Nos. 20-1199 & 21-707

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,

Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the First and Fourth Circuits

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BRIEF OF THE CALIFORNIANS FOR EQUAL RIGHTS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

In 1996, California passed Proposition 209 (the California Civil Rights Initiative), amending its Constitution to bar the state and its subdivisions from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[2] In 2020, the California legislature proposed removing this fundamental protection from the state Constitution ("Prop. 16"), to re-authorize state colleges (along with other subdivisions) to engage in racial discrimination (in admissions, as well as in hiring and contracting). The authors of Prop. 16 knew that passage would halve the number of Asian students at the state's flagship schools; seeing this as a feature, rather than a bug, one proponent brushed aside objections to such a wholesale, racial disqualification of Californians, citing "even greater concerns" of preferred ethnicities.[3]

Californians overwhelmingly rejected Prop. 16 at the ballot box. The veterans of the successful 2020 fight to preserve the California Civil Rights Initiative, many of them parents of young Californians who

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[1] All parties have provided blanket consent to the filing of amicus briefs, including this one. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

[2] Cal. Const. art. I § 31.

[3] Betty Chu, *Reject State-Sanctioned Discrimination, Reject Proposition 16*, THE ORANGE COUNTY REGISTER (Sep. 4, 2020), https://www.ocregister.com/2020/09/04/reject-state-sanctioned-discrimination-reject-proposition-16-betty-chu (last visited Feb. 26, 2021).

rightly perceived their children's future ability to compete on an equal footing to be at stake, then formed CFER.

The cases now before the Court present the same issues surrounding racial discrimination in college admissions CFER's members fought out previously in the court of public opinion. Their children didn't participate in these cases, below, but this Court's decision will decide whether schools nationwide will treat them (like the plaintiffs) as individual Americans with rights or as interchangeable racial units to be balanced.

SUMMARY OF ARGUMENT

The Court should reverse the lower courts and overturn *Grutter* and its progeny for four (4) reasons.[4, 5] First, Justice O'Connor apparently grounded *Grutter* (which the Court's only two relevant cases, since, nominally followed without reconsideration of its merits)[6] on a perceived "broad societal consensus" in

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[4] Several of these reasons parallel the arguments advanced in Gail Heriot and Alexander Heideman, *The Defeat of Proposition 16 in California and Mr. Dooley: Should the Supreme Court Take Note of "Th' Iliction Returns" the Next Time It Addresses Race-Preferential Admissions Policies*, 22 Fed. Soc. Rev. 72 (2021).

[5] *Grutter v. Bollinger*, 539 U.S. 306 (2003)

[6] *Fisher v. Univ. of Texas*, 570 U.S. 297, 313 (2013) (*Fisher I*") (". . . the parties do not challenge, and the Court therefore does not consider, the correctness of" *Grutter*'s determination that the educational benefits of a critical-mass of diversity qualified as a sufficiently compelling interest to satisfy strict scrutiny as long as "it was not a quota, was sufficiently flexible, was limited in time, and followed 'serious, good faith consideration of workable race-neutral alternatives.'") (internal citations omitted); and *Fisher v. Univ. of Texas*, 136 S. Ct. 2198, 2211 (2016) ("*Fisher II*") ("At no stage in this litigation has petitioner challenged the

favor of race-based admissions policies;[7] to the extent such a perception influenced *Grutter*, it substantively got the facts wrong – the American people then had (and, today, have) a broad-based, stable, national consensus against such policies. Second, events, including those in which CFER's members played a role, demonstrate that this broad-based, stable, national consensus remains strong (and may be strengthening), even in America's most diverse regions. Third, while this Court would rightly refuse to consider a popular consensus in *favor* of racial discrimination, this broad-based, stable (potentially strengthening), national consensus *against* racial discrimination in admissions *deserves* consideration by the Court—the public's repeated rejection of the arguments favoring racial discrimination in admissions renders untenable the contention that those interests are sufficiently compelling to survive strict scrutiny. Finally, the Court's three most recent cases concerning race-based school admissions require the application of nominally "strict" scrutiny,[8] while prescribing unique deference to higher-educators within that scrutiny[9] – that's an

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University's good faith in conducting its studies [of the alleged benefits of diversity], and the Court properly declines to consider the extrarecord materials" addressing this issue).

[7] Linda Greenhouse, *The Supreme Court: The Justices: Context and the Court*, N.Y. TIMES, June 25, 2003, at A1. This point is addressed *infra* at Section II.

[8] *Fisher II,* 136 S. Ct. at 2208 (citing *Fisher I*, 570 U.S. at 309 (internal citations omitted)); *Grutter*, 539 U.S. at 326. As those cases each involved state schools, they were decided as governed by the Equal Protection Clause of the Fourteenth Amendment.

[9] *Fisher II*, 136 S. Ct. at 2208 (citing *Fisher I*, 133 S. Ct. at 2419). While *Fisher II* omitted *Fisher I*'s authority for this proposition, *Fisher I* expressly drew this conclusion from *Grutter*, 539 U.S. at 328 and 330.

unworkable combination, incompatible with the rule of law.

For any and all these reasons, the Court should reverse the lower courts and overturn *Grutter* and its progeny.

ARGUMENT

I. *GRUTTER*'S POTENTIAL ACCEPTANCE OF FALSE CONSENSUS

The Court heard oral arguments in *Grutter* on April 1, 2003.[10] Justice O'Connor published *The Majesty of the Law*: *Reflections of a Supreme Court Justice* that same day.[11] In it, Justice O'Connor wrote both that "courts, in particular, are mainly reactive institutions" and that "change comes principally from attitudinal shifts in the population at large"—with it being "rare indeed" that a "legal victory—in court or legislature—[ ]is not a careful byproduct of an emerging social consensus."

At least one of America's best-informed authorities on the Court concluded that the book's text explained Justice O'Connor's reasoning in the *Grutter* opinion:

> For Justice O'Connor, the *broad societal consensus in favor of affirmative action in higher education* as reflected in an outpouring of briefs on Michigan's behalf from many of the country's most prominent

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[10] *Grutter v. Bollinger*, Oyez, https://www.oyez.org/cases/2002/02-241; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[11] *See* Publisher's Weekly, Book Notice: The Majesty of the Law: Reflections of a Supreme Court Justice, https://www.publishersweekly.com/9780375509254 (giving publication date as April 1, 2003).

