No. 21-707

In The
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,

Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, REASON FOUNDATION, CHINESE AMERICAN CITIZENS ALLIANCE - GREATER NEW YORK, YI FANG CHEN, COALITION FOR TJ, AND PROJECT 21 IN SUPPORT OF PETITIONER

JOSHUA P. THOMPSON
WENCONG FA*
ALISON SOMIN
**Counsel of Record*
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
WFa@pacificlegal.org

Counsel for Amici Curiae

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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statute

Constitutional Provision

Rules of Court

Other Authorities

INTEREST OF AMICI CURIAE

Founded in 1973, **Pacific Legal Foundation (PLF)** is a nonprofit legal foundation that defends the principles of liberty and limited government, including equality before the law.[1] For over 40 years, PLF has litigated in support of the rights of individuals to be free of racial discrimination. PLF is currently litigating, or has recently litigated, to vindicate the equal protection rights of children in New York, Virginia, Connecticut, and Maryland; small business owners in Colorado; and farmers in Florida, Illinois, and several other states. *See, e.g.*, *Coal. for TJ v. Fairfax Cty. Sch. Bd.*, 1:21-cv-00296-CMH-JFA, ECF No. 50 (E.D. Va. May 26, 2021) (denying a motion to dismiss in a case involving racial discrimination in K-12 admissions); *Collins v. Meyers*, 1:21-cv-2713-WJM-NYW, ECF No. 14 (D. Col. Oct. 12, 2021) (granting TRO in case involving minority-owned business preference in COVID relief program); *Wynn v. Vilsack*, 3:21-cv-514-MMH-LLL, ECF No. 41, 2021 WL 2580678 (M.D. Fla. June 23, 2021) (granting preliminary injunction against USDA's race-based farm loan forgiveness program). PLF has also participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Fisher v. Univ. of*

[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. All parties received notice of Amici Curiae's intent to file this brief at least 10 days prior to the due date. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any 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 Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Texas at Austin, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The Center for Equal Opportunity (CEO) is a research and education organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code and devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies do not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. *E pluribus unum*: out of many, one. CEO supports colorblind policies and seeks to block the expansion of racial preferences in all areas. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved*, 551 U.S. 701; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Reason Foundation (Reason) is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary

institutions to flourish. Reason advances its mission by publishing *Reason Magazine*, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets" and equality before the law, Reason selectively participates as amicus curiae in cases raising significant constitutional issues. Reason has participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades.

The **Chinese American Citizens Alliance - Greater New York (CACAGNY)** is a chapter of the Chinese American Citizens Alliance, the oldest Asian American Advocacy group in the country. CACAGNY's mission is to empower Chinese Americans, as citizens of the United States of America, by advocating for Chinese-American interests based on the principles of fairness and equal opportunity, and guided by the ideals of patriotism, civility, dedication to family and culture, and the highest ethical and moral standards.

Yi Fang Chen is a mother of a fourth grader at P.S. 102 in Brooklyn. Ms. Chen was born in China and moved to the United States in 1996. Although she came to this country speaking little English, she eventually obtained a doctorate in statistics from Stanford University, and now works as a data scientist in Manhattan. PLF currently represents Ms. Chen and CACAGNY in a lawsuit challenging New York City's discriminatory changes to its admissions program for the city's specialized schools. *See Christa McAuliffe Intermediate School PTO, Inc., et al. v. De Blasio, et al.*, 1:18-cv-11657 (S.D.N.Y. filed Dec. 13, 2018).

The **Coalition for TJ** is a group of parents, students, alumni, and community members of Thomas Jefferson High School for Science and Technology, known as "TJ." The Coalition's approximately 5,000 supporters are primarily Asian American parents, who regularly attend and speak at school board meetings, organize rallies, engage legislators, and educate their community on the value of merit-based admissions for specialized schools like TJ. PLF currently represents the Coalition for TJ in its challenge to Fairfax County's discriminatory changes to its admissions policy for Thomas Jefferson High School for Science and Technology. *See Coalition for TJ v. Fairfax Cty. Sch. Bd.*, 1:21-cv-00296 (E.D. Va. filed Mar. 10, 2021).

