. Universities, not SFFA, determine their educational mission and, accordingly, decide which admissions criteria will serve that mission—a determination to which the Court must, to some extent, defer. See *Fisher v. Univ. of Tex.*, 570 U.S. 297, 310 (2013) (“*Fisher I*”) (“[T]he decision to pursue ‘the educational benefits that flow from student body diversity,’ . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*.” (quoting *Grutter*, 539 U.S. at 330)).

**II. OVERRULING GRUTTER WILL
ARTIFICIALLY DEPRESS THE
ADMISSIONS RATES OF APPLICANTS OF
COLOR AND STAMP THEM WITH A BADGE
OF INFERIORITY, JEOPARDIZING THE
LEGITIMACY OF THIS COURT.**

**A. Eliminating Race-Conscious
Admissions Would Decimate the
Numbers of Certain Students of Color,
Especially Black Students, at Harvard.**

Eliminating the limited consideration of race in admissions at Harvard would result in the loss of almost one-half of Harvard's Black, Latinx, Native/Indigenous, Hawaiian, and Pacific Islander

students.⁴⁷ The share of Black students in Harvard’s admitted class would drop from 14% to 6%, and the share of Latinx, Native/Indigenous, Hawaiian, and Pacific Islander students would drop from 14% to 9%. JA1821. The District Court further found that, even when considering SFFA’s proffered race-neutral alternatives, “African American representation in Harvard’s incoming class would fall nearly one-third to approximately 10% of the class.” Pet. App. 219.

The anticipated loss of one-third of Harvard’s Black students conclusively demonstrates that SFFA’s race-neutral alternatives—including ending preferences for LDC⁴⁸ applicants—do not “promote the substantial interest [in the educational benefits of diversity] about as well” as the limited consideration of race in admissions. *Fisher I*, 570 U.S. at 312 (citation and internal quotation marks omitted). While ending LDC preferences—which overwhelmingly advantage white applicants—may help neutralize the unfair competitive disadvantage faced by many applicants of color, it is not sufficient to equalize opportunities and obviate the need for race-conscious admissions.⁴⁹

⁴⁷ *SFFA v. Harvard*, 980 F.3d 157, 191 (1st Cir. 2020) (“[W]ithout considering race, the share of African American and Hispanic or Other students enrolled at Harvard would decrease by 45%.”). Harvard’s and SFFA’s experts included Native American, Hawaiian, and Pacific Islander students in the “Hispanic or Other” category for the purposes of their analysis. *Amici* substitute the terms “Hispanic,” “Native American,” and “Hawaiian” with “Latinx,” “Native/Indigenous,” and “Hawaiian” pursuant to the preferences of many in their communities.

⁴⁸ LDC refers to Legacies, students on the Dean’s or Director’s Interest Lists, and Children of Faculty and Staff.

⁴⁹ See JA1783 (the share of Black admittees would still drop by one-third); Pet. App. 219 (same).

SFFA tries to obscure this gaping hole in its argument by describing underrepresented students in the aggregate, as though students of color are interchangeable and an increase in Latinx students could compensate for the steep decline in Black students. Harvard reasonably concluded that Latinx students cannot replace Black students and that the loss of so many Black students would be “a bridge too far.”⁵⁰

As Harvard student Madison Trice explained at trial:

[I]t’s important for the broader Harvard community to be able to interact with a number of different [B]lack people who have very different experiences, whether that’s in terms of religion or class or politics or national origin, and to be able to see that [B]lack people are not a monolith.

JA964. Indeed, exposure to differences within Black and Latinx communities is important even for students who identify as Black and Latinx. For Harvard student Cecilia Nuñez, who identifies as Afro-Latina, diversity within the Black and Latinx community has taught her “a lot more about what it means to identify as [B]lack or what it means to identify as Latinx.” Trial Tr. 10/29/2018 124:20-22. Likewise, Harvard alumna Itzel Vasquez-Rodriguez testified that her Afro-Latinx schoolmates helped her better “understand the African diaspora in Latin America,” leading her to become “a better advocate for

⁵⁰ JA823; *see also* JA1314.

the Latinx community and . . . better able to identify classism, and racism, and colorism within [her] own community.” JA911.

Nevertheless, SFFA erroneously suggests that the loss of nearly one-half of the Black, Latinx, Native/Indigenous, Hawaiian, and Pacific Islander population (without race-neutral alternatives) or the loss of one-third of Harvard’s Black students (if SFFA’s race-neutral alternatives are adopted) would be inconsequential, arguing that their contributions could be replaced by a course on cross-racial understanding. Pet’r’s Br. at 55. The trial testimony of Harvard students and alumni, however, proves the contrary.

