No. 20-119

In the

Morris Tyler Moot Court of Appeals at Yale

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Should this Court overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use racial preferences in admissions?

2. Does Harvard violate Title VI of the Civil Rights Act when it penalizes Asian-American applicants, engages in racial balancing, overemphasizes race, and rejects workable, race-neutral alternatives?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

OPINIONS BELOW

The First Circuit's opinion is reported at 980 F.3d 157. The district court's opinion is reported at 397 F.Supp.3d 126.

JURISDICTION

The First Circuit entered judgment on November 12, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title VI, § 601, of the Civil Rights Act of 1964 states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

INTRODUCTION

"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). It took nearly sixty years for this Court to fully vindicate Justice Harlan's famous words by affirming, in *Brown v. Board of Education*, 347 U.S. 483 (1954), that "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007).

But in *Grutter v. Bollinger*, 539 U.S. 390 (2003), this Court abandoned the Equal Protection Clause's aspirational guarantee. A university was free to racially discriminate, *Grutter* said, so long as it paid lip service to pursuing "the educational benefits that flow from a diverse student body." *Id.* at 343. This "faddish slogan of the cognoscenti," *id.* at 350 (Thomas, J., concurring in part and dissenting in part), sanctioned university schemes that practice outright racial sorting. *Grutter* is grievously wrong. The Constitution does not license universities to mix-and-match students based on race for their own inscrutable ends. Twenty years of a failed social-science experiment is enough. This Court should overturn *Grutter*.

Even under *Grutter*, however, Harvard's affirmative-action scheme must fall. Title VI does not permit Harvard to penalize Asian-American applicants based on invidious stereotypes that they are less kind, less likeable, less courageous, or simply not "good [people] to be around." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 168 (1st Cir. 2020). While claiming to apply strict

scrutiny, the lower courts sanctioned a regime that practices blatant racial balancing, overemphasizes race, and ignores race-neutral alternatives.

Harvard stands alone in the American consciousness. It's *Harvard*. Its admissions process serves as the benchmark against which other universities are measured. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-18 (1978). If this Court allows Harvard to disguise its run-of-the-mill discrimination as "benign" preference, even *Grutter*'s meager constraints on the use of race are a dead letter.

"Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment). "[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part). The same is no less true when Harvard metes out classroom seats based on race. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748 (Roberts, C.J.). It is time for this Court to act.

STATEMENT

A. Harvard Admissions' Checkered History

Shortly after the turn of the twentieth century, Harvard President A. Lawrence Lowell adopted the university's first admissions plan grounded in student-body "diversity." Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 Cardozo L. Rev. 379, 390-91 (1979). His goal: to solve Harvard's "Jewish problem." Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* 102 (2005).

In an institution long-dominated by old Protestant stock—in Harvard's words, families versed in the "traditions of refinement and liberal education"—Jews were unwelcome intruders. Dershowitz & Hanft, *supra*, at 387-88. Harvard officials feared that the "Jewish invasion" would crowd out the sons of the Protestant elite. Karabel, *supra*, at 86. But Lowell's first attempt—an explicit Jewish quota—was too far, even for Harvard. Dershowitz & Hanft, *supra*, at 394-95. Lowell instead pushed Harvard to adopt "holistic" admissions, which deemphasized academics and placed greater weight on "desirable character traits" like "moral values," "character," and "educability." *Id.* at 391, 397. This completely subjective standard was intended towards, and succeeded in, suppressing Jewish enrollment at Harvard. *Id.* at 397-98.

Fifty years later, this "Harvard Plan" served as the benchmark for Justice Powell's opinion in *Regents of the University of California v. Bakke*. Powell's landmark opinion, endorsed by a five-Justice majority in *Grutter*, was the first to bless race-conscious

affirmative-action programs for the purpose of achieving student-body diversity. Harvard, Powell wrote, "treats each applicant as an individual in the admissions process" by considering "qualities . . . likely to promote beneficial educational pluralism." *Bakke*, 438 U.S. at 317-18. Such qualities include features like "exceptional personal talents," "leadership potential," and "maturity," as well as race. *Id.* Though Lowell ultimately failed to bar Jews from Harvard, *Bakke* elevated his brainchild to the status of a constitutional holding—and granted it a dangerous new tool: race.

Never defanged, even while *Bakke* was before the Court, Harvard's "diversity" model had already turned to a new victim: Asian-Americans. By the early 1980s, patterns of declining admission rates prompted civil-rights groups to accuse many selective universities of deliberately suppressing Asian-American enrollment. *See* Dana Takagi, *The Retreat from Race: Asian-American Admissions and Racial Politics* 21-56 (1992). Their concern was understandable: in scenes reminiscent of the panic over rising Jewish enrollment in the 1920s, officials at selective universities openly fretted about Asian-American students' "overrepresentation" on their campuses. *See, e.g.*, Daniel Golden, *The Price of Admission* 205 (2007) (quoting a Princeton official defending affirmative action by saying, "You wouldn't want half the campus to be Chinese").

These complaints attracted the attention of the U.S. Department of Justice, which opened an investigation into Harvard in 1988. *See* Takagi, *supra*, at 85-86. DOJ found that Asian-American applicants suffered dramatically lower acceptance rates than whites and that Harvard reviewers engaged in "recurring characterizations of Asian American applicants that were broadly consistent with

stereotypes." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F.Supp.3d 126, 154 (D. Mass. 2019). Despite these findings, DOJ eventually cleared Harvard of wrongdoing in a widely criticized report. *See, e.g.*, Philip Pan, *Ed. Department Clears Harvard*, Harv. Crimson (Oct. 6, 1990), https://perma.cc/GA6V-F8UX.

In 2013, Harvard faced renewed accusations of anti-Asian bias—this time, from within. Prompted by accusations that Harvard maintained an Asian quota, *SFFA*, 397 F.Supp.3d at 147-48, Harvard's Office of Internal Research (OIR) concluded that "Asians are disadvantaged in the admissions process at Harvard," Delano Franklin & Samuel Zwickel, *Internal Harvard Review Showed Disadvantage for Asian Applicants*, Harv. Crimson (June 15, 2018), https://perma.cc/M8AD-49VZ. Absent these race-based penalties, OIR estimated that the proportion of Asian students at Harvard would *more than double*. *See id.* Cursorily concluding that OIR's analysis—which he had commissioned—was "incomplete," the Dean of Admissions quashed public dissemination of the report and took no action. *See SFFA*, 397 F.Supp.3d at 148-49.

Today, nothing has changed. Harvard has settled into a comfortable routine: when allegations of anti-Asian bias are raised—by DOJ, by its own OIR, or by plaintiffs in the present litigation—it responds by convening a cursory working group, populated largely by its own lawyers, which then graciously clears itself of any wrongdoing. *See id.* at 148-53. Harvard is remarkably proficient at resisting change: at trial, the Dean of Admissions testified that Harvard's admissions system "had remained almost exactly the same" during the entirety of his forty-six-year tenure. Jay Caspian Kang, *Where Does Affirmative Action*

Leave Asian Americans?, N.Y. Times Mag. (Aug. 28, 2019), https://perma.cc/ML8M-84YJ. Lowell's "whole-person review" is alive and well. Though Harvard claims to consider every applicant "as a unique individual," *SFFA*, 397 F.Supp.3d at 136, in reality, it does anything but.

B. Legal Proceedings and Factual Findings Below

In November 2014, Students for Fair Admissions (SFFA) filed suit against Harvard for violations of Title VI. SFFA is a nonprofit organized to defend racial equality and equal-protection rights in college admissions. SFFA represents over 20,000 members, including Asian-American high-school students, college applicants, and students denied admission to Harvard. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 261 F.Supp.3d 99, 103, 105 (D. Mass. 2017).

SFFA's suit has unearthed sordid details about how Harvard actually uses race in admissions. In short, at Harvard, race is everything. From start to finish, Harvard consistently holds Asian-Americans to a higher standard, simply because they are Asian.

At the outset of the admissions cycle, Harvard maintains "search lists" of promising high-school students that it targets for recruitment. *SFFA*, 397 F.Supp.3d at 153-54. The criteria for inclusion on a search list varies—students from "sparse country," for example, need lower SAT scores to make the list than students from states better represented at Harvard. *Id.* at 154. Inexplicably, Harvard does not offer Asian-Americans these discounts, subjecting them to higher minimum standardized test-score cut-offs than their white, black, and Hispanic peers. *Id.* In Harvard's eyes, an Asian-American student from Iowa could never be a

real ambassador for rural America like her white neighbors.