> institutions was clearly critical to her conclusion . . . .[12]

Obviously, Linda Greenhouse was neither Justice O'Connor, nor a Metatron for Justice O'Connor. Her words were her own and cannot be ascribed to Justice O'Connor. Nonetheless, they may reflect a silent component of *Grutter*'s reasoning,[13] so they must be taken seriously. When so considered, they collapse as unsupported by the record and insupportable given clearly established facts.

A. No Record-Predicate for Existence of a Consensus at *Grutter*

To state the obvious: the *Grutter* record reflected no direct evidence of a public consensus in favor of race-based admissions at universities. Ms. Greenhouse cited only the number of *amicus* filings to support her contention.[14] If that were a meaningful metric, she'd be right: there were 69 briefs submitted in support of the university, with only 19 (four of which were filed at the petition stage) on the other side of the balance.

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[12] Linda Greenhouse, *The Supreme Court: The Justices: Context and the Court*, N.Y. TIMES, June 25, 2003, at A1 (italics supplied).

[13] Elements of *Grutter* suggest that Justice O'Connor may have placed exactly the importance on the amicus-balance suggested by Ms. Greenhouse. *Grutter*, 539 U.S. at 328–29 ("Public and private universities across the nation have modeled their admissions programs on Justice Powell's views on permissible race conscious policies.") (citing a pair of amicus briefs); *id.* at 332 ("The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*."); *id.* at 333–34 ("These benefits are not theoretical but real, as major American businesses have made clear….") (citing a pair of amicus briefs).

[14] Greenhouse, n. 12.

So, yes, if what mattered was the page count, the university administrators had the (literal) weight of (paper) authority on their side.

But the whole concept of comparing stacks of *amicus* filings to ferret out public preferences presupposes that the Court could have properly engaged in such outside-the-record, appellate fact-finding. Of course, it can't.[15]

Even if it could, comparing stacks of *amicus* filings would be a profoundly lax way to gauge "societal consensus." The *amicuses* supporting the university consisted largely of peers across academia pursuing parallel admissions schemes, government entities or government officials (also overwhelmingly practitioners of race-preferences), and coalitions of students, alumni, and associations of students and alumni from the same institutions, many of whom perceived themselves to be beneficiaries of the race-based policies at issue. No one would expect these self-interested groups' preferences to credibly align with those of the general public.

B. Demonstrable Consensus at the Time of *Grutter* Opposed Race-Based Admissions Policies

The universe of relevant public opinion polls provides a truer perspective. Here the evidence is consistent. At the issuance of *Grutter*, polls showed Americans to oppose race-based admissions policies, as they had consistently shown earlier.

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[15] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("[A]ppellate courts must constantly have in mind that their function is not to decide factual issues.").

As early as 1993, public opinion experts Paul Sniderman and Thomas Piazza wrote that race-based admissions policies were "controversial precisely because most Americans do *not* disagree about it."[16] As these scholars demonstrated, at all relevant times, opposition was strong, indeed, *firmer* and *less malleable* than the positions taken by poll respondents on other issues.[17]

Pre-*Grutter*, in a 2001 poll, the *Washington Post* also found overwhelming opposition to race-based admissions, with 94% of White and 86% of Black Americans saying that hiring, promotions, and college admissions should be based "strictly on merit and qualifications other than race/ethnicity."[18]

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[16] Paul Sniderman & Thomas Piazza, *THE SCAR OF RACE* (1993) (citing polls indicating that race-preferential admissions have little support among members of the public). In 1997, Dr. Sniderman, this time partnering with Edward G. Carmines, studied specifically the correlation between opposition to racial preferences and racial intolerance. Among the group found to be in the top one percent in racial tolerance, opposition to preferential treatment was very high: approximately 80 percent opposed preferential treatment in hiring, and more than 60 percent opposed quotas in college admissions. Sniderman and Carmines wrote that "the fundamental fact is that race prejudice, far from dominating and orchestrating the opposition to affirmative action, makes only a slight contribution to it." Paul M. Sniderman & Edward G. Carmines, *REACHING BEYOND RACE* 20–22 (1997).

[17] They found opinions changed less on this issue than on what they called "more traditional forms of governmental assistance for the disadvantaged." *THE SCAR OF RACE*, *supra* n. 16, at 142.

[18] *See* WASH. POST et al., *Race and Ethnicity in 2001: Attitudes, Perspectives, and Experiences* 22 (2001), https://www.kff.org/other/poll-finding/race-and-ethnicity-in-2001-attitudes-perceptions ("In order to give minorities more opportunity, do you believe race or ethnicity should be a factor when deciding who is hired,

Directly on-point chronologically, Gallup polled the following question the year *Grutter* was decided (2003):

> Which comes closer to your view about evaluating students for admission into a college or university—applicants should be admitted solely on the basis of merit, even if that results in few minority students being admitted (or) an applicant's racial or ethnic background should be considered to help promote diversity on college campuses, even if that means admitting some minority students who otherwise would not be admitted?[19]

69% of Americans choose "solely on the basis of merit;" 27% thought race and ethnicity should be considered.

The accuracy of these polls is supported by the roughly contemporaneous actual election results on related matters. Twice over the decade before *Grutter*, states considered such ballot initiatives. Californians did so in 1996, when they passed the California Civil Rights Initiative. Washington State voters followed suit in 1998, passing (through Initiative 200) a law banning the state from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment,

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promoted, or admitted to college, or that hiring, promotions, and college admissions should be based strictly on merit and qualifications other than race or ethnicity?").

[19] Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, Gallup, July 8, 2016, https://news.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx.

public education, or public contracting."[20] There were no contemporaneous counterexamples.

C. Demonstrable Consensus Has Opposed Race-Based Admissions Policies Ever Since

These results were no fluke. Both polling and voting ever since *Grutter*'s release have mirrored them.

