Nos. 20-1199 & 21-707

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND 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

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS AND REPRESENTATIVES SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are members of the United States Senate and House of Representatives who are committed to the principle of equality under law as guaranteed by the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq. We hold diverse views about educational policy. But we all agree that no American should be denied educational opportunities because of race.

Amici are:

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Mitch McConnell (KY)
Marsha Blackburn (TN)
John Boozman (AR)
John Cornyn (TX)
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United States House of Representatives

Michelle Steel (CA)

Kevin McCarthy (CA)
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[1] Pursuant to Supreme Court Rule 37.3, counsel for all parties have submitted letters to the clerk expressing their blanket consent to *amicus curiae* briefs. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, besides *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

Under *Grutter v. Bollinger*, 539 U.S. 306 (2003), a college or university may adopt the "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." *Id.* at 343. Petitioner asks this Court to overrule *Grutter*. We agree.

Grutter is a constitutional anomaly. Decisions under the Fourteenth Amendment firmly establish that equal protection of the law includes the right to equal treatment regardless of one's race. Except for race-conscious college admissions, laws and policies dividing people by race are immediately suspect. They survive judicial scrutiny only when necessary to remedy the effects of an institution's past discrimination. Education has long taken center stage in the Nation's struggle to end racial inequality. With the narrow exception for remedial necessity, school districts may not assign children to a school based on their race. Yet under *Grutter*, colleges and universities are free to adopt admissions policies that prefer some races and disadvantage others. That is so even when an institution has never engaged in invidious discrimination or has effectively remedied its own past discrimination. However well-intentioned, those policies are untrue to the Constitution's guarantee of equality under law.

Harvard College and the University of North Carolina indisputably use race as an important consideration in deciding whom to admit. Record evidence suggests, in fact, that the challenged admissions policies may strive for racial balancing—an aim that is unconstitutional on its face.

Harvard's identity as a private institution confers no extra leeway to consider race in admissions. Title VI prohibits racial discrimination, and that prohibition is binding on Harvard as the recipient of millions in federal aid. The usual rule of heightened *stare decisis* for questions of statutory interpretation does not apply. It is unrealistic to expect Congress to revise a statute whose scope depends on this Court's interpretation of the Equal Protection Clause.

Race-conscious admissions decisions inflict a heavy toll on Asian-American students. Treating them differently because of their race is a stark departure from equal protection decisions issued early on by this Court, which guarded Asian immigrants from racial prejudice. And the burdens imposed on petitioner illustrate a wider trend. Asian-Americans are increasingly victimized by discriminatory practices.

Respondents' admissions policies intentionally divide applicants by race. In doing so, they harm Asian-American students and others, who are unfairly judged by their race rather than by individual merit. Under the Fourteenth Amendment and Title VI, those policies cannot stand.

ARGUMENT

I. EQUALITY UNDER THE LAW SHOULD BE THE CONSTITUTIONAL STANDARD FOR HIGHER EDUCATION ADMISSIONS NO LESS THAN FOR K-12 SCHOOLS.

A. The Fourteenth Amendment guarantees equality under the law for every American.

Petitioner challenges the admissions policies of respondents University of North Carolina, et al. under the Equal Protection Clause of the Fourteenth

Amendment. UNC Pet. i. Petitioner also challenges the admissions policies of UNC and Harvard College under Title VI. *See id.*; Harvard Pet. i. Since the statutory claim follows the constitutional right, the proper interpretation of the Equal Protection Clause will effectively decide both cases.

Analysis properly begins with the constitutional text. The Fourteenth Amendment to the Constitution declares, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Those spare and sweeping words should be seen in historical context. A constitutional guarantee of equality under law was, along with the other Reconstruction Amendments, [p]urchased at the price of immeasurable human suffering." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring). The price was paid in places like Gettysburg and Antietam, where "every drop of blood drawn with the lash [was] paid by another drawn with the sword." Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *reprinted in* Speeches and Writings, 1859–1865, at 687 (Don E. Fehrenbacher ed., 1989).

But its historical pedigree, while relevant, does not fix the outer limits of the Equal Protection Clause. Its guarantee is "framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 293 (1978) (op. of Powell, J.). For that reason, equal protection "cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.* at 289–90. Equal protection is emphatically not limited to "two classes," white and African-American. *Hernandez v.*

Texas, 347 U.S. 475, 477 (1954). All Americans are entitled to equality before the law.