After submitting an application to Harvard, a candidate's file is reviewed by various permutations of admissions officers. These readers assign applicants four numerical ratings—academic, extracurricular, athletic, and "personal"—and an overall rating. *Id.* at 140. Consistent with evidence that Asian-American applicants to Harvard have the highest average GPAs and standardized-test scores of any racial group, 60% of Asian-American applicants receive one of the highest two academic ratings, compared to 46% of white, 17% of Hispanic, and 9% of black applicants. *Id.* at 161. Likewise, Asian-American applicants also score more highly on the extracurricular rating than any other group. *Id.*

On the personal rating, however, Asian-American applicants score the worst. *Id.* at 162. Harvard's "personal rating" is the modern crux of Lowell's discretionary review: it purports to measure such subjective qualities as an applicant's "likeability," "leadership," "kindness," and whether the student is a "good person to be around." *SFFA*, 980 F.3d at 168. Over the analyzed period of 2014 through 2019, Harvard admissions officers awarded a lower average personal rating to Asian applicants than to applicants of any other racial group. *SFFA*, 397 F.Supp.3d at 162. Despite their superiority in other areas, Asian-Americans thus have the lowest admissions rate of any racial group to Harvard. *See id.* at 160.

Elsewhere, race pervades Harvard's admissions process. Harvard automatically credits an applicant's racial identity even when they "do[] not otherwise discuss [race] on their application." *Id.* at 147. And throughout the admissions season, admissions officers

consult "one-pagers" that track the racial breakdown of the current class and compare it to the prior year's. *Id.* at 145. When enrollment strays too far from its racial benchmarks, the admissions office will "lop off," or reject, provisionally admitted students based on race to reach its intended percentages. *Id.* at 144.

At trial, both SFFA and Harvard relied on expert statistical analysis of the role of race in Harvard's admissions process. SFFA's Peter Arcidiacono, a "highly respected economist[]" and widely published expert on labor economics, *id.* at 158 n.40, concluded in unrebutted testimony that there was a negative, statistically significant correlation between Asian race and the personal rating, *id.* at 169. Professor Arcidiacono also found a negative, statistically significant relationship between Asian race and overall admissions outcome. *Id.* at 172-73. And Richard Kahlenberg, SFFA's other expert, calculated that, by removing current preferences for applicants who are the children of alumni, donors, faculty, or staff—a group of applicants that is disproportionately white, *id.* at 138 n.16—and by increasing the tip for low-income applicants, Harvard could achieve comparable racial diversity while simultaneously significantly increasing socioeconomic diversity. *See SFFA*, 980 F.3d at 182.

The district court dismissed SFFA's claim that Harvard violates Title VI by considering race at all prior to trial, based on *Grutter*. *SFFA*, 397 F.Supp.3d at 132. After a bench trial, the district court also dismissed SFFA's remaining claims against Harvard. *Id.* at 204. It concluded that, despite the above-described factual findings, Harvard had not intentionally discriminated against Asian-Americans, had not racially balanced its class, had not overemphasized race, and had adequately considered race-neutral alternatives. *Id.* The First Circuit

affirmed the district court's ruling on every count. *See SFFA*, 980 F.3d at 163-64.

SUMMARY OF ARGUMENT

I. *Grutter* should be overruled. This Court should affirm that the sorting of citizens by race in higher-education admissions violates the Equal Protection Clause.

First, *Grutter* is grievously wrong in a way that does continuing violence to our constitutional order. This Court's strict-scrutiny precedents consistently reject more compelling interests than "student-body diversity" as permissible bases for racial classifications. And even if diversity were a compelling interest, universities may not eschew race-neutral methods to achieve it. Other peripheral interests, like maintaining selective admissions, cannot circumvent strict scrutiny's narrow-tailoring requirements. Worse yet, *Grutter*'s reasoning is confused and contradictory, rendering it doctrinally unworkable as a guide to future decisions.

Second, *Grutter* has caused significant, negative, real-world consequences. The use of racial classifications is destabilizing to a society committed to judging citizens by the content of their character rather than the color of their skin. Affirmative action perpetuates racial stereotypes against students from disfavored races. It taints the genuine achievements of students from favored races by sowing doubts about the legitimacy of their accomplishments. And it directly harms students who are placed in more demanding academic programs than would be best for their individual success.

Third, overruling *Grutter* would not unduly upset any reliance interests. It has been clear since *Brown v. Board of Education* that no institution has a legitimate reliance interest in maintaining racial segregation. This is doubly true when *Grutter* itself mandated that

affirmative action be time-limited and tasked universities with finding a way to end race-based preferences.

II. Even if this Court upholds *Grutter*, Harvard's admissions system still violates Title VI.

First, the plain meaning of Title VI prohibits universities that accept federal funds from employing racial preferences in admissions. Justice Powell's assumption in *Bakke* that Title VI merely intended to restate the Equal Protection Clause cherry-picked legislative history and is out-of-step with this Court's text-based approach to statutory interpretation. *Grutter* uncritically affirmed Powell's Title VI analysis without independent inquiry. This Court can correct that mistake.

Second, Harvard has violated those few restrictions on the use of race that *Grutter* did impose. Harvard may not intentionally discriminate against Asian-Americans by penalizing them for their race. Harvard may not engage in outright racial balancing. Harvard may not mechanically overemphasize race to the point where it is determinative for most applicants. And Harvard may not categorically reject race-neutral alternatives without lending them good-faith consideration. Harvard has done all four. If *Grutter* imposes any restrictions on universities' use of race at all, Harvard has violated them.

ARGUMENT

I. *Grutter* should be overruled.

Stare decisis is not a "universal inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). Though a departure from precedent requires "reasons that go beyond mere demonstration that the overruled opinion was wrong," *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part), *stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution because [its] interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions," *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

This Court considers several factors when deciding whether to overrule a constitutional precedent: "the quality of the precedent's reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring). These factors can be sorted into three basic categories: whether "the prior decision [is] not just wrong, but grievously or egregiously wrong"; whether "the prior decision [has] caused significant negative jurisprudential or real-world consequences"; and whether "overruling the prior decision [would] unduly upset reliance interests." *Id.* at 1414-15. Each counsels in favor of overruling *Grutter*.

A. *Grutter* is grievously wrong.

Grutter's central holding states that the Equal Protection Clause does not prohibit "narrowly tailored

use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. This conclusion is grievously wrong. The interest that such programs advance in student-body diversity is less compelling than other interests that this Court has *rejected* under strict scrutiny. And *Grutter*'s prescription for how an admissions program could lawfully consider race is not remotely narrowly tailored—its reasoning is riddled with internal contradiction, and it fails to seriously consider race-neutral alternatives.

1. Student-body diversity is not a compelling interest.

1. "[T]his Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Any use of racial classifications must "be subjected to the 'most rigid scrutiny.'" *Id.* (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

In applying that "most rigid" scrutiny, this Court has been extremely reticent to recognize compelling interests in governmental uses of racial classifications. It has rejected them for the purpose of remedying social discrimination by apportioning public contracting opportunities to minority-owned businesses. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). It has rejected them for the purpose of providing diverse role models for schoolchildren. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). It has rejected them for the purpose of achieving school districts that reflect local

demographic distributions. *See Parents Involved*, 551 U.S. at 730.

In each of these cases, this Court held that the weighty interests at play were insufficient to overcome strict scrutiny. *Grutter* is an anomaly. Its asserted interest in "educational benefits" like "cross-racial understanding and the breaking down of racial stereotypes," 539 U.S. at 307, is notably similar to the interest advanced and rejected in *Wygant*, which concerned providing students with role models of various races for similar reasons. No convincing rationale has yet been given for the different standard that this Court applied in evaluating *Grutter*'s interest compared to *Wygant*. *Grutter* is the exception—not the rule.

Indeed, this Court's attitude toward racial classifications is so exacting that it has only ever found two interests capable of sustaining them aside from *Grutter* and *Bakke*. These are the state's interest in remedying its own past discrimination (as distinct from more general, societal discrimination), and the state's interest in protecting national security.

The former involves action to compensate victims of a government's own discriminatory actions. To impose a racial classification on these grounds, "there must be convincing evidence of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy such discrimination." *Wygant*, 476 U.S. at 267. *Wygant* did *not* recognize a "compelling interest" that exists in racial classifications prospectively, or independently of prior mistreatment. Rather, the kind of racial classifications allowed under *Wygant* are valid only so far as they compensate a particularized racial harm—and no farther.

Far from validating a compelling government interest in racial classifications, *Wygant* instead recognizes them as so invidious that they require redress. When a harm occurs along particular lines, reference must naturally be made to those lines to identify the class of victims. But *Wygant* rejected the "role model" theory of remedying broad societal discrimination because "discriminatory hiring and layoff practices [are] long past the point required by any legitimate remedial purpose." *Id.* at 275. *Grutter* is unlike *Wygant* in that the interest it asserts in racial classifications for the purpose of "educational benefits" has no limiting principle, exists independently of any identifiable previous harm that it seeks to remedy, and may ultimately *create* the very kinds of harms that *Wygant* recognizes the need to remedy. Indeed, Justice Powell already recognized as much in *Bakke*. *See* 438 U.S. at 308-10.