Gallup asked precisely the same question in 2007, 2013, and 2016.[21] Each time Gallup's result matched: Americans rejected admissions offices' consideration of race or ethnicity by a margin of at least 2 to 1.

Pew Research Center released its newest relevant polling in late April 2022.[22] 74% of Americans "say gender, race[,] or ethnicity . . . should *not* factor into admissions decisions," including "majorities of Americans across racial and ethnic and partisan groups." So say 79% of White adults, 68% of Hispanic respondents, 63% of Asians polled, 59% of Black Americans, 87% of Republicans, and 62% of Democrats.

These supermajority levels of support across all groups analyzed come as no surprise. Pew's previous parallel poll in 2019 showed the same pattern – 73% of Americans agreeing that race or ethnicity should play no role in admissions, including supermajorities

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[20] *See Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291 (2014).

[21] *See* n. 19, *supra.*

[22] *U.S. Public Continues to View Grades, Test Scores as Top Factors in College Admissions*, Vianney Gomez, Pew Res. Ctr. (Apr. 26, 2022), https://www.pewresearch.org/fact-tank/2022/04/26/u-s-public-continues-to-view-grades-test-scores-as-top-factors-in-college-admissions/.

across all races, ethnicities, and parties of at least 58%.[23] Indeed, the lowest registered supermajority across groups, like overall support, has increased by a point in the interim.

It's not just Pew and Gallup reaching these conclusions. *Every* credible poll over the years since *Grutter* apparently agrees. The Marquette Law School's national polling survey put support for the Court barring "the use of race as one of several factors in deciding which applicants to admit" at 75% in March 2022 and at 81% in September 2021 (again, majorities no smaller than 58% agreed in *every* racial, ethic, and partisan group analyzed).[24] Even pollsters expressly *supportive* of race-based decision-making have found comparable supermajority opposition – Blue Rose Research, a "passionate and progressive" collection of "engineers, machine learning engineers, and social scientists on a mission to make high quality research and testing widely available for the progressive community,"[25] polled "113 Democratic policies … since December 2020" to better advise candidates on what to emphasize in their messaging – they found support

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[23] *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, Pew Res. Ctr. (Feb. 25, 2019), https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions.

[24] *New Marquette Law School Poll National Survey Finds Near-Even Split of Approval of President Biden's Handling of Ukraine, Amid Sharp Partisan Divides in General and No Rebound in Decline in Black Support*, Charles Franklin (Mar. 31, 2022), https://law.marquette.edu/poll/.

[25] About – Blue Rose Research, https://blueroseresearch.org/about/.

for "Affirmative Action" to fall second-lowest of all such policies, with public support below 40%.[26]

No credible polling we've identified suggests differently. While one 2019 Gallup poll suggested increased support for "affirmative action" in the abstract,[27] Gallup later clarified both that: (a) it had not asked about support for admissions – or for any other – policies, at the time; and (b) when pollsters had, opposition rose to approximately 75%.[28] The only outliers suggesting public support, such as the Asian American Voter Surveys produced by Asian Americans Advancing Justice and related organizations, are plainly advocacy pieces, disproven by later events.[29]

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[26] *A Permanent CTC Expansion with a Sharper Means-Test Would Protect Poor Kids Better and Be More Popular*, Simon Bazelon and David Shor (Sep. 28, 2021), https://www.slowboring.com/p/a-permanent-ctc-expansion-with-a?utm_source=URL.

[27] *Americans' Support for Affirmative Action Programs Rises*, Jim Norman (Feb 27, 2019), https://news.gallup.com/poll/247046/americans-support-affirmative-action-programs-rises.aspx.

[28] *Affirmative Action and Public Opinion*, Frank Newport (August 7, 2020), https://news.gallup.com/opinion/polling-matters/317006/affirmative-action-public-opinion.aspx.

[29] In 2018, AAAJ co-sponsored a poll purporting to show that 66% of Asian Americans favored "affirmative action programs designed to help blacks, women, and other minorities get better access to higher education[.]" *2018 Asian American Voter Survey*, by APIAVote and AAPI Data, https://aapidata.com/wp-content/uploads/2018/10/2018-aavs-crosstabs-detailed-categories.html#by_ethnic_group. Then, in May 2020, the same organization co-signed onto an amicus brief at the 1st Circuit, supporting Harvard's discriminatory practices against Asian Americans, before producing a *2020 Asian American Voter Survey*, which purported to show both that, nationwide, 70% of Asian Americans favored "affirmative action programs designed to help blacks, women, and other minorities get better access to higher education" and that, in California, only 21% of Asian Americans

And the subsequent voting history runs consistent with the later polls. Voters in Michigan passed a parallel initiative in 2006.[30] Voters in Nebraska did the same in 2008.[31] In Arizona, in 2010.[32] In

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opposed Prop. 16. *See*, *2020 Asian American Voter Survey (AAVS)*, AAPI Data (Sep. 15, 2020), https://aapidata.com/2020-survey/ and *Proposition 16 and Affirmative Action in California: Plenty of Room for Persuasion*, Jennifer Lee and Karthick Ramakrishnan (Sep. 25, 2020), https://aapidata.com/blog/2020-prop16-affaction/, respectively. The last was extensively tested against actual voting results by academics at UCLA, who "s[aw] indications" that "Asian Americans largely joined whites to oppose" Prop. 16, with 54% of voters in "high-density Asian American . . . precincts" opposing Prop. 16. *See*, *Prop. 16 Failed in California. Why? And What's Next*, Jessica Wolf and Melissa Abraham (Nov. 18, 2020), https://newsroom.ucla.edu/stories/prop-16-failed-in-california and *From Affirmative Action to Gig Economy, Racial Differences in Support for California Propositions in the 2020 Election*, Jessica Lee, Nathan Chan, and Natalie Masuoka (Feb. 17, 2021), https://www.aasc.ucla.edu/resources/policyreports/fromaffirmativeactiontogigeconomy.pdf.