"A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *accord Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) (statement of Black, J.) ("Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race.") (collecting citations). In the words of the Senator who introduced it, the Fourteenth Amendment "establishes equality before the law." Sen. Jacob Howard, *Cong. Globe*, 39th Cong., 1st Sess. 2764–67 (1866), *reprinted in* 2 The Reconstruction Amendments 189 (Kurt T. Lash ed., 2021); *accord Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (*Brown I*) ("The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.'").

The federal government is no less bound to avoid using racial classifications under the Court's reading of the Fifth Amendment Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). *But see United States v. Vaello Madero*, No. 20-303, slip op. at 1 (U.S. Apr. 21, 2022) (Thomas, J., concurring) (disputing *Bolling* and arguing that the Citizenship Clause of the Fourteenth Amendment "prohibit[s] the Federal Government from discriminating on the basis of race"). Laws discriminating on account of race are controlled by the same constitutional standard, regardless of which government adopts them. "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed

by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227.

Repeatedly, the Court has emphasized "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons* not *groups*." *Id.* (emphasis in original); *accord id.* at 230 (citing "the long line of cases understanding equal protection as a personal right"). Under this Court's decisions, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Id.* at 224. Keeping the focus on the person harmed by discrimination is critical. "[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual and its rejection of dispositions based on race or based on blood." *Id.* at 239 (Scalia, J., concurring) (citing U.S. Const. amend. XIV, § 1; *id.* amend. XV, § 1; *id.* art. III, § 3; *id.* art. I, § 9, cl. 8). It follows that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Id.* at 227; *accord Johnson v. California*, 543 U.S. 499, 505 (2005). Under that standard, racial classifications are valid only if they pursue compelling governmental interests through narrowly tailored means. *See Adarand*, 515 U.S. at 235. Applying the most demanding standard in constitutional law is imperative "to ensure that the *personal* right to equal protection of the laws has not been infringed." *Id.* at 227 (emphasis in original).

Taken together, these decisions establish a principle "virtually sacred to our Nation as a whole . . . that discrimination on the basis of race is odious and

destructive." *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

B. The full right to equal protection applies in primary and secondary schools.

Our national commitment to racial equality has been on full display in decisions addressing the conditions of public education. *Brown I*, 347 U.S. at 483, is rightly celebrated for declaring an end to *de jure* racial discrimination. Chief Justice Warren, writing for a unanimous Court, dismissed *Plessy v. Ferguson*, 163 U.S. 537 (1896), in two sentences of uncommon common sense. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown I*, 347 U.S. at 495. Dividing children by race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494. Racial segregation in public schools is, the Court concluded, "a denial of the equal protection of the laws." *Id.* at 495.

A follow-up decision confirmed that the Fourteenth Amendment demands "a system of determining admission to the public schools on a nonracial basis." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300–01 (1955) (*Brown II*). As the Court later explained, "[a]n unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983).

Brown's promise of equal educational opportunities came under scrutiny in *Parents Involved in Com-*

munity Schools v. Seattle School District No. 1, 551 U.S. 701 (2007). There, the Court invalidated school assignment policies adopted by Seattle and Jefferson County, Kentucky (which includes Louisville). In Seattle, students were classified as "white or nonwhite" as part of a system to "allocate slots in oversubscribed high schools." *Id.* at 710. Jefferson County divided schoolchildren between "black or 'other'" and used that classification "to make certain elementary school assignments and to rule on transfer requests." *Id.* Although the Louisville district had been subject to a judicial desegregation order, it had been dissolved before the litigation began. *Id.* at 715–16.

Chief Justice Roberts, writing for the Court, began his analysis with a basic principle. "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Id.* at 720 (citations omitted). Under that standard, the school districts had to show that "the use of individual racial classifications in the assignment plans . . . is 'narrowly tailored' to achieve a 'compelling' government interest." *Id.* Neither school district satisfied that test.

Only two interests have been accepted as compelling reasons to divide students by race, the Court explained. One is "remedying the effects of past intentional discrimination." *Id.* Seattle could not lean on that justification since it had never been legally segregated, and Jefferson County cured any taint of past discrimination when a court dissolved the desegregation decree governing it. *See id.* at 720–21. The other compelling interest is a narrowly tailored program to achieve "student body diversity" in higher education, as endorsed in *Grutter*. *Id.* at 722.