The only other kind of racial classification that this Court has ever found compelling enough to overcome strict scrutiny is the wartime, national-security interest in Japanese exclusion and internment, exemplified by *Korematsu v. United States*. *Korematsu* is universally regarded as one of this Court's worst decisions and has been officially repudiated. *See Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018). *Korematsu*'s "anti-canonical" status illuminates the Equal Protection Clause's antidiscrimination guarantee. Even when granting broad deference to the judgment of military authorities during wartime, our Constitution still does not permit classification and unequal treatment on the basis of race.

Grutter illustrates the adage that history repeats itself first as tragedy, then as farce. Whereas our law now rightly recognizes that interning Japanese-Americans based on race is unacceptable even in

wartime, *Grutter* continues to permit their exclusion from universities in the name of "livelier classroom discussion." *Grutter* is grossly out of line with this Court's strict-scrutiny precedents. This Court should renounce it as emphatically as it has *Korematsu*.

Not only has this Court repeatedly rejected compelling interests in racial classifications, it has recognized a compelling interest in *eliminating* racial classifications in the educational context specifically. Despite burdens on free exercise receiving strict scrutiny, this Court held in *Bob Jones University v. United States* that the government's "fundamental, overriding interest in eradicating racial discrimination in education" was so compelling that it could justify the denial of tax benefits to a religious university with racially discriminatory policies. 461 U.S. 574, 604 (1983). This Court thus believes that the elimination of racial discrimination in education is so compelling an interest that it can justify abridging First Amendment rights. But, strangely, *Grutter* also holds that the "educational benefits that flow from a diverse student body" are enough to *allow* racial discrimination in turn. By doing so, this Court treats *Grutter*'s diversity interest as a paramount principle: one that is compelling enough to overcome not only the Constitution's guarantee of equal protection, but also *other* compelling interests that can themselves trump First Amendment rights. Either "educational benefits that flow from a diverse student body" are the paramount interest on which the rest of our Constitutional order rests—a dubious proposition, to say the least—or *Grutter* is in deep tension with the rest of this Court's jurisprudence and should be overruled.

2. This Court also evaluates "the quality of the precedent's reasoning" when deciding whether or not to

overrule it. *Ramos*, 140 S.Ct. at 1414 (Kavanaugh, J., concurring). *Grutter*'s conclusion that educational diversity is a compelling interest relies on contradictory arguments, faulty logic, and undue deference to the assertions of interested parties.

Strict scrutiny may be overcome "only to prevent grave and immediate danger to interests which the state may lawfully protect." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). It requires "reasons that are exigent and obviously compelling." *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957).

In the space of a single, short paragraph, *Grutter* offers two contradictory reasons for why student-body diversity is "obviously compelling." First, it states, racial diversity is important because "diminishing the force of [racial] stereotypes is . . . a crucial part of the Law School's mission." *Grutter*, 539 U.S. at 333. In support, *Grutter* approvingly cites one of the University of Michigan Law School's experts, whose testimony "indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id.* at 320. Racial diversity benefits education, we are told, because exposure to racial diversity demonstrates that race itself can tell us nothing about a person. Every race contains people with a wide array of experiences, about which no generalizations or stereotypes can legitimately be made.

At least, until the very next sentence, when the opinion states that "just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's

own, unique experience of being a racial minority." *Id.* at 333. Without any acknowledgement, *Grutter* pivots from arguing that racial diversity is important for the sake of *eliminating* preconceptions about racial difference, to arguing that it is important *because of* racial differences that the opinion itself preconceives. But a school cannot teach its students to discard stereotypes about racial minorities while also teaching them that there is a stereotypical "racial minority experience." *Grutter* speaks out of both sides of its mouth: on one hand it "[rejects the] proposition that all individuals of the same race think alike," *Schuette v. Coal. to Def. Affirmative Action*, 571 U.S. 291, 308 (2014); on the other, it relies on the "demeaning notion that members of [minority] racial groups ascribe to certain 'minority views,'" *Metro Broad. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting). This is untenable.

Moreover, *Grutter* credits the mere say-so of schools implementing racially discriminatory policies as evidence that their interests are in fact compelling. *Grutter* states that "the Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer" and invokes the "special niche in our constitutional tradition" accorded to universities. *Id.* at 328-29. Although *Grutter* asserts that "scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university," simply stating this does not make it so. It is not possible to "defer" to the discretion of others without a corresponding reduction in one's own judgment—another of the many contradictions that *Grutter* tolerates.

This Court has not historically deferred to the judgments of school officials defending racial discrimination, which often rested on similar claims of educational benefits. *See Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 325-26 (2013) (Thomas, J., concurring). For example, it explicitly rejected deference to the educational judgment of university officials that admitting women to the Virginia Military Institute would "destroy" the adversative training methods for which VMI was known. This Court held that VMI's sex-discriminatory policies were unconstitutional under the less demanding, *intermediate*-scrutiny standard that sex classifications require. *See United States v. Virginia*, 518 U.S. 515, 556-58 (1996). *Grutter*'s deference to discriminatory educational judgments is thus out-of-step with precedent and suggests an analysis that falls far short of what strict scrutiny demands. Without a more thorough and skeptical inquiry into the asserted interest, *Grutter*'s reasoning cannot justify its holding.

Finally, *Grutter*'s reasoning relies upon an illusory distinction between using race as a "plus factor," which it permits, and a racial penalty, which it prohibits. Justice Powell asserted in *Bakke* that "[t]he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color . . . . His qualifications would have been weighed fairly and competitively . . . ." *Bakke*, 438 U.S. at 318.

This is an unjustifiable claim, but one which *Grutter* endorses without serious consideration. University admissions are zero-sum. There are a limited number of seats for enrollment, and every offer of admission reduces the number of seats available for

other applicants. One applicant's gain is another applicant's loss. The use of the term "plus" obscures the fact that every bonus given to an applicant of a preferred race is equivalent to a "minus" for applicants of non-preferred races.

This is not just a creative rhetorical flourish, however. It affects the substance of Justice Powell's argument, and of *Grutter* by extension. "Consideration," after all, is not what people are seeking when the apply to universities. They are seeking admission. If race is the decisive attribute in deciding to *admit* one applicant over another, all other "consideration" that a university may have given to the applicants' respective merits is constitutionally irrelevant. The rejected applicant has been discriminated against because of their race.

Justice Powell's opinion ultimately permits covert racial discrimination, couched in the banal language of "holistic consideration." Perhaps in recognition of this fact, *Grutter* evades the issue. In response to Justice Kennedy's point that "race is likely outcome determinative for many members of minority groups" 539 U.S. at 389 (Kennedy, J., dissenting), the *Grutter* majority responds that "the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*." *Id.* at 339 (majority opinion). Indeed, it could. But rather than responding to this criticism of Justice Powell's reasoning, *Grutter* simply reaffirms that it was, in fact, his reasoning. No counterargument is ever made, leaving the significance of the distinction between penalties and "plus factors" legally significant but with little justification.

Grutter's racial "plus factor" does not prevent racial discrimination, it just ensures that universities may racially discriminate so long as they do it on an

individual, case-by-case basis. This was certainly how the higher-education professional community understood the "plus factor" rule. In a series of reports and seminars targeted at admissions officials after *Bakke*, lawyers sponsored by the College Board concluded that "the difference between the [plus-factor] and [quota] models may be easier to state than to apply" and ultimately amounted to "nothing more than a smirk and a wink." Susan Welch & John Gruhl, *Affirmative Action and Minority Enrollments in Medical and Law Schools* 62-63 (1998). *Grutter* constitutionally enshrined this state of affairs. This Court should reject its unprincipled reasoning and put an end to the charade that it has produced.

2. Narrow tailoring requires universities use race-neutral alternatives to achieve student-body diversity.

Likewise, *Grutter*'s treatment of strict scrutiny's narrow-tailoring requirement is out-of-step with precedent and reason. *Grutter* misapplies this Court's precedents to reject the dissent's calls for a more narrowly tailored admissions policy. Its unduly lenient standard undermines the logic of strict scrutiny itself.

Grutter's definition of "narrow tailoring" does not align with precedent. Narrow tailoring requires "consideration of whether lawful alternative and less restrictive means could have been used" and a finding that the chosen means "promote the substantial interest about as well and at tolerable administrative expense." *Wygant*, 476 U.S. at 280 n.6. The relevant inquiry in a narrow-tailoring analysis is thus whether race-neutral means advance the government's compelling interest *about as well* as non-neutral means.