[30] *See generally* Carl Cohen, *The Michigan Civil Rights Initiative and the Civil Rights Act of 1964*, 105 Mich. L. Rev. First Impressions 117 (2006).

[31] *Official Results of Nebraska General Election – November 4, 2008*, Neb. Sec'y of State (2008), https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2008/2008%20General%20Canvass%20Book.pdf; Melissa Lee, *Affirmative Action Ban Passes*, Lincoln J. Star, Nov. 5, 2008, at 7A.

[32] *State of Arizona Official Canvass: 2010 General Election – November 2, 2010*, Ariz. Sec'y of State (2010), https://apps.azsos.gov/election/2010/General/Canvass2010GE.pdf; *Affirmative-Action Ban is a Winner at Ballot Box*, Ariz. Daily Star, Nov. 3, 2020, at A10.

Oklahoma, in 2012.[33] Only in Colorado in 2008 has such a statewide initiative *ever* failed.[34]

D. Consensus Clear and Opposed to Racial Admissions

No "consensus" supports or ever supported race-based admissions policies. Far from it. They were imposed over the broad-based, stable opposition of the American people. Where voters had access to a referendum process, they almost always overturned them. Americans overwhelmingly reject the supposed "consensus" in favor of race-based admissions reported by Ms. Greenhouse as accepted by Justice O'Connor.

II. BALLOT INITIATIVE HISTORY OVER RECENT CYCLES DEMONSTRATES THAT AMERICA'S BROAD-BASED, STABLE, NATIONAL CONSENSUS REMAINS STRONG (AND STRENGTHENING), EVEN IN AMERICA'S MOST DIVERSE REGIONS

The most recent related ballot initiative results predictably follow suit.

A. California 2020: Electorate Refuses to Reauthorize Public Discrimination by Defeating Prop. 16

On November 3, 2020, California voters overwhelmingly voted to retain the California Civil Rights

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[33] *Federal, State, Legislative and Judicial Races General Election — November 6, 2012*, Okla. State Election Bd., https://www.ok.gov/elections/support/12gen_seb.html (last visited Nov. 23, 2020); Silas Allen, *State Colleges Prepare for Affirmative Action Ban*, OKLAHOMAN, Nov. 8, 2012, at 7A.

[34] Tim Hoover, *Amendment 46 Fizzling Out*, Denver Post, Nov. 6, 2008, https://www.denverpost.com/2008/11/06/amendment-46-fizzling-out.

Initiative in their state Constitution, rejecting Prop. 16 by 57.2% to 42.8%.[35] A wider majority of Californians voted to *retain* Proposition 209 in 2020 than voted to *adopt* it in 1996.[36]

California has one of America's most racially diverse populations.[37] It has grown far more diverse since 1996.[38] When given the chance to *permit* public institutions to discriminate against or grant preferential treatment to persons on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting, today's Californians said "no," more loudly and emphatically than did 1996's Whiter, more homogenous California.

They did so despite widespread agreement among the state's ruling class that they should vote otherwise. Prop. 16 flew out of the state's legislature, garnering more than two thirds of the vote in each house. Influential government officials, businesses, newspapers, and advocacy organizations endorsed it.[39]

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[35] Nov. 3, 2020, Gen'l Election State Ballot Measures, https://elections.cdn.sos.ca.gov/sov/1996-general/votes-for-against.pdf (last visited May 4, 2022).

[36] *Compare* n. 35, supra, with *Vote for and Against Statewide Ballot Measures and Const. Amends., November 5, 1996*, Cal. Sec'y of State, https:// elections.cdn.sos.ca.gov/sov/1996-general/votes-for-against.pdf (last visited Feb. 25, 2021)

[37] Adam McCann*, Most and Least Diverse States in America*, WalletHub (Sep. 9, 2020), https://wallethub.com/edu/most-least-diverse-states-in-america/38262 (last visited Feb. 25, 2021).

[38] *See A Quick Look at California's Changing Demographics*, LAist (Mar. 6, 2020) https://laist.com/latest/post/20200306/california-demographic-change-1970-to-now (last visited Feb. 25, 2021).

[39] *Endorsements*, VOTEYESONPROP16, https://voteyesonprop16.org/endorsements/ (last visited Nov. 23, 2020) (listing among the

They "dwarfed their opponents in fundraising by nearly a 14-1 margin."[40] Big businesses and big labor unions showered money on the "Yes on 16" campaign, including Pacific Gas & Electric ($250,000), Kaiser Foundation Health Plan, Inc. ($1,5000,000), United Domestic Workers of America Issues PAC ($100,000), Saleforce.com, Inc. ($375,000), SEIU Local 2015 Issues PAC ($50,000), and Genentech USA ($100,000).

By contrast, the opposition to Prop. 16 operated on a shoestring. Its volunteers (many of them Asian American, more often than not Chinese immigrants or the children of Chinese immigrants, who correctly understood that Prop. 16 and the admissions programs its backers sought—programs likely to parallel those utilized by Harvard and UNC —targeted the future of their children) organized car rallies during the pandemic and distributed yard signs. They used Facebook, Twitter, Instagram, WeChat, YouTube, and TikTok. They got out word of what, behind the pretty

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many prominent endorsers: now–Vice President Harris, now-Sec. of Transp. Pete Buttigieg, U.S. Sen. Dianne Feinstein, now-U.S. Sen. State Alex Padilla, Gov. Gavin Newsom, U.S. Rep. Karen Bass, the mayors of Los Angeles and San Francisco, Tom Steyer, several local governments, the *New York Times*, the *Los Angeles Times*, the *San Francisco Chronicle*, two co-founders of Black Lives Matter, the AFL-CIO, the Anti-Defamation League, the Cal. Dem. Party, the Cal. Teachers Association, the Natural Resources Defense Council, Sierra Club Cal., the ACLU of Cal., several chambers of commerce, the San Francisco 49ers, the San Francisco Giants, Twitter, Uber, Facebook, United Airlines, Wells Fargo, Yelp, and Instacart).