Project 21, the National Leadership Network of Black Conservatives, is an initiative of the National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 has participated as amicus curiae in significant cases involving equal protection principles. *See, e.g.*, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Bartlett v. Strickland*, 556 U.S. 1 (2009).

INTRODUCTION AND SUMMARY OF ARGUMENT

"In the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring). Both the Constitution and the Civil Rights Act of 1964 enshrine the important principle that we are equal under the law. The Equal Protection Clause prohibits

the government from denying "any person . . . the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. Title VI extends that prohibition to private universities that receive federal financial assistance. *See* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.").

The University of North Carolina is a public institution that receives federal funds.[2] *See* App. 144 & n.46. But in making race a factor in its admissions decisions, the University runs afoul of both Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The protections of Title VI and the Equal Protection Clause are coextensive, *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003), and ought to forbid racial discrimination of any kind.

Yet UNC uses race in admissions decisions. *See* App. 195 (UNC application readers are trained to consider "an applicant's self-disclosed race or ethnicity" as a factor in its "holistic review" of the applicant). According to the University's expert, race is *determinative* "for 1.2% for in-state students and 5.1% for out-of-state students." App. 112.

The district court upheld this policy. The court concluded that the "small percentage of decisions" based on race was consistent with this Court's equal protection jurisprudence. Yet the district court's flawed decision rested upon an outlier in that

---

[2] For ease of reference, Amici will refer to all Respondents as "UNC" or the "University."

jurisprudence: *Grutter v. Bollinger*, 539 U.S. 306 (2003).

This petition, like the petition in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard University,* No. 20-1199, presents the ideal vehicle to overrule *Grutter*. *See* App. 188 (alleging, in Count III of Petitioner's complaint, that UNC's admissions process is illegal because it "uses race as a factor in admissions"); App. 189 (granting judgment on the pleadings against Plaintiff on Count III because it was foreclosed by Supreme Court precedent). From the day on which it was decided, *Grutter* has been "grievously wrong." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part). The Equal Protection Clause contains a categorical statement: government shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, cl. 1. Yet the thrust of *Grutter* is that "not every decision influenced by race is equally objectionable." 539 U.S. at 327. *Grutter* expressly endorsed racial preferences—so long as universities administer them in a "flexible, nonmechanical way." *Id.* at 334. But the Equal Protection Clause and Title VI prohibit racial discrimination of any kind—flexible or rigid; mechanical or not.

Grutter's troubles do not end there. In endorsing racial preferences in University admissions, the *Grutter* Court endorsed a novel interest: "obtaining the educational benefits that flow from a diverse student body." *Id.* at 343; App. 184 (concluding that UNC is entitled to "judicial deference" for its decision to pursue and attain "the educational benefits of diversity"). This diversity rationale is both amorphous

and unsound. It rests upon arbitrary racial classifications. The term "Hispanic," for instance, does not describe a common background, designate a common language, or even describe gross physical appearance. *See* Peter Wood, *Diversity: The Invention of a Concept* 25 (2003). And "Asians" make up roughly 60 percent of the world's population and encompass people of Chinese, Indian, Filipino, and many more backgrounds. David E. Bernstein, *The Modern American Law of Race*, 94 S. Cal. L. Rev. 171, 182–83 (2021). Although state-sponsored treatment of individuals as members of arbitrary racial groups is reason enough to overrule *Grutter*, the decision's disastrous consequences provide additional support to do so. As explained below, *Grutter*'s diversity rationale perpetuates harmful stereotypes against Asian applicants. *Grutter* is also unworkable. Universities across the Nation treat the decision as an unqualified endorsement of racial preferences. Such preferences not only deny students their right to equal justice before the law, but harm the very students they purportedly benefit. *See generally* Richard H. Sander, *A Systemic Analysis of Affirmative Action in Law Schools*, 57 Stan. L. Rev. 367 (2004) (students who received racial preferences were less likely to pass the bar exam). This Court should grant the petition and overrule *Grutter*.