Grutter concedes that the University of Michigan Law School, whose policies it reviewed, did not even *consider* use of the race-neutral alternatives that the dissenters suggest. It excuses this on the grounds that such alternatives would potentially require sacrificing "a reputation for excellence," "the academic quality of all admitted students," and "other educational values, not to mention every other kind of diversity." *Grutter*, 539 U.S. at 340. These arguments are by turns unconvincing.

First, the use of racial preferences *also* involves trade-offs against other forms of diversity. If an applicant who would add a nonracial form of diversity is rejected in favor of one who adds racial diversity, the university sacrifices "other kind[s] of diversity." Indeed, the use of racial preferences takes for granted that such decisions will occur. If the university's decisions would be exactly the same without racial preferences, it would have no reason to implement them to begin with.

Second, other race-neutral policies, like lottery systems, can equally advance the asserted interest in student-body diversity. A totally random sample of our "increasingly diverse . . . society," *Grutter*, 539 U.S. at 330, will certainly be diverse, even if not exclusively in ways that university administrators prefer. But if the educational benefits flowing from diversity are as compelling as *Grutter* claims, then this should be welcome. University administrators' attempts to limit the kinds of diversity worthy of consideration undermine their claims that diversity really is compelling. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to

that supposedly vital interest unprohibited." (citation omitted)).

Third, a university's interests in maintaining "a reputation for excellence" or "academic quality" cannot justify forgoing race-neutral alternatives. While competing interests may sometimes foreclose the adoption of more narrowly tailored alternatives, these interests must be of comparable significance to those which would survive strict scrutiny to begin with. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 260 (1982) ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."). Ordinary trade-offs do not suffice. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 (2014) ("If [there is a] Government interest of the highest order, it is hard to understand [the government's] argument that it cannot be required under [strict scrutiny] to pay *anything* in order to achieve this important goal.").

This Court has never held that selective admissions are a compelling interest. "[T]here is nothing ancient, honorable, or constitutionally protected about 'selective' admissions." *Grutter*, 539 U.S. at 368 (Thomas, J., concurring in part and dissenting in part). An interest in maintaining selective admissions cannot defeat narrow tailoring's requirement that a comparable race-neutral alternative be used. *Wygant*'s exception for "[in]tolerable *administrative* expense" (emphasis added) is unavailing here. Not all costs are administrative. If the unremarkable fact that governments must sometimes choose between competing interests were sufficient to overcome all tailoring requirements, our Constitution would be a

dead letter. That the Constitution might inconvenience a university is no argument against its application.

B. *Grutter* has caused significant, negative, real-world consequences.

As this Court has repeatedly recognized, racial classifications amplify the salience of racial identity. Government-sanctioned racial preferences "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *J.A. Croson Co.*, 488 U.S. at 495.

Grutter claimed racial preferences result in "cross-racial understanding and the breaking down of racial stereotypes." *Id.* at 308. The opposite is true. Resentment and self-consciousness abound in a society increasingly defined by and divided along racial lines. Those whom *Grutter* hurts, including many from immigrant families who were the victims of historical discrimination themselves, understandably suspect that our Constitution is not delivering on its promises of racial equality and equal opportunity for all. Those whom *Grutter* supposedly aids are often the victims of stereotyping, feelings of inferiority, and educational "mismatch." Because *Grutter* harms all it touches, this Court should overrule it.

1. Affirmative action perpetuates anti-Asian stereotypes and feelings of racial inferiority.

Affirmative action perpetuates Asian-Americans' status as "perpetual foreigners." In 1890, the New York Times confidently declared that, "the Chinaman," with his "foreign face[], garb[], and tongue[]" would forever remain an "alien race," never to "be digested" by his adopted country. Editorial, *The Chinese Within Our*

Gates, N.Y. Times (July 20, 1890), https://perma.cc/3RLR-CQ2L. Such attitudes in the late-nineteenth century fueled campaigns of "ethnic cleansing" and "political terrorism" against Chinese laborers, as well as legal codification of Asians' permanent-alien status through the Chinese Exclusion Acts. *See generally* Beth Lew-Williams, *The Chinese Must Go: Violence, Exclusion, and the Making of the Alien in America* (2018).

Today, affirmative action drives similar attitudes, different in degree from the xenophobia of the 1800s, but not in kind. In none of the higher-education affirmative-action plans analyzed by this Court in the last twenty years were Asian-Americans among the preferred minority groups. *See Grutter*, 539 U.S. at 319; *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S.Ct. 2198, 2216 (2016) (Alito, J., dissenting); *infra* Section II.B.1. To justify this under the logic of *Grutter*, universities openly argue that "Asian Americans are not worth as much as [other minorities] in promoting" the educational benefits of classroom diversity. *Fisher II*, 136 S.Ct. at 2227 (Alito, J., dissenting).

This is an old slur, resurfaced for a new age. The modern "yellow peril" is universities' fear of "competitive, spectacle-wearing engineering students overcrowding [their] classes." Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 Asian Am. L.J. 57, 79-80 (2007). Rather than understanding Asian-Americans as fully human, universities routinely denigrate them as, in the words of one MIT admissions officer, "textureless math grinds," "quasi-robots programmed . . . to ace math and science tests." Golden, *supra*, at 201. Or, to use Harvard's words, as "quiet," "bland," "flat," and "not exciting." *SFFA*, 397 F.Supp.3d at 156.

Grutter teaches children to be ashamed of their racial identity. It promised a world where higher education would be "visibly open to talented and qualified individuals of every race." 539 U.S. at 332. It has resulted in one where experts instruct Asian applicants to hide their race at all costs. Akane Otani, *Tips from the* Princeton Review*: Act Less Asian, Add Pics if You're Black*, Bloomberg Businessweek (Nov. 21, 2014), https://perma.cc/5EB9-V7N2. The consequences of this despair—and of being held to near-impossible standards to which their peers are not—are devastating. *See* George Qiao, *Why Are Asian American Kids Killing Themselves?*, Plan A. Mag. (Oct. 6, 2017), https://perma.cc/VT3H-QSE9. This is not the racial utopia we were promised.

2. Recipients of racial preferences suffer from stereotyping and educational mismatch.

Lowering standards based on race "stamps minorities with a badge of inferiority." *Adarand Constructors*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment). Because of affirmative action, "[w]hen blacks take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin color played a part in their advancement." *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part); *see also* John McWhorter, *Losing the Race: Self-Sabotage in Black America* 248 (2000) ("[H]ow much of an achievement can I truly say it was to have been a good enough *black* person to be admitted [to Stanford], while my colleagues had been considered good enough *people* to be admitted?").

Minority students admitted under race-conscious admissions regimes suffer psychological harms as a

result. Studies have linked knowledge of racial stereotypes to feelings of impostor syndrome and inferiority among minority students. *See Impostor Feelings Fuel Negative Mental Health Outcomes for Minority Students, Study*, UT News (Apr. 5, 2017), https://perma.cc/SA6W-8562. This Court recognized in *Brown* that such feelings were derived from legally sanctioned segregation and had a tendency to "deprive [black students] of some of the benefits they would receive in a racial[ly] integrated school system." 347 U.S. at 494. *Brown* was right: racially discriminatory educational systems psychologically harm targeted students. Claims that stereotyping and formal racial distinctions can ever be "beneficial" to their targets warrant considerable skepticism.

Affirmative action also places some minority students in academic environments where they have difficulty succeeding. Following California's passage of Proposition 209, which banned racial preferences in California public institutions, minority graduation rates at California's public colleges modestly increased. *See* Peter Arcidiacono et al., *Affirmative Action and University Fit: Evidence from Proposition 209*, IZA J. Lab. Econ., 2014, at 1-4. These gains from better matching are particularly pronounced for STEM majors. *See* Peter Arcidiacono et al., *University Differences in the Graduation of Minorities in STEM Fields: Evidence from California*, 106 Am. Econ. Rev. 525, 526-29 (2016).

Law schools—"the training ground for a large number of our Nation's leaders," *Grutter*, 539 U.S. at 332—experience the same phenomenon. *See* Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004). "[R]acial preferences end up producing *fewer* black lawyers each year than would be produced by a race-

blind system." *Id.* at 372. *Grutter* regarded "access to legal education" and access to the "legal profession" as one and the same, 539 U.S. at 332, but minorities cannot succeed in the profession if they fail out of school.

Admittedly, *Grutter* did not claim that the interest justifying racial preferences was primarily the benefit of minority students. Rather, their presence improves the *educational product* offered to everyone else around them. But to whatever extent racial preferences ultimately advance that interest in a diverse educational environment, they do so *at the expense* of the students who bring that "diversity" in the first place.