[40] Thomas Peele and Daniel S. Willis, *Yes on Prop. 16 Has Big Fundraising Lead in Effort to Restore Affirmative Action in California*, EDSOURCE (Oct. 30, 2020), https://edsource.org/2020/yes-on-prop-16-has-big-fundraising-lead-in-effort-to-restore-affirmative-action-in-california/642647 (last visited Nov. 23, 2020).

phrases, Prop. 16 would do: reauthorize racial discrimination in education, expressly and primarily to the detriment of Asian Americans.

Since the vote, apologists have attributed the loss to a distracting election cycle, voters' inability to keep track of issues, and "abundant misinformation concerning affirmative action."[41] But the data show that Californians of almost every stripe dislike racial preferences. About 1/3 of voters who supported President Biden's election rejected Prop. 16.[42] Evidence strongly suggests that the bipartisan majority solidly rejecting Prop. 16 included majorities of each subset of the more than 90% of Californians labeled by demographers as White, Asian American, Pacific Islander, or Latino/ Hispanic.[43]

Strategies 360's post-election poll for the "Yes on 16" campaign debunked the notion that voters didn't understand Prop. 16. It first asked whether respondents thought "the proposal to permit government decision making policies to consider race, sex, color, ethnicity, or national origin in order to address diversity by repealing constitutional provision prohib-

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[41] Jeremy Bauer-Wolf, *California Vote Signals Affirmative Action Remains Divisive*, EDUCATION DIVE, Nov. 4, 2020, https://www.educationdive.com/news/california-vote-signals-affirmative-action-remains-divisive/588433/ (last visited Feb. 25, 2021).

[42] Althea Nagai, *Race, Ethnicity, and California Prop 16*, CTR. FOR EQUAL OPPORTUNITY 13 (2020), https://www.ceousa.org/attachments/article/1380/California%20Proposition%2016.pdf.

[43] For example: Liz Peek, *Hispanics Shock Democrats in Deep Blue California*, THE HILL (Nov. 20, 2020), https://thehill.com/opinion/education/526642-hispanics-shock-democrats-in-deep-blue-california (last visited Feb. 25, 2021) ("[E]very single majority-Hispanic county voted against it.").

iting such policies" was a good or bad idea. Only 33% thought it was a good idea, with 44% responding that it was a bad idea and 22% admitting to being unsure. Respondents were next told:

> Sometimes the language on the ballot can be confusing, so here is a little more information about Prop[.] 16. California law currently bans the use of policies and practices within government that seek to include particular groups based on their race, gender, ethnicity, and national origin in areas in which they were underrepresented in the past such as education and employment. In order to address issues of diversity and representation, Prop 16 would have removed this ban and allowed state and local governments to optionally consider factors like race, gender, ethnicity, and national origin in college admissions, public employment, and public contracting. These programs would still be subject to federal laws, meaning that any quota systems would have remained illegal.
>
> Now that you have a little more information, do you think Prop[.] 16 was a good idea or a bad idea?[44]

The gap between those who viewed it as a good idea and those who viewed it as a bad idea barely changed: 37% now viewed it as good idea, while 47% considered it a bad one. Interestingly, African American support for the idea *dropped* and opposition *increased*. Support

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[44] *California Statewide Adults, Ages 18+, Conducted November 4–15, 2020*, STRATEGIES 360 (2020), https://www.strategies360.com/wp-content/uploads/2020/11/20-665-Nov-CA-Community-Post-Elect-Survey-Toplines.pdf.

changed moderately among Americans scored as Asians or Pacific Islanders, while their opposition significantly increased.[45]

Californians simply voted consistent with America's long-standing, stable, broad-based antipathy to race-based admissions programs. Like most Americans, California voters—including many who consider themselves left-of-center—have long known and understood how racial preferences work. They just don't like them. Apparently, they share the view, expressed as the *Argument Against Proposition 16* in the Official Voter Information Guide distributed to all voters through the mail, that the kind of discrimination Prop. 16 would have legalized was "poisonous."

As it stated, echoing this Court's opinion from *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*,[46] "The way to stop discriminating is to stop discriminating." "Not every Asian American or White is advantaged," just as "[n]ot every Latino or Black is disadvantaged." Pretending otherwise only "perpetuate[s] the stereotype that minorities and women can't make it unless they get special preferences."[47] It took no great insight to admit these points, while also admitting that California

> also has men and women—of all races and ethnicities—who could use a little extra

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[45] *Id.*

[46] 551 U.S. 701, 748 (Roberts, C.J.) (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

[47] Ward Connerly, Gail Heriot & Betty Tom Chu, Argument Against Proposition 16, Official Voter Information Guide: California General Election: Tuesday, November 3, 2020 29 (2020), https://vig.cdn.sos.ca.gov/2020/general/pdf/complete-vig.pdf.

> break. Current law allows for "affirmative action" of this kind so long as it doesn't discriminate or give preferential treatment based on race, sex, color, ethnicity or national origin. For example, state universities can give a leg-up for students from low-income families or students who would be the first in their family to attend college. The state can help small businesses started by low-income individuals or favor low-income individuals for job opportunities.[48]

This common-sensical position resonated with Californians, even while staying true to the promise of the Fourteenth Amendment. Californians understood that they could continue to have their state's colleges serve as the greatest engine of advancement the world has ever known, without reembracing the policies of the Yellow Scare and falling back into the race-baiting traps of yesteryear.