For example, the perspectives of Black students in class have informed thought-provoking discussions about the public health consequences of biased medical studies that lack diverse participants, JA955–56 (Diep), and about “the particular prejudices[,] stigmas[,] and barriers” faced by Black people, JA928–31 (Cole). As Harvard student Madison Trice explained, Black students “bring our experiences with racism and with social justice and with our culture, and we are the only people in classrooms who can speak to our own unique experiences.” JA966. And according to Harvard student Sally Chen, a reduction in racial diversity on campus “would really rob students of that critical part of education where you learn from and with people who are different from you and have different experiences from you.” JA971.

Moreover, some vitally important student groups would cease to exist or be significantly diminished if fewer diverse students were admitted each year. JA938–40 (Ho); JA965–66 (Trice). As Harvard student

Cecilia Nuñez explained: “Certain sub-Latinx organizations cannot sustain themselves when there are not enough students from a particular background. A lot of Latinx clubs on campus have gone through periods of being defunct since their founding.”⁵¹

What occurred in states like California and Michigan after the banning of race-conscious admissions portends the significant threats to diversity at Harvard should SFFA prevail.⁵² The end of race-conscious admissions at the University of California (“UC”), for example, led to admissions declines for Black, Latinx, and Native/Indigenous students at every UC campus and enrollment increases for white students, with especially sharp declines for Black, Latinx, and Native/Indigenous students at the UC’s more selective campuses. The share of Black and Latinx students at UC Berkeley dropped by more than one-half.⁵³ Moreover, Black and Native/Indigenous enrollment at the University of Michigan (“U of M”) also dropped precipitously after

⁵¹ Decl. of Cecilia Nuñez (Fuerza Latina) at 4, *SFFA v. Harvard*, No. 1:14-cv-14176 (D. Mass. 2018), ECF No. 455-3.

⁵² See Univ. of Cal. Off. of the President, *Underrepresented Groups (URG) as a Percentage of California Public High School Graduates and UC Applicants, Admits, and New Freshmen, Systemwide, Fall 1989 to Fall 2016*, https://www.ucop.edu/academic-affairs/_files/prop209-gap-analysis-chart.pdf (last visited July 19, 2022).

⁵³ *Prop. 209 Lands on UC*, L.A. Times (Apr. 1, 1998), <http://articles.latimes.com/1998/apr/01/local/me-34867> (reporting that the number of Black and Latinx students admitted to UC Berkeley, as a part of the first freshman class since Proposition 209 went into effect, dropped by 66% and 53%, respectively, compared to the previous year).

race-conscious admissions ended.⁵⁴ Although Michigan’s state population was 14.1% Black in 2020, U of M’s student population was 4.34% Black⁵⁵ that same year.⁵⁶

B. Drastic Reductions of the Number of Black, Latinx, Native/Indigenous, Hawaiian, and Pacific Islander Students in Selective Universities Would Solidify Racial Hierarchies Within Those Educational Institutions.

Ending the consideration of race in college admissions artificially inflates the value of admissions credentials and other advantages that many students of color have far less of an opportunity to earn, *see supra* at 4–15, thereby depressing their prospects while improving the prospects of other (mostly white)

⁵⁴ See William C. Kidder, UCLA C.R. Project, *Restructuring Higher Education Opportunity? African American Degree Attainment After Michigan’s Ban on Affirmative Action* 3 (2013); Nick Assendelft, *Investing in Diversity*, Alumni Ass’n of the Univ. of Mich. (Spring 2017), <https://alumni.umich.edu/michigan-alum/investing-in-diversity/> (“Since the passage of Proposal 2, the number of underrepresented minority undergraduate students attending U-M has dropped nearly 11 percent.”). From 2006 to 2015, the underrepresented minority (“URM”) population at U of M decreased by 12% at the undergraduate school, despite attempts to use race-conscious alternatives; Br. for the University of Michigan as *Amicus Curiae* in Supp. of Resp’ts, *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) (No. 14-981), 2015 WL 6748811, at *24–*28.

⁵⁵ *University of Michigan-Ann Arbor, Data USA*, <https://datausa.io/profile/university/university-of-michigan-ann-arbor#enrollment> (last visited July 19, 2022).