C. Overruling *Grutter* will not upset reliance interests.

This Court has never recognized a legitimate reliance interest in perpetuating racial discrimination. Indeed, *Brown*—"the single most important and greatest decision in this Court's history," *Ramos*, 140 S.Ct. at 1412 (Kavanaugh, J., concurring)—invalidated a system of *de jure* racial segregation on which the entirety of Southern society had been built. In *Briggs v. Elliot*, one of the cases consolidated into *Brown*, the appellants "emphasized that southern states had ordered their institutions around the *Plessy* Court's blessing of racial segregation, and argued that these reliance interests counseled in favor of retaining *Plessy* even if the Court no longer viewed it as a proper interpretation of the Equal Protection Clause." Jonathan Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich. L. Rev. 1, 38 (2011). This Court rejected the reliance-interest argument for upholding *Plessy* then, and it should reject the reliance-interest argument for upholding *Grutter* now.

That said, reliance interests are especially weak here. "The inquiry into reliance" focuses on costs to "those who have relied reasonably" on the precedent. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992). Overruling *Grutter* implicates only a few universities—over two-thirds of U.S. colleges already practice race-blind admissions. Melissa Clinedinst et. al, *State of College Admission*, NACAC 21 (2015), https://perma.cc/DEF7-EFCN. Eight states have banned race-conscious admissions at public universities outright. Halley Potter, *What Can We Learn from States that Ban Affirmative Action?*, Century Found. (June 26, 2014), https://perma.cc/2FXP-P9DH.

Outlier universities can costlessly excise race from their admissions criteria. In *Grutter*-compliant programs, race is already only a "factor of a factor of a factor." *Fisher II*, 136 S.Ct. at 2207. Overruling *Grutter* would thus not require a dramatic overhaul of holistic admissions. Universities would remain free to consider "all pertinent aspects of diversity," *Bakke*, 438 U.S. at 317, an applicant offers—just not race. And *Grutter* directed these universities to terminate their use of race "as soon as practicable," imposing a twenty-five-year period to do so. *Grutter*, 539 U.S. at 343. If, as this Court required, universities have been steadfastly working to eliminate race from their admissions processes for twenty years, their interest in preserving racial preferences can hardly outweigh the countervailing "reliance the American people place in their constitutionally protected [rights]." *Ramos*, 140 S.Ct. at 1408.

In college admissions, memories are short and horizons limited. A new crop of applicants arises each year, with no reliance in any particular form of admissions, except that interest we all share in being

free from racial discrimination. This Court should not permit universities to indefinitely violate those applicants' equal-protection rights on the grounds of *stare decisis*.

II. Even under *Grutter*, Harvard's affirmative-action program violates Title VI.

If this Court does not overrule *Grutter*, Harvard, a recipient of federal funds, must still satisfy the requirements of Title VI. *SFFA*, 980 F.3d at 184. The plain meaning of Title VI's text rejects racial preferences in college admissions. But even if this Court reaffirms its previous conclusion that Title VI's and the Equal Protection Clause's protections are coextensive, Harvard's affirmative-action program fails to pass muster under *Grutter*.

A. Affirmative action flouts the plain meaning of Title VI.

1. When interpreting statutes, this Court "begins with the text." *Ross v. Blake*, 578 U.S. 632, 638 (2016). Title VI bars both "exclu[sion] from participation in" and "discrimination under" a federally funded program "on the ground of race." 42 U.S.C. § 2000d. Its plain meaning prohibits any university receiving federal funds from using racial preferences in admissions.

Title VI's antidiscrimination provision is nearly identical to that of Title VII. *Compare* 42 U.S.C. § 2000d (Title VI), *with* 42 U.S.C. § 2000e-2(a) (Title VII). In *Bostock v. Clayton County*, this Court held that Title VII incorporates the "'simple' and 'traditional' standard of but-for causation." 140 S.Ct. 1731, 1739 (2020). As explained by *Bostock*, "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.* But-for causation is the "'default' or 'background' rule against which Congress is normally presumed to have

legislated . . . when it comes to federal antidiscrimination laws." *Comcast Corp. v. Nat'l Ass'n of Af. Am.-Owned Media*, 140 S.Ct. 1009, 1014 (2020). Additionally, but-for causation applies to "individuals rather than groups." *Bostock*, 140 S.Ct. at 1741.

Bostock also defines "discrimination," as used in both Title VI and Title VII, as "treating that individual worse than others who are similarly situated." *Id.* at 1740. Taken together, Title VI's text is thus unambiguous—it bars any scheme that "intentionally treats a person worse because of" race, "even if the scheme promotes equality at the group level." *Id.* at 1740, 1744. That worse treatment includes, but is not limited to, exclusion from the program altogether.

Holding all else equal, if a *single* student who was "excluded from participation in" Harvard's class would have been accepted had they been a different race, Harvard has violated Title VI. The district court found that race was the determinative factor for nearly 1,000 Harvard students over four years. *SFFA*, 397 F.Supp.3d at 178. But-for their race, 1,000 other students would have been admitted to these seats. This Court can settle this case on statutory grounds—Title VI prohibits such discrimination.

2. This Court should abandon Justice Powell's contrary interpretation in *Bakke*. Though *stare decisis* is stronger for statutory decisions than constitutional ones, this Court has long recognized exceptions warranting overruling statutory precedents. *See* William Eskridge, *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, app. A (1988) (collecting cases). Principally, "the relevant demands of stare decisis do not preclude [re]considering . . . a statutory interpretation which started as an unexamined assumption on the basis of inapplicable citations and

has the claim of a dogma solely through reiteration." *Monroe v. Pape*, 365 U.S. 167, 220-21 (1961) (Frankfurter, J., dissenting in part).

Presenting a handful of statements from Title VI supporters as evidence of Congress's "clear legislative intent," Powell concluded that Title VI's protections were exactly coextensive with those of the Equal Protection Clause. *Bakke*, 438 U.S. at 284-87. "But legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1631 (2018). This Court does not embark on fishing expeditions into committee reports to "salvage [an] atextual interpretation." *Pereira v. Sessions*, 138 S.Ct. 2105, 2119 (2018). Rather, "clear text controls even in the face of *contrary* legislative history." Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2128 (2016) (emphasis added). Accordingly, *Bostock* rejected arguments sounding in legislative history regarding the interpretation of Title VII, because "no ambiguity exists" within the text. 140 S.Ct. at 1749. So too here—Title VI really does mean what it says.

Moreover, any discussion of legislative history must acknowledge that Title VI and Title VII were proposed and passed as part of the same bill: the Civil Rights Act of 1964. *See* Charles Whalen & Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 1-2, 218-29 (1985). Any argument that the meaning of the word "discriminate" differs between Title VII, as defined by *Bostock*, and Title VI must assert that the same Congress, in the same bill, used identical language in two drastically different respects. This contravenes both ordinary canons of statutory interpretation and common sense. "[I]dentical words used in different parts of the same statute are . . . presumed to have the same meaning." *Robers v. United States*, 572 U.S. 639, 643 (2014).

There is simply no "persuasive reason to afford the *same* statutory term two such radically different constructions." *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2365 (2019).

Instead, as Justice Stevens wrote for four Justices in *Bakke*, "[N]othing in the legislative history justifies the conclusion that the broad language of [Title VI] should not be given its natural meaning." *Bakke*, 438 U.S. at 418 (Stevens, J., concurring in the judgment in part and dissenting in part). Rather, "[a]s succinctly phrased during the Senate debate, under Title VI it is not 'permissible to say "yes" to one person; but to say "no" to another person, only because of the color of his skin.'" *Id.* (quoting 110 Cong. Rec. 6047 (1964) (statement of Sen. Pastore)).

Grutter's treatment of the Title VI issue comprised all of one sentence, restating *Bakke*'s holding. *See* 539 U.S. at 343. This Court need not repeat *Grutter*'s mistake. Revisiting Powell's egregiously wrong interpretation of Title VI allows this Court to avoid the constitutional question because statutory resolution is possible. *See, e.g.*, *McDonnell v. United States*, 136 S.Ct. 2372-73 (2016).

B. Harvard's affirmative-action program fails strict scrutiny.

If this Court instead affirms that Title VI's protections are coextensive with those of the Equal Protection Clause, Harvard's racial preferences must satisfy strict scrutiny. S*ee Fisher I*, 570 U.S. at 309. They do not.

Strict scrutiny requires that Harvard show its affirmative-action program is "narrowly tailored" onto achieve the university's interest in "student body diversity." *Id.* Harvard's consideration of race is not narrowly tailored in four ways. Harvard systematically

penalizes Asian-American applicants because of their race. Harvard engages in patent racial balancing of its student body. Harvard uses race in a mechanical, rather than a holistic, way and overemphasizes its importance. And Harvard has workable, race-neutral alternatives to achieve its interest in student-body diversity. Each is sufficient to defeat Harvard's use of race on narrow-tailoring grounds.