B. Washington State 2019: Electorate Refuses to Reauthorize Public Discrimination by Defeating Proposition 1000

Like California, Washington State lies on the Left Coast in more than the geographic sense. Politically, it is among the nations' most progressive havens.[49] Demographically, it, too, is among our more diverse

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[48] *Id.*

[49] *See Political Ideology by State*, Pew Research Center (2014), https://www.pewforum.org/religious-landscape-study/compare/political-ideology/by/state/ (ranking Washington tied for 4th).

states, and it, too, has become progressively more diverse over the last 2 decades.[50]

Just as California voters had company in banning discriminatory admissions policies in the 1990s, they share the distinction of rejecting an effort to repeal that protection today. Washington State voters did the same in 2019.[51]

C. Revealing Preferences of Washington State's Backers of Discrimination: Retreat from Pursuit of *Any* Vote on Restoration of Racial Preferences

While advocates of discriminatory admissions in Washington were keen for a third round and attempted to put the matter on the ballot again, they failed to find even the minimal number of signatures necessary before the December 30, 2020 deadline to start the initiative process this cycle.[52] Instead,

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[50] For first, *see* Adam McCann, *Most and Least Diverse States in America*, WalletHub (Sep. 9, 2020), https://wallethub.com/edu/most-least-diverse-states-in-america/38262 (last visited Feb. 25, 2021); for second, *compare Washington 2000: Census 2000 Profile*, U.S. Census Bureau (Aug. 2002), https://www.census.gov/prod/2002pubs/c2kprof00-wa.pdf (last visited Feb 26. 2021), and *Population by Race*, Wash. Office of Fin'l Mgt., https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/population-changes/population-race (last visited Feb. 26, 2021).

[51] *Referendum Measure No. 88*, Wash. Sec'y of State (Nov. 26, 2019, 4:55 p.m.), https://results.vote.wa.gov/results/20191105/state-measures-referendum-measure-no-88.html; Joseph O'Sullivan, *With Nearly All Ballots Counted, Voters Reject Washington's Affirmative-Action Measure*, Seattle Times, Nov. 12, 2019, https://www.seattletimes.com/seattle-news/politics/with-nearly-all-ballots-counted-voters-reject-washingtons-affirmative-action-measure.

[52] E-mail from WA Asians for Equality dated Dec. 31, 2020 (on file with CFER's executives).

recognizing the unpopularity of their proposal, the supporters of restoring racial preferences moved to pressuring Washington's Governor to issue an executive order, reinterpreting state law and reimposing race-based decisionmaking, under the pretense that such an order could legalize state schools considering "race, sex, color, ethnicity[,] and national origin" "to admit a lesser qualified candidate over a more qualified candidate," "as long as these are no[t] the sole factors used" to admit under-qualified applicants.[53]

Even more tellingly, despite Governor Islee's public embrace of the concept and recission of his predecessor's executive order effectuating Initiative 200,[54] his replacement for it refused to openly re-embrace race-based discrimination in admissions, instead merely "direct[ing]" the preparation of a report on demographics and options.[55]

Both supporters' tactical shift to a strategy that required no public consent to the reimposition of race-based admissions and the Governor's refusal to go further than symbolic action underscore how widely

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[53] Washington Equity Now!, *Urge Governor Inslee to Sign the EQUITY NOW! Executive Order to Rescind Governor's Directive 98-01*, https://waequitynow.com (last visited Dec. 2, 2021).

[54] *Inslee Signs Executive Order for Equity in Public Contracting and Announces Intention to Rescind Directive 98-01*, Wa. Gov. Inslee (Jan. 7, 2022), https://www.governor.wa.gov/news-media/inslee-signs-executive-order-equity-public-contracting-and-announces-intention-rescind.

[55] *EO 22-02: Achieving Equity in Washington State Government*, Wa. Gov. Inslee (Jan. 17, 2022), https://www.governor.wa.gov/sites/default/files/exe_order/22-02%20-%20Equity%20in%20State%20Government%20%28tmp%29.pdf.

acknowledged the deep unpopularity of the proposed policy really is.

D. Consensus Clear and Opposed to Racial Admissions

America's most diverse, most progressive states remain firmly part of the national consensus (embodied in the Equal Protection Clause, properly understood) against race-based admissions. The Court should bring its jurisprudence back into accord with the mainstream, bipartisan majority of the American people's settled understanding of propriety and the law.

III. PROPRIETY OF CONSIDERING AMERICAN PUBLIC'S BROAD-BASED, STABLE, NATIONAL CONSENSUS AGAINST RACIAL ADMISSIONS POLICIES

Much of the foregoing addresses the long-standing, broad-based, American consensus against race-based admissions (and the apparent misapprehension to the contrary that may have infected *Grutter*). A fair objection would be that none of this should matter to the Court—after all, "[f]ew would quarrel with" the proposition that "the Court must take care to render decisions 'grounded truly in principle,' and not simply as political and social compromises."[56] Indeed, "the Court's duty is to ignore public opinion and criticism on issues that come before it[.]"[57] And it is (or should be) error for Americans to imagine that the Court is "engaged not in ascertaining an objective law but in

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[56] *Planned Parenthood v. Casey*, 505 U.S. 833, 958 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

[57] *Id.*

determining some kind of social consensus."[58] Yet, CFER raises these issues both because: (a) as discussed above, the *Grutter* opinion appears to *feed* this error (compounding it with factual error at that); and (b) this *one* setting arguably presents the exception that proves the rule.

It is one thing when the Court ignores public opinion that *favors* the kind of discrimination barred by the Fourteenth Amendment. That's what courts are supposed to do: ignore the passions of the moment, exercise their independent judgment of what law requires, and ensure that Americans' rights are not tossed aside by discriminatory policies without exceedingly rare, truly compelling justifications.[59] But *Grutter* presents the opposite scenario: the public isn't just *unconvinced* that the argument for race-based admissions is compelling, it affirmatively rejects that argument by an overwhelming margin.

Acknowledging a stable, broad-based, national consensus *in harmony* with the clear language of the Equal Protection Clause, from which prior precedent departed, is consistent with the judicial duty to follow the law instead of the passions of faction. The purpose of strict scrutiny is to create a strong presumption

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[58] *Id.*, 505 U.S. at 999 (Scalia, J., concurring in part and dissenting in part).

[59] The Federalist No. 78 (Alexander Hamilton) ("[I]ndependence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

against the legitimacy of even *popular* racial discrimination, to favor the race neutrality required by the Equal Protection Clause and preferred by the American people. Here, despite the usual norm, the Court should heed what Americans have been saying and voting for decades. Allowing *Grutter*'s error to survive and to continue to declare "compelling" what the public consistently rejects would be inexcusable.[60]

The fact that the public has consistently opposed race-based admissions policies for decades, as it continues to do, is reason enough to correct the lower-courts, rule that Harvard and UNC's policies violate federal law, and put an end to our decades' long departure from equally protecting college applicants.