⁵⁶ *QuickFacts: Michigan*, U.S. Census Bureau, <https://www.census.gov/quickfacts/MI> (last visited July 19, 2022).

applicants who have an unfair competitive advantage.⁵⁷ Outlawing the limited consideration of race, therefore, does not achieve race neutrality, but rather cements preferences that benefit white students and reinforces a narrative that Black, Latinx, Native/Indigenous, Hawaiian, Pacific Islander, and certain Asian American students are less capable. Such a result exacerbates a racial caste system in which an individual's race mediates their access to opportunities.⁵⁸ Far from the meritocracy promised by SFFA, opportunities would be shaped not by ability but by the racialized hierarchies that characterize K-12 education.⁵⁹

⁵⁷ The inability to assess student applicants on a level playing field persists despite the Court's optimistic prediction that, by 2028, race-conscious admissions would no longer be necessary to further the educational benefits of diversity. *See Grutter*, 539 U.S. at 343. Justice O'Connor made that prediction with the understanding that race-conscious admissions are "a measure taken in the service of the goal of equality itself." *Id.* at 342 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989)). As discussed *supra*, race-conscious admissions are necessary to neutralize persistent inequalities in the educational landscape that make it difficult for universities to identify talented applicants of all backgrounds. Without the limited consideration of race in admissions, universities would not be able to assemble the diverse student bodies necessary to reap the educational benefits of diversity.

⁵⁸ *See* Jo Freeman, *The Legal Basis of the Sexual Caste System*, 5 Val. Univ. L. Rev. 203, 204 (1971) ("[A] caste system is one of closed, ranked, interdependent groups in which the members of each group have unequal 'access to goods, services, prestige and well-being.'").

⁵⁹ *See generally* Isabel Wilkerson, *Caste: The Origins of Our Discontents* (2020); *see also* Sigal Alon & Marta Tienda, *Diversity*,

Opportunities dictated by racial hierarchies necessarily lead to the omission and exclusion of a vast swath of individuals who could otherwise make valuable contributions. For example, a study of scientific collaborations in academia found that ethnic diversity has a greater scientific impact—determined by the number of citations of the study within 5 years of its publication—than diversity in discipline, gender, affiliation, and age.⁶⁰ Another study concluded that more access to highly-skilled occupations for talented women and Black men accounted for approximately “two fifths of growth in U.S. market GDP per person between 1960 and 2010.”⁶¹

Racially diverse groups “anticipate differences of opinion and perspective,” leading them to better prepare to make their case, anticipate alternative viewpoints and new information, and work harder to reach consensus than if they were with others like themselves who they assumed shared their

Opportunity, and the Shifting Meritocracy in Higher Education, 72 *Am. Socio. Rev.* 487, 489 (2007) (“A meritocracy is a social system where individual talent and effort, rather than ascriptive traits, determine individuals’ placements in a social hierarchy.”).

⁶⁰ Bedoor K. AlShebli et al., *The Preeminence of Ethnic Diversity in Scientific Collaboration*, *Nature Commc’ns*, 2018, at 1, 9, <https://doi.org/10.1038/s41467-018-07634-8>.

⁶¹ Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Economic Growth*, 87 *Econometrica* 1439, 1441 (2019). See also Tyler Kepner, *Baseball Rights a Wrong by Adding Negro Leagues to Official Records*, *N.Y. Times* (Dec. 16, 2020), <https://www.nytimes.com/2020/12/16/sports/baseball/mlb-negro-leagues.html> (“All of us who love baseball have long known that the Negro Leagues produced many of our game’s best players, innovations and triumphs against a backdrop of injustice.”).

presumptions.⁶² “Diversity jolts us into cognitive action in ways that homogeneity simply does not.”⁶³ In addition to workplaces, these benefits have been found in racially heterogeneous juries, which deliberate longer, consider more facts, and make fewer mistakes than homogeneous juries.⁶⁴ In fact, the Court has long recognized that the exclusion of an “identifiable segment of the community” “from jury service” “deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.”⁶⁵

Similarly, the limited consideration of race to promote diversity at selective universities has yielded immeasurable dividends and confirms that traditional indicia of merit are an inaccurate predictor of academic and professional success. For instance, a study of about 1.2 million U.S. doctoral recipients from 1977 to 2015 found that “demographically underrepresented students [produced scientific innovations] at higher rates than majority students.”⁶⁶ Among Black graduates of Harvard Law School “are CEOs and general counsels of Fortune 500

⁶² Katherine W. Phillips, *How Diversity Makes Us Smarter*, *Sci. Am.* (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/>.