1. Harvard penalizes Asian-American applicants.

1. To survive strict scrutiny, a university's affirmative-action program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Grutter*, 539 U.S. at 341. The evidence presented at trial—including Harvard's own expert analysis—puts the lie to Harvard's contention that "[r]ace is only intentionally considered as a positive attribute." *SFFA*, 397 F.Supp.3d at 146. Rather, in order to boost its "favored racial and ethnic groups"—black and Hispanic applicants—the evidence shows that Harvard systematically penalizes Asians, most notably through the personal rating.

Harvard's "personal rating" attempts to measure the strength of an applicant's personal qualities, including "likeability," "leadership," "kindness," and whether the student is a "good person to be around." *SFFA*, 980 F.3d at 168. Harvard admissions officers award a lower average personal rating to Asian applicants than to applicants of any other racial group. *SFFA*, 397 F.Supp.3d at 162. The negative correlation between Asian race and personal rating is statistically significant. *Id.* at 169.

Racial classifications are not narrowly tailored when "the motive for the classification [is] illegitimate racial prejudice or stereotype." *J.A. Croson Co.*, 488

U.S. at 493. Harvard's personal ratings for Asian-American applicants are rife with invidious stereotype. Harvard *admits* that its admissions officers considered race "indirectly" in the assignment of the personal rating. *SFFA*, 397 F.Supp.3d at 146. And the record demonstrates that, contrary to Harvard's characterization, these racial considerations were *quite* explicit. Admissions officers described Asian applicants as "quiet," "bland," "flat," and "not exciting," *id.* at 156, engaging in common but pernicious racial stereotyping of Asians as "submissive: culturally prone to be physically unaggressive, politically docile, and accommodating," Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1931 (1993).

The statistical evidence for a negative penalty for Asian-American applicants is stark. Both SFFA's and Harvard's experts' models confirm that being Asian is negatively correlated with admission odds. *SFFA*, 397 F.Supp.3d at 167-68. Harvard's expert's model returns a negative correlation *despite controlling for the personal rating*—meaning that even assuming "race does not itself affect the personal ratings assigned by admissions officers," an implausible assumption as discussed above, Asians are *still* penalized in Harvard's admissions process through another avenue. *Id.* at 166. Accounting for the racial bias of the personal rating—an approach for which the district court concluded there was "a reasonable econometric basis"—returns an even more negative, statistically significant correlation. *Id.* at 167-68, 173. As a result, Asian applicants experienced the lowest admissions rate of all racial groups to Harvard—even lower than white applicants—despite scoring *overwhelmingly* higher on academic ratings and modestly higher on extracurricular ratings. *See id.* at 161.

The district court's factual conclusions are clear. Fewer Asian students are being admitted than would be absent racial penalties. *Id.* at 178. According to Harvard's 2013 OIR report, were Harvard to admit applicants solely based on merit, the percentage of Asian students in its class would more than double. Franklin & Zwickel, *supra*. *Grutter* does not permit Harvard to sacrifice Asian-Americans as casualties of its scheme to elevate its favored races.

2. The lower courts committed the same error that this Court overruled in *Fisher I*. They "presume[d] the University acted in good faith" and "place[d] on the petitioner the burden of rebutting that presumption." *Fisher I*, 570 U.S. at 297. In reality, "no deference" is owed to universities—it remains Harvard's obligation throughout to show that its use of race is narrowly tailored to achieve its permissible goals. *Id.* at 311-12. "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). The Equal Protection Clause does not countenance Harvard-exceptionalism.

The district court's evaluation of the experts' competing methodological choices granted Harvard undue deference. Though both Harvard's and SFFA's experts found a negative correlation between an applicant's Asian race and admissions odds, because of modeling differences, SFFA's expert's effect size was larger and statistically significant. *SFFA*, 397 F.Supp.3d at 175. The district court determined that SFFA's expert's econometric model was "viable," and that its finding that racial animus had infected the personal rating was "econometrically reasonable" and "probative of the effect of race on the admissions process." *Id.* at 173. The court nevertheless ruled for

Harvard, speculating that "it is possible" that various unobserved factors not raised by either party could explain the negative effect. *Id.* at 175.

This is not "strict" scrutiny—it is hardly "scrutiny" at all. "While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors must be considered unacceptable as evidence of discrimination." *Bazmore v. Friday*, 478 U.S. 385, 400 (1986). And once an inference of intentional discrimination is raised by statistical analysis, the burden shifts to Harvard to prove it has not discriminated against Asian applicants. *Cf. Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977). The lower courts have reversed that burden.

Perhaps the omitted variable explaining Asians' lower personal ratings is simply that they *are* less likeable and less suited for leadership compared to their peers. This is an argument that Harvard dared not raise, *SFFA*, 397 F.Supp.3d at 194 n.59, but one on which the district and circuit courts principally rely. *See id.* at 193 (speculating that it is "possible" that Asian-American applicants "did not possess the personal qualities that Harvard is looking for at the same rate as white applicants); *accord SFFA*, 980 F.3d at 200-01. In fact, the district court gently chastised Harvard for being "unwilling to overtly argue that Asian American applicants *were actually weaker* in personal criteria." *SFFA*, 397 F.Supp.3d at 194. n.59 (emphasis added). This supposition has zero basis in the record. It is contradicted by the district court's own finding that "Asian Americans are not inherently less personable than any other demographic group." *Id.* at 202. It is contradicted by the fact that alumni

interviewers—who, unlike admissions officers, actually meet applicants—rate Asian and white candidates similarly. *Id.* at 162. And even if Harvard had pressed this argument, this Court "[does] not accept as a defense to racial discrimination the very stereotype the law condemns." *Powers v. Ohio*, 499 U.S. 400, 410 (1991).

Finally, the lower courts improperly credited Harvard's witnesses' testimony that they did not consider race when assigning the personal rating and that they did not discriminate against Asian applicants. *SFFA*, 397 F.Supp.3d at 169; *SFFA*, 980 F.3d at 200. "Strict scrutiny does not permit a court to [simply] accept a school's assertion that its admissions process uses race in a permissible way . . . ." *Fisher I*, 570 U.S. at 313. "[A]ffirmations of good faith" cannot rebut a charge of intentional discrimination when "[t]he result bespeaks discrimination," as it does here. *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972). In fact, the district court acknowledges that admissions officers' "implicit biases" may have "disadvantaged" Asian-American applicants. *SFFA*, 397 F.Supp.3d at 171. The very nature of implicit bias renders Harvard's officers' denials less credible. And calling a bias "implicit" does not relieve Harvard's burden under strict scrutiny: "the subtlety [of prejudice] does not . . . make the impact less significant or less unlawful." *Lynn v. Regents of the Univ. of Cal.*, 656 F.3d 1337, 1343 n.5 (9th Cir. 1981).

Over and over, the lower courts gave Harvard every benefit of the doubt. Rather than strict scrutiny, their analyses resemble rational-basis review in disguise: Harvard wins so long as there is "any reasonably conceivable state of facts that could provide a rational basis for" its use of race. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Such an

analysis eviscerates not only Title VI and the Equal Protection Clause, but strict-scrutiny analysis itself.

2. Harvard engages in racial balancing.

"[O]utright racial balancing . . . is patently unconstitutional." *Grutter*, 539 U.S. at 330. This Court does not permit a university to seek to achieve "some specified percentage" of a particular racial group for its own sake. *Id.* at 329. Rather, "the educational benefits that diversity is designed to produce" are the only interest that this Court has permitted affirmative-action programs to serve. *Id.* at 330. But despite its protestations, Harvard's plans are "[i]n design and operation . . . directed only to racial balance, pure and simple." *Parents Involved*, 551 U.S. at 726.

1. Harvard's admissions process intentionally seeks racial balance. Harvard admits its one-pagers—which track the admitted class's racial composition—are intended to prevent "a dramatic drop off [in a racial group's enrollment] *relative to the prior year*." *SFFA*, 397 F.Supp.3d at 146 (emphasis added). Lest the message be lost on admissions officers, the Dean of Admissions begins *each* admissions-committee meeting by explaining "how the breakdown of the class *compares to the prior year* in terms of racial identities." *Id.* (emphasis added). If Harvard identifies that a particular group is below the prior year's target, it will "give additional attention to applications from students within that group." *Id.* And if there are too many admitted members of a particular race, the admissions office will "lop off" some of those students to reach the target percentage. *Id.* at 144.

This is racial balancing, "pure and simple." "[T]ruly individualized consideration demands that race be used in a flexible, nonmechanical way."