IV. DEFERENCE MODEL ADOPTED BY THE COURT IN ITS *FISHER* CASES IS UNWORKABLE AND UNTENABLE

The Court developed the concept of strict scrutiny to assess the constitutionality of governments' post-Reconstruction use of race in policymaking.[61] Always and everywhere it applies, strict scrutiny requires a "compelling purpose" and "narrow tailoring."[62] Under

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[60] *See* Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy that Most Americans Oppose?*, 40 HARV. J. LEG. 217 (2003).

[61] *Fisher I*, 570 U.S. at 316 (Thomas, J., concurring) ("The Court first articulated the strict-scrutiny standard in *Korematsu v. U.S.*, 323 U.S. 214 (1944).").

[62] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 639 (6th ed. 2000). *See also* Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to*

strict scrutiny, it is the Court's job to conduct "a most searching examination."[63] The Court has only ever held three interests to satisfy that examination: (a) national security, in the *Korematsu* anti-precedent; (b) remedying the government's own historical discrimination, when there is "a strong basis in evidence for its conclusion that remedial action [is] necessary;" and (c) in this line of cases, the purported educational benefits of a diverse student body.[64]

Nominally, in *Grutter* and its progeny, the Court required exactly this same legal analysis. But this "strict scrutiny" is not like all other "strict scrutiny." Here, uniquely, out of respect for "a university's academic decisions," the Court announced that "[t]he . . . School's educational judgment" that producing "such diversity" as could only be achieved through race-conscious interventions "is essential to its educational mission is one to which we defer."[65]

Subsequently, the Court clarified in its *Fisher* cases that this deference to universities' academic judgment on the compelling nature of the interest served through race-discrimination would *not* extend to the accuracy of schools' judgment as to the sufficiency of

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a Compelling Need in a Policy Most Americans Oppose?, 40 HARV. J. LEGIS. (making same point).

[63] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1984) (plurality opinion)).

[64] *Fisher I*, 570 U.S. at 316–17 (Thomas, J., concurring) (citing for the first two, respectively, *Korematsu*, 323 U.S., and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant*, 476 U.S. at 277)).

[65] *Grutter*, 539 U.S. at 328.

the "narrow tailoring" of the racially discriminatory admissions programs adopted to serve those interests.[66]

The resulting scheme of bifurcated deference is both unworkable and untenable as a consistent application of the principals this Court applies across the rest of its strict-scrutiny jurisprudence.

A. Deference Model Unworkable: Bifurcation of Deference, Under Different Standards, Invites Gamesmanship and Discrimination

Mike Tyson famously observed that "Everyone has a plan until they get punched in the mouth."[67] The Court's *Fisher* bifurcation is exactly the kind of plan that evaporates when actual litigation of a race-conscious admissions policy punches it in the mouth. At a functional level, as demonstrated both by the lower courts' application of its requirements, here, and consideration of how it would have applied to the foundational case giving rise to strict scrutiny, on its first contact with reality, the *Fisher* bifurcation collapses into an incoherent, unprincipled mush. As chains are no stronger than their weakest links, judicial scrutiny is no more strict than its most forgiving step.

To see why, imagine strict scrutiny to be the analytical equivalent of a balloon in the hand of a clown at a birthday party. Just as the clown has two hands on the balloon and can squeeze either, a court

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[66] *Fisher I*, 570 U.S. at 311.

[67] Mike Bernadino, *Mike Tyson Explains One of His Most Famous Quotes*, South Florida Sun Sentinel (Nov. 8, 2012), https://www.sun-sentinel.com/sports/fl-xpm-2012-11-09-sfl-mike-tyson-explains-one-of-his-most-famous-quotes-20121109-story.html.

has two components of its strict-scrutiny analysis imposing pressure on a discriminating policy. The clown can put more pressure on either end of the balloon, without changing the amount of air in the balloon or the nature of the balloon. Just so, a court can put its emphasis in strict scrutiny onto either analyzing the compellingness of the interest asserted to justify a challenged policy or the narrowness of that policy's tailoring toward a compelling end. If both hands are on the balloon, either will work.

The facts of *Korematsu*, the case that gave rise to strict scrutiny in the first place, offer a model of how this should work, even if *Korematsu*'s failure to so let it work renders it one of the Court's most notorious anti-precedents. Civil Rights Commissioner Gail Heriot has asked, what "[w]as the supposed compelling interest" that justified the compelled evacuation "of all persons of Japanese ancestry (including many natural-born American citizens) from large portions of the United States[?]"[68] "Was the supposed compelling interest national security?" Was it "the need to remove nationals of enemy nations and their children or grandchildren from the country's vulnerable West Coast . . . and to put them in places where they could do little or no harm?" The difference matters, as "[i]f the latter, the actions [at issue] were clearly narrowly tailored and the analysis shifts to whether the governmental interest was truly compelling. If the former, the governmental interest is clearly compelling, and the analysis must center on whether the government's actions are narrowly tailored to serve that purpose." Either way, a traditional application of strict scrutiny

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[68] Gail L. Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle*, 2012-2013 Cato Sup. Ct. Rev. 63, 88 (2013).

would compel enjoining the policy (without twisting the proverbial balloon).

But *only* a traditional approach to strict scrutiny – the *Fisher* bifurcation would have required sufficient balloon-twisting to produce the same perverse result reached in *Korematsu*. Compelled deference to the definition of the interest and its compelling nature would have allowed only judicial scrutiny of the tailoring of the mass-deportation to the end served. Knowing this, the discriminating actors would have described their end as the latter –removal of aliens and their descendants from the potential theater of war. The courts, barred from letting the interest-analysis side of the balloon expand to address the difficulty, would have been forced to approve the internment.