REASONS TO GRANT THE PETITION

I. *Grutter* Should Be Overruled Because It Is Grievously Wrong

A. There Is No Higher Education Exception to Equality Under the Law

Grutter is an outlier in equal protection jurisprudence. Both the Equal Protection Clause and Title VI provide a categorical bar on discrimination on the basis of race. *See* U.S. Const. amend. XIV, cl. 1 (prohibiting the government from denying "any person . . . the equal protection of the laws"); *see* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."). Earlier congressional records confirm that the Fourteenth Amendment contains an unqualified mandate: The "abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). This Court has enforced that mandate in its subsequent decisions. In *Adarand Constructors, Inc. v. Pena*, this Court explained that, because racial distinctions are "odious to a free people," racial classifications are always subject to strict scrutiny. 515 U.S. at 214. And in *Rice v. Cayetano*, this Court observed that "race is treated as a forbidden classification" because "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." 528 U.S. 495, 517 (2000).

The *Grutter* Court fashioned a strange exception to these important principles. It announced that the Court would countenance racial discrimination if it were narrowly tailored toward a university's interest

in "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. Of course, a truly diverse student body may produce a number of benefits. It might teach tolerance, acceptance, and open-mindedness. But none of those purported benefits can justify the harm of racial preferences: racial discrimination.

Grutter ends up in the wrong place because it started in the wrong direction. The *Grutter* Court provided two reasons for deferring to a university's judgment about whether educational benefits are sufficient to justify racial preferences. ***First***, it did so in light of what the Court viewed as the "important purposes of public education and the expansive freedoms of speech and thought associated with the university environment." *Grutter*, 539 U.S. at 328–29. ***Second***, the Court observed that a university is typically entitled to "make its own judgments as to . . . the selection of its student body." *Id.* at 329.

Neither reason provides a basis to carve out an exception to the "moral imperative of racial neutrality" that is the "driving force of the Equal Protection Clause." *City of Richmond v. J.A. Croson*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring). ***First***, public education has not become significantly more important in the decades since *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). Yet that decision rejected race-based decisionmaking in school assignments. ***Second***, the "expansive freedoms of speech and thought associated with the university environment" have little to do with the Equal Protection Clause. Freedom of speech allows students to express their views, profound or ignorant, about race. The Equal Protection Clause prohibits

administrators from discriminating on the basis of race in college admissions. ***Finally***, nothing in Title VI or the Constitution cabins the substantial leeway that universities have to craft their own admissions policies. UNC is free to continue to examine "more than forty criteria considered in every application." App. 37. The Equal Protection Clause and Title VI do not forbid UNC from drawing distinctions based on an applicant's academic performance, test scores, extracurricular activities, or dozens of other factors that the University deems relevant to a student's ability to flourish at UNC. App. 167. The Equal Protection Clause and Title VI only prohibit the University from discriminating against applicants on the basis of race.

Grutter's departure from this categorical prohibition on racial discrimination created a *sui generis* rule for admissions in higher education. This Court permits racial preferences in furtherance of an amorphous benefit in the context of college admissions — and no place else. An analogy from employment law elucidates this point. An employer can conjure up some "benefits that flow from a diverse [workforce]," just as universities can surmise educational benefits that flow from a diverse student body. *Grutter*, 539 U.S. at 328. But Title VII does not allow an employer to achieve those supposed benefits by resorting to racial preferences. *See, e.g.*, *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1557–58 (3d Cir. 1996) (en banc). And a finding that an applicant's race was "the decisive factor" in even a small percentage of employment decisions would undoubtedly subject an employer to liability under Title VII. *Cf.* Pet. for Cert. at 9 (noting that "the [district] court concluded that UNC's use of race was constitutional because it is the

decisive factor in only 5.1% of out-of-state decisions and 1.2% of in-state decisions").[3] Because *Grutter* conflicts with this Court's broader equality jurisprudence, it must be overruled. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177 (2019).