Grutter, 539 U.S. at 334. An admissions program may not reduce an applicant to simply "a member of a particular racial group." *Parents Involved*, 551 U.S. at 722. Harvard reduces applicants to their race by mechanically plucking more students of a given race out of the applicant pool when their enrollment has "drop[ped] off relative to the prior year," *SFFA*, 397 F.Supp.3d at 146, and "lop[ping] off" admitted students when enrollment of members of their racial group is too high, *id.* at 144. Harvard *admits* to "monitoring the likely racial makeup of the admitted class" to prevent such variation. *Id.*

The lower courts cited supposedly analogous programs approved by this Court in *Grutter* and *Fisher II* to validate Harvard's consideration of race. *See SFFA*, 397 F.Supp.3d at 197; *SFFA*, 980 F.3d at 189. This was in error. In *Grutter*, the University of Michigan did review "daily reports" of their admitted class's racial composition, but this Court found that admissions officers "never gave race any more or less weight" based on those reports. *Grutter*, 539 U.S. at 336. By contrast, Harvard's admissions office "give[s] *additional attention* to applications from students within [a racial] group" based on enrollment numbers. SFFA, 397 F.Supp.3d at 146 (emphasis added). This attention may be positive *or negative*, as when the "lop" process rejects an *otherwise admitted* student based on their race. *Id.* at 144. Despite surface-level similarities, Michigan's "daily reports" did not invite consideration of applicants' race for numerical balancing. Harvard's "one-pagers" did.

The cites to *Fisher II* are even more misplaced. In *Fisher II*, this Court required the University of Texas at Austin to consult demographic data about its classes "to scrutinize the fairness of its admissions program[] [and] to assess whether changing demographics have

undermined the need for a race-conscious policy." 136 S.Ct. at 2214 (emphasis added). That is, this Court warned that UT Austin must continually reassess whether affirmative action remains necessary.

The lower courts relied on this language to assert that *Fisher II* had sanctioned Harvard's use of race to *practice* affirmative action. This is exactly backwards. Harvard does not use the one-pagers to "assess whether its race-conscious admissions policy is still necessary." *SFFA*, 980 F.3 at 189. Indeed, Harvard witnesses repeatedly testified that the university *never* used demographic data to reconsider its need to practice race-conscious admissions over the course of two decades, even after multiple investigations, external and internal, into discrimination against Asian-Americans. *See*, *SFFA*, 397 F.Supp.3d at 151, 153, 155. Rather, Harvard's one-pagers are intended to help Harvard maintain specified racial percentages in its class.

2. The resulting numbers speak for themselves. For the classes of 2009 through 2018, the admission rate for Asian-American students varied by no more than 2.8 percentage points. *SFFA*, 980 F.3d at 188. Over the same period, the variation in the percentage of admitted black and Hispanic students was *even smaller*. *See SFFA*, 397 F.Supp.3d at 177 fig.2.

This Court has invalidated other racial-balancing schemes that have permitted much more variation. In *Parents Involved*, this Court invalidated a race-conscious school-assignment program on racial-balancing grounds that permitted variations as large as 20 percentage points in the enrollment of specific racial groups. *See* 551 U.S. at 726. The program upheld in *Grutter* too exhibited far more year-over-year

variation in racial enrollment than Harvard. *See* 539 U.S. at 336.

The lower courts concluded otherwise through confused statistical reasoning. The district court erred by presenting the annual variation in minority students' enrollment as the *relative* percentage change in enrollment, rather than the *absolute* percentage change. *See SFFA*, 397 F.Supp.3d at 176 fig.1. This method of presentation magnifies the degree of small differences in small populations.

To see the flaw, consider two hypothetical universities, both of which admit 100 students a year and set strict quotas on the number of Asian-American students. University *A* admits two Asian-American students in year 1 and three in year 2. University *B* admits fifty Asian-American students in year 1 and fifty-one in year 2. The absolute percentage variation in each example is 1%. But University *A*'s relative percentage variation is a whopping 50%, while University *B*'s is a mere 2%. Both universities' plans are identical with respect to the degree of balancing, but the district court's logic would clear University *A*'s policy of balancing concerns, while subjecting University *B*'s to scrutiny. This difference in treatment based on a simple quirk in presentation defies logic.

Next, the lower courts found "the fact that the share of admitted Asian Americans co-varies almost perfectly with the share of Asian American applicants" to be evidence *against* balancing. *SFFA*, 980 F.3d at 188; *see SFFA*, 397 F.Supp.3d at 177. This flagrantly misreads *Grutter*. All nine Justices in *Grutter* explicitly or implicitly found such evidence to *support* an inference of balancing. A "far too precise" "correlation between the percentage of [Harvard's] applicants who are members of . . . minority groups and the percentage

of the admitted applicants who are members of these same groups" "suggests a formula for admission based on the aspirational assumption that all applicants are equally qualified academically, and therefore that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool." *Grutter*, 539 U.S. at 383, 385 (Rehnquist, C.J., dissenting). But "this is precisely the type of racial balancing that the Court itself calls 'patently unconstitutional.'" *Id.* at 386.

The majority did not rebut Rehnquist's analysis, finding instead that the co-variance of the *enrolled* students and the applicant pool fluctuated dramatically. *Id.* at 336 (majority opinion). Though comparison to enrolled, rather than admitted, students is improper, *see id.* at 385 (Rehnquist, C.J., dissenting), the majority, by so doing, implicitly conceded that perfect co-variance with the applicant pool *would* be problematic.

Indeed, the district court determined below that not all racial groups in the applicant pool were "equally qualified academically"—Asian students scored significantly higher than all other groups on the academic and extracurricular ratings. *SFFA*, 397 F.Supp.3d at 161. Chief Justice Rehnquist's logic holds: the perfect correlation between the share of minorities admitted to Harvard and the share of minorities in the applicant pool bespeaks racial balancing.

3. Harvard overemphasizes race.

Even if Harvard does not operate a quota, Harvard's admissions "must remain flexible enough to ensure that each applicant is evaluated as an individual." *Grutter*, 539 U.S. at 336-37. As Justice Powell recognized in *Bakke*, students contribute more than just their race to a school's educational

environment—"*all* pertinent elements of diversity" an applicant offers must be considered. 438 U.S. at 317. No "single characteristic automatically ensure[s] a specific and identifiable contribution to a university's diversity." *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003).

1. *Bakke* contemplated a nuanced, contextual consideration of an applicant's race and its impact on a school's diversity—the same kind of consideration that would be required to assess a student's "leadership potential" or "compassion." *Bakke*, 438 U.S. at 317. Such consideration naturally requires applicants to "highlight their own potential diversity contributions" in "a personal statement, letters of recommendation, [or] an essay." *Grutter*, 539 U.S. at 338. Thus, in *Gratz*, this Court struck down the University of Michigan's undergraduate-admissions plan which automatically awarded points to underrepresented-minority applicants on the basis of race alone. 539 U.S. at 270. Because the university "never consider[ed] [an applicant's] individual background, experiences, and characteristics to assess their individual 'potential contribution to diversity,'" this Court held that the plan was not narrowly tailored. *Id.* at 274 (quoting *Bakke*, 438 U.S. at 317).

As in *Gratz*, Harvard considers race mechanically. Harvard automatically credits an applicant's racial identity even when they "do[] not otherwise discuss [race] on their application." *SFFA*, 397 F.Supp.3d at 147. Far from serving educational *diversity*, such surface-level analysis reduces a university's interest to one in "[c]lassroom *aesthetics*." *Grutter*, 539 U.S. at 355 (Thomas, J., concurring in part and dissenting in part) (emphasis added). This is *Gratz* in disguise. Though Harvard may not quantify the exact magnitude of its racial preferences, a black candidate to Harvard is still awarded a "tip," simply "because their application[]

indicate[s] that they are [black]." *Gratz*, 539 U.S. at 273. This Court's precedents forbid such an inflexible treatment of race. Put simply, Harvard cannot possibly engage in a "highly individualized, holistic review," *Grutter*, 539 U.S. at 337, when one of its principal considerations is whether the right racial checkbox was marked.

2. Individualized review is also incompatible with an admissions process that considers an applicant's race the "defining feature" of their application. *Grutter*, 539 U.S. at 337. Race may not be "decisive" for most admitted minority applicants. *Bakke*, 438 U.S. at 317.

At Harvard, race is everything. Race may be validly used as a "plus" to allocate "the last available seat," *Bakke*, 438 U.S. at 318, or to decide "a small portion of admissions decisions," *Fisher II*, 136 S.Ct. at 2212. But at Harvard, race is "determinative" for the *majority* of admitted black students and for more than one-third of admitted Hispanic students. *SFFA*, 397 F.Supp.3d at 178. Over four years, this amounted to nearly 1,000 students for whom race was outcome-determinative. *Id.* The corollary to race's decisiveness for underrepresented minorities is that race operates as a large penalty for Asians: SFFA's expert calculated that an Asian applicant with just a 25% chance of admission to Harvard would have a 36% chance of admission if they were white, a 77% chance if they were Hispanic, and a 95% chance if they were black. Heather Mac Donald, *Harvard Admits Its Preferences*, New Criterion (Nov. 2019), https://perma.cc/Q2VJ-NT4G.

