Nos. 20-1199 and 21-707

In The
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
V.
PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
V.
UNIVERSITY OF NORTH CAROLINA, *ET AL.*,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the First Circuit and Fourth Circuit

BRIEF OF *AMICI CURIAE* MARK KEITH ROBINSON AND WINSOME EARLE-SEARS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici are statewide African American elected officials from two different states. These states not only formed part of the Confederacy, but also enacted and then enforced Jim Crow laws until the 1960s. Both of these states have increasingly diverse populations, and both *amici* have experience working toward improvements in education in their respective states.

Mark Keith Robinson is the 35th Lieutenant Governor of North Carolina. The ninth of ten children, he grew up in a predominantly African American and economically disadvantaged part of Greensboro, North Carolina. Even though he lived in a home with an abusive father, he graduated from high school and entered the U.S. Army Reserve. In April 2018, while still a private citizen, he made an impromptu speech to the Greensboro City Council that brought him into the national spotlight. Lt. Governor Robinson did not enter electoral politics until 2019, when he declared his candidacy for the office of lieutenant governor. Despite never having previously run for any public office, he won the Republican nomination by more than 130,000 votes over his nearest opponent, carrying 94 of the state's 100 counties in the primary. Since being elected in

[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents for *amicus* briefs pursuant to Rule 37.3(a).

2020, Lt. Governor Robinson has made reform of public education one of his top priorities. He is North Carolina's first African American lieutenant governor.

Winsome Earle-Sears is the 42nd Lieutenant Governor of the Commonwealth of Virginia. A Republican, she is the first woman to be elected lieutenant governor of Virginia and the first woman of color elected to any statewide office in Virginia. Born in Kingston, Jamaica, Lt. Governor Sears immigrated to the United States at age six. After serving in the United States Marine Corps, she built a successful business, led a men's prison ministry, and served as director of a women's homeless shelter before becoming involved in elected politics. She previously served in the Virginia House of Delegates from 2002 to 2004 and on the Virginia Board of Education, of which she was Vice President. She was also a presidential appointee to the U.S. Census Bureau and an appointee to the Advisory Committee on Women Veterans to the U.S. Secretary of Veterans Affairs. In 2021, she was elected to the office of lieutenant governor after a campaign in which education issues came to dominate the election.

SUMMARY OF ARGUMENT

These consolidated cases present the opportunity for this Court to overturn its prior decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Grutter* should be overturned because it permits public and private universities like those in these cases to violate the Equal Protection Clause and

Title VI of the Civil Rights Act of 1964 by discriminating on the basis of race. *Grutter* was a dangerous decision—so dangerous the Court said at the time it was issued that its holding should have a lifespan of no more than twenty-five years. Though we are somewhat shy of that mark, *Grutter* should nonetheless be discarded now in favor of race neutral and truly effective means of enhancing educational opportunities for all students. Such a course would not only improve education, but also remove the judicial reinforcement for a toxic ideology that is increasingly dividing American society based on race. *Grutter* must be repudiated by this Court.

ARGUMENT

I. *GRUTTER V. BOLLINGER* SHOULD BE OVERRULED BECAUSE IT PERMITS UNEQUAL TREATMENT BASED ON RACE.

A. *Grutter* Perpetuates the Invidious Principle of Inherited Guilt.

Justice Robert Jackson wrote regarding the internment of Japanese Americans during World War II:

> [I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of

> treason shall work corruption of blood, or forfeiture except during the life of the person attainted."

Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting); *see* U.S. Const. art. III, § 3, cl. 1 (treason clause); *see also id.*, amend. XIV, § 1 ("Nor shall any State . . . deny to *any* person" equal protection of the laws) (emphasis added).

Justice Jackson's view, of course, did not carry the day with the Court when it issued its opinion in December 1944. Instead, at that time, the Court accepted the argument that U.S. citizens convicted of no crime could nonetheless be imprisoned for no reason other than their ancestry. The majority opinion came to be roundly condemned. In the end, *Korematsu* was expressly rejected—indeed, excoriated—by this Court. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("The dissent's reference to *Korematsu* . . . affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'") (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

Yet, *Grutter v. Bollinger*, 539 U.S. 306 (2003), in approving of certain types of educational Affirmative Action programs, enshrines into constitutional law the permissibility of racial discrimination by government entities. Consequently, states (along with private educational institutions) have been permitted to deny

educational opportunities based on race in spite of the Fourteenth Amendment to the U.S. Constitution and in spite of Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d).