Simplistic conceptions of diversity, coupled with the use of race as a crude sorting device, doomed both the Seattle and Jefferson County policies. *See id.* at 723–24. Both districts likewise committed the cardinal sin of trying to preserve racial balance under the rubric of diversity. *Id.* at 726 (holding that the districts' racial classifications were "directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate"). That policies separating children by race were found invalid should be unsurprising. "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons." *Id.* at 747. In this historically resonant setting the Court concluded with a flourish: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748.

C. This Court has allowed colleges and universities to consider race in admissions.

The same degree of clarity has eluded the Court in its consideration of race-conscious admissions policies in higher education. In *Bakke*, an applicant to a state medical school challenged the validity of the school's admissions policy that reserved 16 out of 100 class placements for racial minorities. 438 U.S. at 275. Justice Powell's opinion reached conclusions somewhat in tension with each other.

On one hand, Justice Powell rejected the invitation to apply a lower standard to preferences intended to benefit historically disadvantaged groups. In his view, "[r]acial and ethnic distinctions of any sort are inherently suspect." *Id.* at 291. Any person injured by

such a distinction "is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.* at 299.

On the other hand, Justice Powell endorsed the limited use of race in university admissions. Race could be relevant, he explained, as part of a "program [that] treats each applicant as an individual in the admissions process." *Id.* at 318. He pointed to Harvard College as a model, though that reference turned out in retrospect to be ironic.[2] But whatever nuanced use of race he invited, Justice Powell strictly condemned policies aimed at achieving racial balance—"some specified percentage of a particular group merely because of its race or ethnic origin." *Id.* at 307. That, he wrote, is "facially invalid." *Id.*

In *Bakke* and since then, influential voices have advocated greater flexibility to implement race-conscious policies without rigorous judicial review. These voices insist that "[i]n order to get beyond racism, we must first take account of race." *Id.* at 407 (Blackmun, J., dissenting). But this Court has steadily rebuffed the invitation. *See*, *e.g.*, *Adarand*, 515 U.S. at 226 (declining to hold "'benign' racial classifications to a lower standard").

This brings us to *Grutter*. It held that "the Equal Protection Clause does not prohibit the [Michigan]

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[2] Critics later showed that the Harvard Plan was "*inherently capable* of gross abuse and . . . [was] *deliberately* manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions." Alan M. Dershowitz & Laura Hanft, *Affirmative Action & the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 385 (1979) (emphasis in original).

Law School's 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. Justice O'Connor, writing for the Court, deferred to the university's judgment that assembling "a diverse student body," composed of a "critical mass" of minority students, was "essential to its educational mission." *Id.* at 328, 330.

As for narrow tailoring, the majority opinion highlighted certain features that prevented the Law School's policies from becoming "a quota system." *Id.* at 334. Racial identity appeared as part of "a highly individualized holistic review." *Id.* at 337. Race counted toward "a broader assessment of diversity," *Parents Involved*, 551 U.S. at 723, and not as a means of "achiev[ing] racial balance"—a goal, the Court warned, that would be "patently unconstitutional." *Grutter*, 539 U.S. at 330. It found that Michigan's "race-conscious program does not unduly harm nonminority applicants." *Id.* at 341. And while race-conscious policies "must be limited in time," the Court accepted the Law School's vague assurance that race-conscious admissions would end "as soon as practicable." *Id.* at 342, 343. Given these features, the Law School's admissions policies passed muster under the Equal Protection Clause. *Id.* at 343–44.

D. Grutter *should be overruled.*

Grutter should be overruled, just as petitioner urges. Several reasons support its plea. Among them the following strike us as especially compelling:

1. *Grutter* is a constitutional outlier. It flies in the face of decades of decisions holding that "racial discrimination in education violates a most fundamental

national public policy, as well as rights of individuals." *Bob Jones Univ.*, 461 U.S. at 593. No one has convincingly explained why dividing schoolchildren by race is unconstitutional, while dividing young adults by race is permissible.

2. *Grutter* is vulnerable to abuse. Petitioner suggests that "universities have used *Grutter* as a license to engage in outright racial balancing." Harvard Pet. 3. Both Harvard and UNC appear to be committing that error.