⁶³ *Id.*

⁶⁴ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 *J. Personality & Soc. Psych.* 507, 606 (2006).

⁶⁵ *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

⁶⁶ Bas Hofstra et al., *The Diversity-Innovation Paradox in Science*, 117 *PNAS* 9284, 9284 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7196824/pdf/pnas.201915378.pdf>.

corporations, influential partners in major law firms, leaders on Wall Street, prominent politicians and social advocates, federal and state judges, academics in every discipline, successful entrepreneurs, novelists and entertainers, and a host of other leaders in their chosen fields.”⁶⁷ Furthermore, graduates of color from both Michigan’s and Harvard’s law schools contributed more to the well-being of their communities, performing more than three times the amount of pro bono work as their peers.⁶⁸

Selective universities often serve as a gateway to opportunities for our future leaders, making it vital for them to be able to identify talented students from all segments of our society. As the Court has aptly recognized, “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332. Ensuring that talented

⁶⁷ *Celebration of Black Alumni*, Harvard Law Today (Sept. 12, 2000), <https://today.law.harvard.edu/celebration-of-black-alumni/>, (quoting Harvard Law School Dean Robert C. Clark). See also David B. Wilkins et al., *Harvard Law School Report on the State of Black Alumni: 1896–2000* (2002), <https://clp.law.harvard.edu/assets/Report-on-the-State-of-Black-Alumni-I-1869-2000.pdf>; David B. Wilkins & Bryon Fong, *Harvard Law School Report on the State of Black Alumni II: 2000–2016* 33 (2017), <https://clp.law.harvard.edu/assets/HLS-Report-on-the-State-of-Black-Alumni-II-2000-2016-High-Res.pdf> (noting that “the most comprehensive examination of the careers of the black graduates of any school ever assembled” shows that Black Harvard Law School alumni have enjoyed considerable success even though, nationally, Black LSAT examinees have, on average, lower scores than white examinees).

⁶⁸ David B. Wilkins et al., *supra*, at 50–51 (also discussing findings from the Lempert study on Michigan law graduates).

people from all walks of life contribute to American ingenuity benefits us all. By contrast, reducing our selective universities to mere vessels for the reproduction of unearned advantages undermines their legitimacy and, with it, the legitimacy of all this country's institutions populated by their graduates.

C. Overruling Grutter Is Contrary to the Meaning and Purpose of the Equal Protection Clause and Title VI and Would Undermine the Legitimacy of This Court.

Ruling in SFFA's favor would give this Court's imprimatur to the idea that admissions criteria like standardized test scores, grades, extracurricular accolades, and teacher recommendation letters are objective indicia of merit unaffected by race even though that premise is flatly contradicted by the evidence. *See supra* at 4–15. And such a ruling would lend the Court's stamp of approval to pernicious stereotypes that Black, Latinx, and other students of color are less capable, talented, and hardworking than their peers, do not belong at selective higher education institutions, and are taking the places of more deserving applicants.⁶⁹

Courts have long recognized the dignitary harms that racial exclusion from educational institutions can cause. *See Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1012 (11th Cir. 2018) (noting that a

⁶⁹ Wilkerson, *supra*, at 20 (“The use of inherited physical characteristics to differentiate inner abilities and group value may be the cleverest way that a culture has ever devised to manage and maintain a caste system.”).

predominantly white city’s racially motivated secession from a more diverse county school system sent “messages of inferiority,” which could not have “escaped the [Black] children in the [C]ounty”) (quoting *Wright v. Council of Emporia*, 407 U.S. 451, 466 (1972)); *Brown v. Bd. of Educ.*, 347 U.S. at 493–94 (recognizing that the “intangible” harm of racial segregation “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

Moreover, applicants—including Asian American applicants—whose credentials are inextricably intertwined with their racial and cultural heritage would be disadvantaged in the application process, as universities would not be able to fully consider their credentials.⁷⁰ For example, Harvard student Catherine Ho testified that all of her application essays discussed her race as “all of my experiences are informed by the fact that I am Vietnamese-American.” JA935–37 (noting that she discussed her experience as the child of immigrants and as a volunteer at a refugee center). Likewise, Sally Chen testified that she “wrote very directly about how being the daughter of Chinese immigrants and being a kind of translator and advocate for them across barriers of cultural and linguistic difference . . . shaped [her] views on social