The cases before the Court demonstrate how such discrimination occurs. The evidence in the record against Harvard University shows that it uses race-conscious policies throughout the admissions process and that Asian Americans are discriminated against so that they will not be "overrepresented" (whatever that means) in the school's student population. *See* Pet'r Br. at 20-36. The University of North Carolina—a state institution—likewise obsesses over the race of its applicants from the beginning to the end of the application process, actively disadvantaging white and Asian American students in favor of what it deems "underrepresented minorities." *Id.* at 40-47. In each school's process, applicants—of all races—are deprived of their individuality; some receive favorable treatment due to their ancestry, while others have their ancestry only tolerated (at best).

With the record's striking details of how these schools have long engaged in the "sordid business . . . [of] divvying us up by race," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part), this Court should continue its course of affirming the unquestionable morality embodied in Justice Jackson's words from over seventy-five years ago. In so doing, the Court should clearly reject the nonsensical idea that the right to receive *equal*

protection from the government depends on the color of skin inherited from one's ancestors.

B. The Risks Inherent in *Grutter* are so Dangerous this Court Expressly Recognized its Holding Should be Time-Limited, and the Day to Enforce that Limit Has Come.

To be fair to the Court that issued *Grutter*, it apparently recognized at the time that it was, stated proverbially, playing with fire. Thus, although it approved a state law school's "race-conscious admissions program," the Court nonetheless added an admonition: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343. Justice Thomas's opinion added that he "agree[d] with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years." *Id.* at 351 (Thomas, J., concurring in part and dissenting in part). Meanwhile, Justice Kennedy aptly observed that "the opinion contains its own self-destruct mechanism." *Id.* at 394 (Kennedy, J., dissenting).

Rather than indulging discrimination, even if cloaked in noble motives, the Court in *Grutter* should have rejected these ostensibly benevolent acts of racial injustice. "As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995)

(Thomas, J., concurring in part and concurring in the judgment). "'Benign racial classification' is a contradiction in terms . . . To the person denied an opportunity or right based on race, the classification is hardly benign." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 609 (1990) (O'Connor, J., dissenting), *majority opinion overruled by Adarand Constructors*, 515 U.S. at 227. When the government acts with the intent to discriminate on the basis of race it necessarily, "undermine[s] the moral basis of the equal protection principle" on which our nation was founded. *Adarand Constructors,* 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).

Tellingly, in the time since *Grutter* was decided, a dangerous ideology has gained ground toward the end of preserving racial division in perpetuity. This new paradigm of supposed "anti-racism" holds that only those of the politically dominant race (*viz.*, whites) can truly be guilty of racism and that racially motivated actions disadvantaging that race are not only permissible but morally and ethically desirable. *See generally, e.g.,* Robin DiAngelo, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 15-38, 91-98 (2018); *see also* Ijeoma Oluo, SO YOU WANT TO TALK ABOUT RACE 216-20 (2018) ("[I]f you are white in a white supremacist society [such as the United States], you are racist."); *cf.* Kenny Xu, AN INCONVENIENT MINORITY: THE ATTACK ON ASIAN AMERICAN EXCELLENCE AND THE FIGHT FOR MERITOCRACY 197-98 (2021) (criticizing the concept of "systemic racism" and describing how it in fact leads to racial discrimination: "From systemic

racism, we get the idea of racial equity, i.e., equality of outcome based on race.").

The idea that the government may engage in racial discrimination as a means of broadly adjusting perceived societal inequities is anathema to the foundations of American law. "Our constitution is color-blind[] and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The constitutional right to equal protection is "guaranteed to the individual . . . [as a] personal right[]." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J., with Rehnquist, C.J., and White and Kennedy, J.J.) (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). "[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual[.]" *Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in judgment). But such race-obsessed government action at the expense of individual rights is exactly what *Grutter* countenances.

"History should teach greater humility. Untethered to narrowly confined remedial notions, . . . [embrace of 'benign' racial discrimination] reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broad.*, 497 U.S. at 609-10 (O'Connor, J., dissenting).

Thus, as *Grutter* is poised to enter its second decade, its demise as a source of constitutional law could not be more opportune.

II. *GRUTTER* GIVES GOVERNMENT OFFICIALS AND OTHERS AN EXCUSE TO IGNORE WAYS OF TRULY IMPROVING EDUCATIONAL OPPORTUNITIES IN FAVOR OF CONTINUING RACIAL DIVISION.

A. Governments and Educational Institutions Should Pursue Race Neutral Means of Improving Opportunities for All Students, Regardless of Race.