Harvard's complex system of "tips" and "lops" serves, in part, to ensure that no racial group "is notably underrepresented or has suffered a dramatic drop off relative to the prior year." Harvard App. 136. Admissions figures for eight years, beginning with the Class of 2010, show that racial composition for African-American, Hispanic, and Asian-American students varied no more than 3%. *See* Br. for United States as Amicus Curiae at 12–13, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) (U.S. Br.). With 35,000 or so applicants, *see* Harvard App. 11, that level of stability is astonishing. Whether judged by the old methodology or the new, Harvard's admissions decisions evince what the United States characterized as "deliberate racial balancing." U.S. Br. at 12. And that is "patently unconstitutional." *Grutter*, 539 U.S. at 330.

UNC's record is likewise troubling. The University considers an applicant's race at "every stage" of the admissions process. UNC App. 51. It has the discretion to award a preference to "underrepresented" applicants. *Id.* 36–37. That term of art includes African-Americans, American Indians, Alaska natives, or Hispanics. *See id.* 15 n.7. Other groups, including

Asian-Americans, do not qualify for the preference. *See id.* 21. Through these race-conscious policies UNC seeks what it calls "the educational benefits of diversity." *Id.* 58. But *diversity* in UNC's parlance denotes representation by *underrepresented* racial groups—defined as the correlation between the percentage of students belonging to each enumerated race and the racial composition of North Carolina. *See id.* 15 n.7.[3] Diversity for UNC cannot mean a "critical mass of minority students," *Grutter*, 539 U.S. at 329, since its admissions policies make no attempt to pursue that goal. *See* UNC App. 54–55.

3. *Grutter* injures students who lose educational opportunities because of their race. That result offends the Equal Protection Clause, which guarantees "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Plyler v. Doe*, 457 U.S. 202, 222 (1982). In bitter contrast, the challenged admissions policies here erect artificial barriers that "inevitably harm[ ] students" who do not belong to favored racial groups. *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 410 n.4 (2016) (*Fisher II*) (Alito, J., dissenting).

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[3] UNC acknowledges that its "framework" for deciding which racial groups count as "underrepresented" originated with "a 1981 consent decree between the UNC System and the U.S. Department of Health, Education, and Welfare." UNC App. 15 n.7. But that consent decree expired long ago since the district court retained jurisdiction only until December 31, 1988. *See Adams v. Bell*, 711 F.2d 161, n.50 (D.C. Cir. 1983). Like the dissolved desegregation order in *Parents Involved*, 551 U.S. at 715–16, the defunct consent decree lurking behind UNC's admissions policies cannot justify its nonremedial use of race now. *See id.* at 720–21.

4. Retiring *Grutter* is urgent to discourage race-conscious policies in other settings. Its invitation to use race in college admissions—no matter how hedged around with qualifications—encourages government officials to adopt race-conscious policies in settings far afield from higher education. Such policies appear to be proliferating:

- On his first day in office, President Biden issued an executive order announcing "an ambitious whole-of-government equity agenda." Exec. Order No. 13,895, 86 Fed. Reg. 7009, 7009 (Jan. 25, 2021). *Equity* is defined in racial terms. *See id.* Federal agencies are directed to determine whether federal programs "perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups." *Id.*

- Congress adopted a measure extending loan forgiveness to farmers and ranchers economically injured by the COVID-19 pandemic—but only if they were "socially disadvantaged[.]" The American Rescue Plan of 2021, Pub. L. No. 117-2, 135 Stat. 12, § 1005 (2021). That phrase is code for a recipient's racial identity. *See* 7 U.S.C. § 2279(6), (7) (defining "socially disadvantaged farmer or rancher" and "socially disadvantaged group" in terms of race). Congress thus withheld critical financial relief during a national emergency because of race.

- Multiple States responded to COVID-19 by rationing medical treatments based on the patient's race. *See*, *e.g.*, N.Y. State Dep't. of Health, COVID-19 Oral Antiviral Treatments Authorized and Severe Shortage of Oral Anti-viral and Monoclonal Antibody Treat-

ment Products (2021) (directing healthcare providers that "[n]on-white race or Hispanic/Latino ethnicity should be considered a risk factor" when prioritizing a patient for life-saving COVID-19 therapies); *see generally* Shadi Hamid, *Race-Based Rationing is Real—And Dangerous*, The Atlantic (Jan. 30, 2022), https://www.theatlantic.com/ideas/archive/2022/01/race-based-covid-rationing-ideology/621405/ (discussing similar policies in Illinois, Minnesota, Missouri, Utah, and Wisconsin).