B. The Diversity Rationale Rests Upon Arbitrary Racial Classifications

The diversity interest put forth by universities routinely rests on arbitrary racial classifications. Every applicant to UNC must complete a common application, App. 167, which allows the applicant to identify as a member of a racial or ethnic group, such as White, Black, Hispanic, or Asian. UNC's admissions policy favors members of underrepresented minority groups, which is defined as any group "whose percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina." App. 15 n.7. For more than three decades, UNC has considered "students identifying themselves as African American or [B]lack; American Indian or Alaska Native; or Hispanic, Latino, or Latina" as underrepresented minorities. *Id.*; *see also* App. 4 n.2 (referring to students who self-identify as members of the same groups as "students of color").

Racial labels, whether state-mandated or state-sponsored, are "inconsistent with the dignity of individuals in our society." *Parents Involved*, 551 U.S.

---

[3] To be sure, the Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1973), interpreted Title VII to permit employers to adopt affirmative action plans, but only in the limited circumstances in which they are tailored to remedy a "manifest imbalance" in a "traditionally segregated" job category. *Id.* at 197.

at 797 (Kennedy, J., concurring). That is because racial labels require their creator to "first define what it means to be of a race." *Id.* In that process, they impinge on the right of every individual to "find his own identity," and "define her own persona, without state intervention that classifies on the basis of his race or the color of her skin." *Id.*

The racial classifications upon which the University relies are both common and crude. Members of the same racial group may have vastly different backgrounds, skills, and aspirations. The use of race in admissions policies presents the risk that UNC evaluates applicants not as individuals but as members of a broadly defined racial group. *See Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) ("Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.") (internal citation and quotation marks omitted).

Thus, although the district court concluded that "URM students are [ ] likely to have experiences of particular importance," App. 150 (citing *Grutter*), there is nothing intrinsic in these broad racial categories that assures a commonality of experience. *See* Wood, *supra*, at 25. As one scholar explained, contemporary group classifications such as "[B]lack," "Asian," and "Hispanic" fail to identify any common factor inherent to individuals within those groups. *Id.* The term "Hispanic," for instance, covers people of different backgrounds. "The Mexican Americans of the southwest, the northeast's Puerto Ricans, and Florida's Cubans had rarely thought of themselves, or

been thought of by others, as constituting a single group until somebody decided to lump them into a single statistical category of 'Spanish Americans.'" Sean A. Pager, *Antisubordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. Davis L. Rev. 289, 303–04 (Nov. 2007). The same problems plague the definition of "Asian," which includes individuals of Chinese, Indian, Japanese, Vietnamese, and other origins. *Id.* at 305.

Amicus Coalition for TJ has experienced the effects of crude racial lumping first-hand. The "Asian American" student population at Thomas Jefferson High School for Science and Technology is made up of students whose families hail from 30 countries, including India, Pakistan, South Korea, Japan, Vietnam, China, and the Philippines. Altogether, Asian American students make up 73% of the Class of 2024. As a result of the perceived overrepresentation of Asian American students, the school board implemented changes to the admissions system to eliminate a test that the board claims "squeezed out diversity in our system." As a result, a sharp decline occurred in the number of Asian American students admitted to the Class of 2025 at TJ. The percentage of admissions offers made to Asian Americans fell from 73% for the Class of 2024 to 54% for the Class of 2025. *See Coal. for TJ*, 1:21-cv-00296, Plaintiff's Memorandum in Support for Motion for Summary Judgment, ECF No. 98 at 14. It is indeed a "sordid business, this divvying us by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

C. Racial Classifications Perpetuate Harmful Stereotypes

"Race-based assignments embody stereotypes that treat individuals as the product of their race." *Miller*, 515 U.S. at 912 (citation omitted). Admissions at UNC are no exception. Online chats between admissions officers sometimes expressly refer to an applicant's race. Pet. for Cert. at 5–6. One admissions officer claims to have reviewed "a brown girl who's an 810 [SAT]." *Id.* at 5. Another instructed that "[i]f its brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]." *Id.* Still another revealed that she was "reading an Am. Ind." application. *Id.* at 6. These crude statements underscore that racial classifications "demean[] us all." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 316 (2013) (Thomas, J., concurring).