The ideological regime allowed to flourish by *Grutter* gifts to public officials the means of evading responsibility for the disastrous consequences of their policy decisions. It is hard to conceive of any elected official—whatever the official's political party, governing philosophy, or race—expressing great satisfaction with the current state of educational outcomes in the United States. Nevertheless, "the more the plans fail, the more the planners plan."[2] The public's ability to hold their leaders accountable for the ill effects of poor educational policies is seriously undermined when all policy failures can be vaguely attributed to "racism" in society at large or when some members of a race receive benefits that mask the ways their government has not delivered for others.

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[2] Ronald Reagan, *A Time for Choosing* (Oct. 27, 1964), *available at* https://www.reaganlibrary.gov/reagans/ronald-reagan/time-choosing-speech-october-27-1964.

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). Rather than accept the racial paternalism like that present in the programs at issue here, *cf. Adarand Constructors*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring the judgment) ("There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution."), public policy makers should work to ensure that meaningful educational opportunities are available for *all* students. There is no constitutional infirmity in such a course; to the contrary, often it is a constitutional imperative. *See, e.g.,* N.C. Const. art. IX, § 2 ("The General Assembly shall provide . . . for a general and uniform system of free public schools . . . wherein *equal opportunities shall be provided for all students*.") (emphasis added); Va. Const. art. VIII, § 1 ("The General Assembly shall provide for a system of free public elementary and secondary schools *for all children of school age throughout the Commonwealth*[.]") (emphasis added).

The race neutral alternatives available to states and private institutions are legion and have been the subject of development and study by education policy scholars and analysts for decades. Here are but a few of those options that might be considered and that would benefit students of *all* races:

- *University Support and Sponsorship of Charter Schools*. Charter schools are primary and secondary schools authorized by the state government and operating outside of local public school systems. *See, e.g.,* Terry Stoops, "Charter Schools," NORTH CAROLINA POLICY SOLUTIONS, 34 (2022), *available at* https://www.johnlocke.org/wp-content/uploads/2021/11/Policy-Solutions-2022-John-Locke-Foundation-1.pdf#page=42 (last accessed May 5, 2022). Charter schools increase parental options for educating their children, which can be particularly beneficial for low-income parents whose only other choice would be a low performing public school. Furthermore, charter schools increase competitive pressure for improvement on area public schools. Many institutions of higher learning (both public and private) could support, form, or even serve as the chartering entity for charter schools, seeking out modifications in state law to enable this where necessary. *See, e.g.,* N.C. Gen. Stat. § 115C-238.29B(c)(2) (1999) (repealed) (providing that a chartering entity may be "a constituent institution of The University of North Carolina, so long as the constituent institution is involved in the planning, operation, or evaluation of the charter school"); *see also* N.C. Gen. Stat. § 115C-218.1(b) ("Any nonprofit corporation seeking to establish a charter school may apply to establish a charter school."). This would allow universities, especially those with schools of education, to use their expertise to help students while they are still "in the

pipeline" before they are even at the college application process.

- *Expansion of Scholarships for Low Income Students*. Another straightforward means of increasing opportunities for students is through the creation or expansion of state-funded opportunity scholarships and other tuition assistance programs, under which means-tested support is provided to students so that they may receive their education at non-public schools. *See, e.g.,* N.C. Gen. Stat. § 115C-562.1 *et seq.* (Opportunity Scholarship Program); *see also Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262-63 (2020) (holding that states may not discriminate against religious schools when providing students financial support for education). Such a path can help ensure students from low-income homes have access to the same schools as students from higher income families. *See, e.g., Espinoza*, 140 S. Ct. at 2274 (Gorsuch, J., concurring) ("Kendra Espinoza . . . is a single mother who works three jobs. She planned to use scholarships to help keep her daughters at an accredited religious school."). As with charter schools, opportunity scholarship programs provide more options for parents and put competitive pressures on local public schools to improve educational quality. *See generally* Milton Friedman, CAPITALISM AND FREEDOM 85-97 (2002 ed.).

- *Improved Student Testing*. Primary and secondary school teachers also require access to improved methods of determining when students are or are not satisfying certain metrics. In many states, this will require discarding the current tests in favor of those that provide the teacher real-time insight into student progress. Such tests are currently available, but underutilized.

These policy suggestions, as well as countless others, are ways of ensuring a university's pool of qualified applicants is more diverse, not just racially, but in terms of economic background as well.

B. The Discrimination Permitted by *Grutter* Has Inflicted Injury on the Body Politic.

Martin Luther King, Jr., spoke of a colorblind America: "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." Martin Luther King, Jr., *I Have a Dream*, March on Washington for Jobs and Freedom (Aug. 28, 1963), *available at* https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety (last visited May 4, 2022).