The effect of Harvard's single-minded focus on race dwarfs that of programs this Court has previously sanctioned. In *Fisher II*, race was only outcome-determinative for 15 black and 18 Hispanic students in

one year, constituting a mere 0.5% of the entering class. *Fisher II*, 136 S.Ct. at 2237 (Alito, J., dissenting). And though the proportion of the student body for which race was determinative in *Grutter* was comparable to Harvard's, *compare SFFA*, 397 F.Supp.3d at 178 (finding race determinative for 10% of Harvard's class), *with Grutter*, 539 U.S. at 320 (finding race determinative for 10.5% of Michigan's class), *Grutter* was decided nearly 20 years ago. In the intervening time, this Court tasked universities to seek a "find a race-neutral admissions formula" and to "terminate [their] race-conscious admissions program[s] as soon as practicable." *Id.* at 343. This Court directed universities to decrease the magnitude of racial preferences over time—Harvard defies that command.

4. Harvard has rejected workable, race-neutral alternatives.

Racial classifications are always the "last resort." *J.A. Croson Co.*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment). Though a university need not exhaust "every conceivable race-neutral alternative," it must engage in "serious, good faith consideration of workable race-neutral alternatives" to outright racial preferences. *Grutter*, 539 U.S. at 339. A "workable" alternative is one that promotes the university's interest "about as well and at tolerable administrative expense." *Wygant*, 476 U.S. at 280 n.6.

1. The timeline of Harvard's self-serving, post-hoc justifications severely undermines the sufficiency of Harvard's "good faith consideration." Harvard has *never* engaged in "serious, good faith consideration" of race-neutral alternatives. After all, Harvard's admissions system has remained "almost exactly the

same" for nearly half a century. Kang, *supra*. Indeed, prior to 2017, Harvard "had not . . . conducted a detailed empirical analysis of race-neutral alternatives for at least fifteen years." *SFFA*, 397 F.Supp.3d at 153. This means that Harvard spent the *entire time* between *Grutter* in 2003, through the inception of this lawsuit in 2014, to the summer of 2017 without *once* heeding this Court's command in *Grutter* to find a way to "terminate its race-conscious admissions program as soon as practicable." *Grutter*, 539 U.S. at 343.

Harvard only deigned to consider race-neutral alternatives after the onset of this litigation. *See SFFA*, 397 F.Supp.3d at 152. The first committee Harvard assembled to fulfill its constitutional duty "never really got 'off the ground,'" meeting only a few times before being disbanded. *Id.* Its next two attempts rubber-stamped Harvard's conclusion that it lacked a viable race-neutral alternative to affirmative action. *Id.* at 152-53. No wonder—not only did the committees "work[] with Harvard's attorneys," who were simultaneously defending against this litigation, their reports were even "*drafted* by Harvard's attorneys." *Id.* at 153 (emphasis added). After fifteen years of inaction, an admission that Harvard had race-neutral alternatives would amount to a confession that it violated *Grutter*. Harvard's word that this paltry consideration was "serious" and "good faith" alone does not make it so.

2. Harvard has workable race-neutral alternatives. SFFA's expert calculated that "Simulation D"—eliminating the sizeable tips given to applicants who are legacies and the children of donors, faculty, or staff, and increasing the tip for low-income applicants—achieves Harvard's interests in a diverse student body *better* than do their current race-conscious practices. Under Simulation D, the total

proportion of black, Hispanic, Asian, and other non-white students at Harvard would rise. *SFFA*, 397 F.Supp.3d at 182. The percentage of students from an "economically disadvantaged background" would skyrocket, from 12% to 49%. *Id.* And *intra*-racial diversity would increase: more of the "non-white students in Harvard's class [would] com[e] from modest socioeconomic circumstances." *SFFA*, 980 F.3d at 178.

The lower courts accepted Harvard's objections to this plan at face value. This was inappropriate—reviewing courts owe "no deference" to university's own judgments about the viability of race-neutral alternatives. *Fisher I*, 570 U.S. at 311. Under searching judicial review, these objections fail because Harvard demands that any alternative to its naked racial sorting replicate its existing student body *exactly*. But this Court requires race-neutral alternatives be only "workable," not "perfect," and that they be achievable at "tolerable," not "zero," administrative expense. *Grutter*, 539 U.S. at 339; *Wygant*, 476 U.S. at 280 n.6. Under this test, SFFA's alternative succeeds.

Harvard complains that Simulation D would "sacrifice the academic strength of its class." *SFFA*, 397 F.Supp.3d at 201. There is scant evidence for this conclusion. Admitted students' average high-school GPA would remain unchanged. *SFFA*, 980 F.3d at 193. Admitted students' average SAT score would dip slightly: about 60 points, from 2244 to 2180. *Id.* at 193-94. This is a miniscule change in percentile terms (<1%). *See SAT Percentile Ranks for Males, Females, and Total Group*, CollegeBoard (2015), https://perma.cc/C2AB-VPMG. And Harvard has eliminated the standardized-test requirement entirely for six classes and counting. *Admissions Update for the 2023-2026 Application Cycles*, Harv. Coll.,

https://perma.cc/7LWH-AZ6V. Harvard's belief that it can recruit sufficiently strong students without the SAT *at all* severely undermines its argument that a minor variation in average SAT scores demonstrates an intolerable drop-off in academic strength. Harvard readily acknowledges that there are far more applicants with "exceptional academic credentials" than it can admit. *SFFA*, 397 F.Supp.3d at 134. Simulation D adjusts how Harvard chooses from *within* that candidate pool but does not require it to choose from *outside* of it.

Harvard next argues that the removal of the tip for children of donors and faculty and minor changes in the numbers of students pursuing certain majors constitute "sizeable administrative expenses." *SFFA*, 980 F.3d at 194. Harvard predicts that faculty would depart and donors stop giving should their children no longer be preferentially admitted. *SFFA*, 980 F.3d at 194. This is rank speculation—Harvard has never tested these changes. Harvard is a world-class university—by many measures, the best in the world. Its intellectual heft and global prestige cast doubt on its claims that it could not attract top-flight faculty without preferences for their children. Likewise, donors derive substantial reputational and instrumental benefits from their donations. *See, e.g.*, *Charitable Giving and Universities and Colleges*, Ass'n of Am. Univs. (Mar. 2014), https://perma.cc/A8WS-RD4K.

Moreover, Harvard is the wealthiest university in the world. *See* Derek Choi & Jessica Zhu, *A Guide to Harvard's Endowment*, Harv. Crimson (Sept. 23, 2016), https://perma.cc/VC5H-2PSF. A few forgone donations, or shuffling a few seats from humanities to engineering classes, hardly constitute a prohibitive expense justifying the use of racial preferences.

Finally, Harvard argues that Simulation D would decrease black representation in its student body from 14% to 10%. *SFFA*, 397 F.Supp.3d at 182. This drop alone cannot sustain Harvard's objection—a declaration that Harvard has a minimum black enrollment percentage between 10% and 14% would constitute an admission of an unconstitutional quota. But its argument that *any* decrease in black enrollment would be intolerable to Harvard because it would exacerbate "feelings of isolation and alienation among racial minorities" is precisely such a declaration. *Id.* at 183. This argument also ignores that total representation of said "racial minorities" *increases* under Simulation D. Finally, this argument violates *Grutter*'s command that universities must consider "all pertinent elements of diversity" an applicant offers, not just race. 539 U.S. at 334. The increase in the representation of black students "who are truly underprivileged," *id.* at 354 n.3 (Thomas, J., concurring in part and dissenting in part), serves this interest. Incredibly, the lower courts viewed this increase in economically disadvantaged minority students as a *negative*. *See SFFA*, 980 F.3d at 178 ("[U]sing socioeconomic status as a proxy for race would result in many non-white students in Harvard's class coming from modest socioeconomic circumstances. Achieving racial diversity in this way would . . . undermin[e] rather than advance[e] Harvard's diversity-related educational objectives."). This focus on Simulation D's impact on race alone "limit[s] . . . the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." *Grutter*, 539 U.S. at 338. This was in error.

* * *

The lower courts permitted Harvard to discriminate against Asian-Americans, to racially balance its class, to treat an applicant's racial identity as their defining feature, and to eschew race-neutral alternatives on paper-thin and self-contradictory rationales. This cannot stand. If *Grutter* does not permit such rampant abuse of racial classifications, this Court should say so. If *Grutter* does, then it too should be overruled.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the First Circuit should be reversed.

Respectfully submitted.

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* *Petitioner and Respondent counsel jointly dedicate their briefs to the memory of Holden Thomas Tanner (YLS '21), a cherished mentor and an irreplaceable friend.*