This is what happened below in these cases. *Grutter* bars any scrutiny of the interest at issue, preventing the proverbial clown from placing any pressure on one end of the balloon, while *Fisher*'s instruction to nonetheless strictly scrutinize tailoring squeezes the other. The first end of the balloon simply expands in response, relieving the applied pressure without imposing any longterm constraint on the balloon at all. Just so, when the lower courts deferred in the definition of the allegedly "compelling" interests, they wound up finding that essentially *any* means adopted to accomplish them were narrowly tailored to their achievement. When *all* the content of the policy is pushable into the definition of the interest, a discriminating defendant's tailoring could never *not* satisfy "strict" scrutiny as "narrow," with or without judicial deference.

Without the available potential to independently assess the compellingness of the interest served, the

courts cannot meaningfully strictly scrutinize the tailoring of a policy to attain it. The lower courts couldn't and didn't – the First Circuit, for example, unable under *Fisher* to either consider what "level of racial diversity" would produce a "compelling" interest or to consider whether that interest was more or less compelling than other institutional goals (such as preserving an academic reputation or comparative advantages in recruiting faculty), only scrutinized whether race-neutral alternatives would have produced the same racial balance, without compromising anything else the school found important.[69]

Fisher bifurcation encourages discrimination by telling admissions departments that they can get away with anything, so long as they describe it as having been undertaken in the name of diversity. Any rule that is always defeated by gamesmanship is either unworkable as an honest enforcement mechanism of Constitutional requirements or a profoundly bad rule that intentionally undermines them.

B. Deference Model Unworkable: Third-Party Actions Remove Decisionmaking Authority from Those the *Grutter* Court Held Worthy of Deference, Threatening a Closed Feedback Loop Only This Court Can Break

As a factual matter, one should doubt that educational institutions have any discretion to determine whether racially balanced student populations have any educational benefits or to act on a conclusion that they do not. A sampling of accrediting agencies

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[69] *Students for Fair Adms. v. Pres. & Fellows of Harvard College*, 980 F.3d 157, 177-178, 193-195 (1st. Cir. 2020).

suggests that schools may be compelled to achieve a "diverse" student body even when they conclude that the racial balance of their students has no educational value at all.[70]

More pointedly, the recent trend among accreditors dramatically underscores that this threat is real and growing. The Standards Committee of the American Bar Association, for example, expressly "aims" its proposed alteration of the ABA Standards and Rules of Procedure for Approval of Law Schools "to achieve the effective educational use of diversity, the compelling state interest recognized in *Grutter*[.]"[71] To serve that end, it compels schools to "ensure the effective educational use of diversity by providing: (1) Full access to the study of law and admission to the profession to all persons, particularly members of underrepresented groups related to race and ethnicity; [and] (2) A faculty and staff that includes members of underrepresented groups, particularly those related

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[70] For example, at least some of Harvard and UNC's accrediting agencies require such diversity to be achieved, regardless of the opinions of the accredited institution on the alleged educational benefits of a racially balanced student body. *E.g.,* ABET Board of Directors, *ABET Statements on Inclusion, Diversity, and Equity* (Jun. 15, 2020), at https://www.abet.org/about-abet/diversity-equity-and-inclusion ("It is time for our collective practices, procedures, policies, regulations, standards and laws to reflect our priorities and drive for accountability around inclusion, diversity, equity and justice across the STEM community.").

[71] *Memorandum, Re: Final Recommendations: Definitions (7) and (8); Standards 206, 306, 311(c) and (e), and 405(b); and Rules 19 and 29*, The Standards Comm. (Feb. 10, 2022), p. 2, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/feb22/22-feb-council-final-recs-with-exhibit.pdf.

to race and ethnicity[.]"[72] A draft interpretive note stresses that "To ensure the effective educational use of diversity, a law school should include among its faculty, staff, and students members of underrepresented groups generally, but should be particularly focused on those groups that historically have been underrepresented in the legal profession because of race or ethnicity."[73]

The Court, in *Grutter*, deferred to educators' educational judgment of the benefits of diverse classrooms for students, while stressing that "diversity" meant something more than race. The accreditors then interceded, in nominal deference *to the Court*, curtailing the ability of university educators to exercise any independent judgment on this subject and compelling that all schools "ensure" "diversity," "particularly focused [on] race or ethnicity." Once the new rule takes effect, out of nominal deference to the Court's deference to educators' educational judgment, educators will be barred from exercising that judgment to reach any other conclusion. The feedback loop will be closed, with no party retaining an off-ramp, except this Court. *Grutter* will have created an environment in which the Court, alone, will retain the chance to rethink matters and end this experimental departure from equal protection.

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[72] *Id.*, at p. 4. While not addressed in depth, please note that the ABA is requiring race-conscious *hiring* in the service of nominal diversity, despite *Grutter*'s tight-focus solely on *admissions* and the Court's long-standing, unquestioned opinions banning race-based employment decisions by schools undertaken to produce matching demographics for students and faculty. *E.g., Wygant*, 476 U.S. at 275.

[73] *Id.*, at p. 5.

C. Deference Model Untenable: Deference to Discriminating Entities on Whether Discrimination is Justified Incompatible with Strict Scrutiny

Finally, as an exercise in strict scrutiny, deferring to a defendant simply makes no sense. Every policymaker asserts that its reasoning is compelling. Even the Topeka Board of Education did in *Brown*.[74] If the Court's "most searching examination" is limited to asking the perp whether it had a good reason, then the "most searching examination" requirement becomes no examination at all.

Such an approach makes a mockery of the Court's broader precedents and reduces the Rule of Law to little more than the punchline of a joke. It establishes that the law is for little people, whose betters in university administrations can ignore Congress's instructions and the people's ratified Constitutional amendments, since, after all, they know best. This is not a reasonable application of concepts of expertise and specialization; it is an enshrinement of oligarchy.

The Court should correct any such implication in its recent case law and re-establish that the judiciary will apply the same standards to its peers in academia that it does to both participants in government and the rest of the American people.

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[74] *Fisher I*, 570 U.S. at 320 (Thomas, J. concurring) ("[T]he argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's . . . . And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination . . . the alleged educational benefits of diversity cannot justify racial discrimination today.") (citing *Brown v. Board of Education*, 347 U.S. 483 (1954)).

CONCLUSION

The Court should reverse the decisions below and overturn *Grutter* and its progeny in their entirety.

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