⁷⁰ See, e.g., Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 Cal. L. Rev. 1139, 1162 (2008) (discussing difficulty for college applicants who racially identify to “come up with a meaningful account of [their] life without referencing race” and without “captur[ing] who [they] imagine[] [themselves] to be”); Elise Boddie, *The Indignities of Color Blindness*, 64 UCLA L. Rev. Discourse 64 (2016).

responsibility.” JA967–68. Thus, rather than serving as a penalty to Asian Americans, race-conscious admissions benefits many Asian Americans—like Catherine Ho and Sally Chen—by allowing them to explain how their cultural heritage and background shaped and informed their potential contributions to the Harvard community.⁷¹ Also, as *Amicus Curiae* Native American Alumni at Harvard University (NAAHU) explained, “If students cannot even discuss their home reservation (since that would likely identify their race), how can they possibly expect to give the Harvard Admissions Office a reasonably full picture of who they are in their admissions essays?”⁷²

Even those students of color who beat the odds and earn an offer of admission despite unequal opportunities will be disadvantaged because racial isolation—and the inhospitable, unhealthy environment it fosters—will detrimentally affect their educational experience and deprive them of an equal chance to reap the full benefits of their education.⁷³ As Harvard Dean Smith noted, “alienation and isolation . . . interfer[e] with an individual’s ability to pursue their academic studies” JA823. As Emily Van Dyke, President of *Amicus Curiae* NAAHU, explained:

⁷¹ See also Decl. of Jasmine Parmley at 3 (Harvard Japan Society), *SFFA v. Harvard*, No. 1:14-cv-14176 (D. Mass. 2018), ECF No. 471-7 (“Being Japanese is a big part of who we are. If our application materials are to authentically reflect who we are, it is important that we be able to write about the culture we grew up with.”).

⁷² Decl. of Emily Van Dyke (Native American Alumni of Harvard University), *SFFA v. Harvard*, No. 1:14-cv-14176 (D. Mass. 2018), ECF No. 471-14.

⁷³ See Jonathan P Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 1 Utah L. Rev. 59, 65 (2019).

“Harvard provides enormous and thrilling opportunities, yet it can be alienating if absolutely no one else in your class, cohort, or school has experienced life as you have. There are only a few Native students, if any, in any given class. Having even fewer Native students would be devastating.”⁷⁴ And Harvard student Madison Trice testified that being one of a few Black students at her high school was “difficult” and “isolating;” “There were times where you felt like a representative for your entire race” JA961.

For over six decades, *Brown*, Title VI, and the Equal Protection Clause have been the engines of racial integration in our country, breaking down racial stereotypes that people of certain races are inherently less intelligent, less qualified, and less deserving of the most competitive opportunities. SFFA wholly misunderstands *Brown* and fails to appreciate its correction of “one of the most serious injuries recognized in our legal system”⁷⁵ and its acknowledgment of the United States’ own racial apartheid. In the name of *Brown* and wholly contrary to its holding, SFFA invites the Court to eliminate the limited consideration of race, requiring colleges and

⁷⁴ Decl. of Emily Van Dyke (Native American Alumni of Harvard University), *supra* note 71, at 5.

⁷⁵ *Allen v. Wright*, 468 U.S. 737, 756 (1984) (“The injury they identify—their children’s diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but, as shown by cases from *Brown v. Board of Education*, 347 U.S. 483 (1954), to *Bob Jones University v. United States*, 461 U.S. 574 (1983), one of the most serious injuries recognized in our legal system.”), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

universities to rely solely on credentials and preferences that are stratified by race, leading to unfair preferences for white students and the inability of universities like Harvard to identify talented students of color to produce the educational benefits of diversity that are so essential to a high-caliber education and a multiracial democracy.

Far from finding support in *Brown*, overruling *Grutter* would be at war with that decision. The resulting racial stratification of selective universities, as well as the professional opportunities that come with a degree from those institutions, would reverse the progress toward racial integration and racial equality that have occurred in higher education in the years following *Brown*. The *Brown* decision was one of the finest moments in this Court's history. Yet, this Court risks jeopardizing that legacy—and damaging its own legitimacy—should SFFA prevail in misconstruing one of its canonical decisions to dismantle decades of precedent that affirmed the legality of race-conscious admissions.

CONCLUSION

Race-conscious admissions are as important now as ever before—to ensure the “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation . . . if the dream of one Nation, indivisible, is to be realized.” *Grutter*, 539 U.S. at 332. Accordingly, for the foregoing reasons, *Amici Curiae* respectfully urge this Court to affirm the ruling below.

Respectfully submitted,

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