These pernicious stereotypes extend beyond campus. College guidebooks like the Princeton Review advise Asian American applicants to "be careful about what [they] say and don't say in [their] application." Princeton Review, *Cracking College Admissions* 174 (2d ed. 2004). Against the backdrop of racial preferences, Asian American applicants to prestigious universities must "distance [themselves] as much as possible from" stereotypes about Asians. *Id.* at 176. The guide implores Asian American students to disavow any aspiration of being a doctor or an engineer, and to "get involved in activities other than math club, chess club, and computer club." *Id.* at 175.

The principle of equal protection before the law embodies the promise that race will not stand in the way between an individual and her dreams. Yet Asian American students who want to attend elite

universities are incentivized to forgo a career in medicine, math, and sciences—all because there happens to be "too many Asians" in those programs. This leads to devastating consequences. As one Chinese-American student at Yale recounted, "I quit piano, viewing the instrument as a totem of my race's overeager striving in America. I opted to spend much of my time writing plays and film reviews—pursuits I genuinely did find rewarding but which I also chose so I wouldn't be pigeonholed." Althea Nagai, *Too Many Asian Americans: Affirmative Discrimination in Elite College Admissions*, Center for Equal Opportunity, May 22, 2018.[4]

Amici have felt the sting of pernicious racial stereotypes in school admissions. In the meetings preceding efforts to racially balance Thomas Jefferson High School at the expense of Asian American students, one school board member referred to the culture at TJ as "toxic." *See Coal. for TJ*, 1:21-cv-00296, ECF No. 1, Compl. ¶ 45. A Virginia state delegate, as part of a working group to address diversity and equity, made baseless claims of "unethical ways" Asian American parents "push their kids into [TJ]," when those parents are "not even going to stay in America," but instead are "using [TJ] to get into Ivy League schools and then go back to their home country." *Id.* ¶ 38. CACAGNY, Yi Fang Chen, and others have had similar experiences in New York, where Mayor de Blasio referred to the racial composition of the specialized high schools as a

[4] http://www.ceousa.org/attachments/article/1209/AN.Too%20Many%20AsianAms.Final.pdf.

"monumental injustice."[5] Administrators at the specialized high schools see the matter differently. *See Students for Fair Admission, Inc. v. President and Fellows of Harvard College*, 1:14-cv-14176-ADB, ECF No. 414-3 at 150–55 (Stuyvesant assistant principal in tears when shown the numbers of Asian American acceptance rates "[b]ecause these numbers make it seem like there's discrimination, and I love these kids and I know how hard they work").

II. *Grutter* Should Be Overruled Because It Is Unworkable

Grutter was "egregiously wrong when decided" and should be overruled for that reason alone. *Ramos v. Louisiana*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring). The Equal Protection Clause demands "equal justice under law," a venerable principle etched on the building of the Supreme Court. The Fourteenth Amendment prohibits racial discrimination; *Grutter* allows it. A rule that permits racial preferences should not be countenanced even if it were workable. But *Grutter* is anything but workable. It was meant to (wrongly) permit only a sliver of racial discrimination, but universities have long viewed it as an unqualified endorsement of racial preferences.

This case is one example. Race is decisive for "5.1% of out-of-state decisions and 1.2% of in-state decisions." Pet. for Cert. at 9 (citing App. 112–13). The University's consideration of race is especially pronounced for applicants who score within the range

---

[5] Bill de Blasio, *Our Specialized Schools Have a Diversity Problem. Let's Fix It.*, Chalkbeat (June 2, 2018), https://chalkbeat.org/posts/ny/2018/06/02/mayor-bill-de-blasio-new-york-city-will-push-for-admissions-changes-at-elite-and-segregated-specialized-high-schools/.

of UNC's median applicant. Petitioner's expert observed that while "pretty much everybody" in the top decile of academic performance is admitted to UNC, there are "meaningful differences" between students of different racial groups in the middle deciles. App. 76. In one such decile, "whites and Asian Americans have admit rates that are below 30%, but the African American admit rate is over 40 points higher, at 71%, and the Hispanic admit rate is almost 54%." App. 76–77.