Sadly, the dream of a colorblind nation continues to be opposed under the pretense of making that dream real. In the twenty-first century, Dr. King's venerable ideal is rejected most prominently by those who claim to be against racism. It is now commonplace in what would be

called "respectable" quarters for ideas to be publicly denigrated and rejected, not on their merits, but because they are attributable to "whites." *See, e.g.,* Andre Henry, ALL THE WHITE FRIENDS I COULDN'T KEEP 151, 159-64 (2022) (criticizing whites of all political beliefs, and minimizing the benefit to minorities of engaging with whites, due to their race).

And, it is likewise not at all uncommon for members of racial minority groups who express political views different from what elite opinion expects them to hold to be publicly derided as "race traitors" or as some version of an "Uncle Tom." For example, a prominent media commentator recently said of *amicus* Lt. Governor Sears: "There is a black mouth moving but a white idea running on the runway of the tongue of a figure who justifies and legitimates the white supremacist practices." Caroline Downey, *MSNBC Guest on Winsome Sears: "There Is a Black Mouth Moving but a White Idea Running on the Runway of the Tongue,"* NAT'L REVIEW (Nov. 5, 2021), https://www.nationalreview.com/news/msnbc-guest-on-winsome-sears-there-is-a-black-mouth-moving-but-a-white-idea-running-on-the-runway-of-the-tongue/ (last accessed May 4, 2022). Similarly, *amicus* Lt. Governor Robinson was depicted last year wearing Ku Klux Klan robes in a political cartoon published by one of the state's leading news outlets. *See, e.g.,* Dominick Mastrangelo, *North Carolina's first Black lieutenant governor slams critical KKK cartoon*, THE HILL (Fed. 3, 2021), *available at* https://thehill.com/homenews/537157-north-carolinas-black-lt-governor-criticizes-

cartoon-depicting-him-as-kkk-member/ (last accessed May 5, 2022).

The above examples are hardly isolated incidents. *See, e.g.,* Sen. Tim Scott, Press Release, Remarks: Senator Scott Response to the Joint Address (April 28, 2022), https://www.scott.senate.gov/media-center/press-releases/remarks-senator-scott-response-to-the-joint-address ("I get called "Uncle Tom" and the N-word—by 'progressives'!") (last accessed May 4, 2022); Alexandra Hutzler, *Twitter Blocks "Uncle Tim" From Trends After Racist Phrase Goes Viral in Response to Tim Scott's Speech*, NEWSWEEK, April 29, 2022, *available at* https://www.newsweek.com/twitter-blocks-uncle-tim-trends-after-racist-phrase-goes-viral-response-tim-scotts-speech-1587456 (last accessed April 29, 2022) (quoting Sen. Scott as saying, "What they want for us is for us to stay in a small corner and not go against the tide[.]"); Robert L. Ehrlich, Jr., *Blacks and Republicans: an overdue debate*, THE BALTIMORE SUN, Oct. 21, 2012, *available at* https://www.baltimoresun.com/opinion/bs-xpm-2012-10-21-bs-ed-ehrlich-black-republicans-20121021-story.html (last accessed May 4, 2022) (citing modern examples of racially derogatory remarks by prominent figures toward African American Republicans).

There is a direct ideological connection between the racial presuppositions in *Grutter* and this form of toxic, race-based attack. Calling them both "true and increasingly prophetic," over thirty years ago Justice Scalia quoted the words of Prof. Alexander Bickel:

> [A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice . . . The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.

J.A. Croson, 488 U.S. at 523 (Scalia, J., concurring in the judgment) (citing Alexander Bickel, THE MORALITY OF CONSENT, at 133). In much the same vein, Justice Thomas has written that "[s]o-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence . . . These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." *Adarand Constructors*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring the judgment); *see* Condoleezza Rice, DEMOCRACY: STORIES FROM THE LONG ROAD TO FREEDOM 66 (2017) ("And I am very aware that every admitted minority student faces a kind of stigma due to affirmative action, no matter what universities argue to the contrary. I saw this so often that it ceased to come as a surprise.").

Over several decades of governmental experimentation in various forms of quotas, set

asides, and other race-based preferences, American education moved continuously away from the ideals of Dr. King, with devasting consequences. Students, whether in college or kindergarten, should be educated to engage with an idea's merits, not the race of an idea's proponent. Unfortunately, students are taught the exact opposite lesson by the actions of the government itself when it discriminates on the basis of race.

Quality education will be further damaged, not attained, through the continued sacrifice of legal equality. Government officials should abide by their oath to support the Constitution, *see* U.S. Const., art. VI, § 3, including its obligation to provide equal protection of the law. Therefore, *Grutter*'s experiment in supposedly "good" racial discrimination should be ended.

CONCLUSION

For the above-stated reasons, this Court should reverse the decisions below.

Respectfully submitted,

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