The rise of mismatch research, most of which was published after *Grutter*, also counsels in favor of revisiting that decision. *See Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring) (listing "changed facts" as a factor to consider in cases implicating stare decisis). The basic principle underlying "mismatch" theory is intuitive: most students learn best if they are in a class with others at the same level of preparation. This effect holds regardless of the student's race.

Racial preferences implicate mismatch theory. By definition, they give underqualified applicants a boost to further the university's goal in achieving a diverse class. A few years before *Grutter*, Rogers Elliott and his colleagues at Dartmouth conducted an empirical study that revealed that racial preferences were deterring racial and ethnic minority students from majoring in science, technology, engineering, and mathematics. Rogers Elliott et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Admissions*, 37 Res. Higher. Ed. 681 (1996). Another study published a year after *Grutter* came to the same conclusion. *See* Frederick L. Smyth & John J. McArdle, *Ethnic and Gender Differences in Science Graduation Rates at Selective Colleges with*

Implications for Admissions Policy and College Choice, 4 Res. Higher Educ. 353 (2004). Stephen Cole and Elinor Barber similarly found that African American students at elite colleges were less likely to persist with an initial interest in academic careers than their counterparts at less elite schools because of academic mismatch. Stephen Cole & Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Students* 124, 212 (2003). The following year, law professor Richard Sander published a study indicating that students who received racial preferences in admissions were less likely to pass the bar exam. *See generally* Sander, *supra*.

Although some scholarship on mismatch existed prior to *Grutter*, the principle was popularized more widely after the decision. Since Professor Sander's Stanford Law Review article, the United States Commission on Civil Rights published two reports—*Affirmative Action in American Law Schools* and *Encouraging Minority Students in Science Careers*—intended to make this research more accessible to a wider audience of policymakers, and Richard Sander co-authored a book on his research to the same end. A new report published this year by Amicus Center for Equal Opportunity provides more on the point. *See* Althea Nagai, *Campus Diversity and Student Discontent: The Cost of Race and Ethnic Preferences in College Admissions, Center for Equal Opportunity*, Jan. 27, 2021.[6] Summarizing the current research, the report concludes that racial preferences harm the very

[6] https://www.ceousa.org/2021/01/27/campus-diversity-and-student-discontent-the-costs-of-race-and-ethnic-preferences-in-college-admissions-2/.

students they purportedly benefit. *Id*. at 29–30. Students who "benefit" from racial preferences end up transferring more frequently, take longer to graduate, and were more dissatisfied compared to others in their class. *Id*.

The post-*Grutter* research on mismatch counsels in favor of granting the petition. Many who support racial preferences in education rest their support of such programs not on diversity, but on an interest in remedying past discrimination. *See* Wencong Fa, *The Trouble with Racial Quotas in Disparate Impact Remedial Orders*, 24 Wm. & Mary Bill Rts. J. 1169, 1198–1200 (2016). Yet mismatch theory confirms that "[i]f the need for the racial classifications . . . is unclear, . . . the costs are undeniable." *Parents Involved*, 551 U.S. at 745 (plurality op.). All students, regardless of race, bear the burden of racial preferences.

CONCLUSION

For the reasons stated herein, and those stated by Petitioner, Amici respectfully request that this Court grant the petition for certiorari.

DATED: December 2021.

Respectfully submitted,

JOSHUA P. THOMPSON
WENCONG FA*
ALISON SOMIN
**Counsel of Record*
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
WFa@pacificlegal.org

Counsel for Amici Curiae *Pacific Legal Foundation, Center for Equal Opportunity, Reason Foundation, Chinese American Citizens Alliance - Greater New York, Yi Fang Chen, Coalition for TJ, and Project 21*