Grutter didn't cause these race-conscious policies, but it may have influenced them. This Court's decisions shape policy alternatives that decisionmakers consider across a wide range of areas. That is because this Court is a teacher—especially when it declares the Constitution's meaning. *See Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) ("[T]he law can be a teacher.").

For all these reasons, *Grutter* should be overruled. The same constitutional standard should control higher education that has controlled public schools since *Brown*.

II. TITLE VI BANS RACIAL DISCRIMINATION EXACTLY AS THE EQUAL PROTECTION CLAUSE DOES.

A. The text of Title VI confirms that Congress adopted the statute to end racial discrimination in federal programs and activities.

Respondents' admissions policies likewise offend Title VI. *See* Harvard Pet. i; UNC Pet. i. Section 601 of Title VI provides:

> 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.

The meaning is plain. Accepting federal aid obligates the recipient to avoid discriminating on the basis of race, color, or national origin. That prohibition applies to public and private universities alike since both accept federal assistance—as Harvard has acknowledged in the past. *See* (Nos. 02-241, 02-516), Br. of Harvard University et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger,* 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 399220, at *2 ("Because Title VI . . . forbids institutions that receive federal funds from engaging in racial 'discrimination,' the ability of private colleges and universities to exercise their institutional competence could well be dramatically compromised by any new limits this Court might place on state university admissions criteria or procedures.").

B. Title VI has the same meaning as the Equal Protection Clause.

This Court has consistently held that Title VI proscribes the same racial discrimination forbidden by the Fourteenth Amendment.

In *Bakke*, Justice Powell reviewed the legislative history of Title VI and discerned there "a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Bakke*, 438 U.S. at 284. He went further, noting that "supporters of Title VI repeatedly declared that the bill enacted constitutional principles" and evinced "the incorporation of

a constitutional standard into Title VI." *Id.* at 285, 286. He concluded that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287. Four other justices agreed. *See id.* at 328 (op. of Brennan, J., joined by White, Marshall, and Blackmun, JJ.) ("In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies . . . .").

Later decisions have reiterated that understanding. *See*, *e.g.*, *United States v. Fordice*, 505 U.S. 717, 732, n.7 (1992) ("the reach of Title VI's protection extends no further than the Fourteenth Amendment"); *accord Cannon v. Univ. of Chicago*, 441 U.S. 677, 711 n.48 (1979) (quoting Title VI's lead author, Senator Humphrey: "Title VI is simply designed to ensure that Federal funds are spent in accordance with the constitution and the moral sense of the Nation") (110 Cong. Rec. 6544 (1964)). The same principle—Title VI follows the Equal Protection Clause—figured in *Grutter* and in its companion case, *Gratz v. Bollinger*. *Grutter*, 539 U.S. at 343 (sustaining law school's "narrowly tailored use of race in admissions decisions" only because it satisfies the Equal Protection Clause); *Gratz*, 539 U.S. 244, 276 n.23 (2003) ("[D]iscrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.").

Reading Title VI as congruent with the Fourteenth Amendment holds special importance for Harvard. Harvard defends its admissions policies as consistent with *Bakke* and *Grutter*, not as remedial measures to correct past discrimination. Harvard Br.

Opp. 20 ("Harvard considers race only as this Court's precedents permit") (punctuation altered and emphasis removed). But if *Grutter* is overruled, as we urge, then the Equal Protection Clause would disallow the supposedly "holistic" use of race in college admissions. 539 U.S. at 337. Such a racial classification would be invalid unless an institution is required to remedy its own previous unlawful discrimination. *See Fordice*, 505 U.S. at 728. Without *Grutter* to prop them up, Harvard's admissions policies would offend Title VI insofar as they take into account an applicant's race.

C. Because Title VI is not subject to a stringent rule of stare decisis, the Court can apply the statute's central meaning in university admissions.

Harvard resists that conclusion. It insists that *stare decisis* poses a barrier that stands "particularly high here, for this case involves the application of a statute." Br. Opp. 25; *accord id.* (citing the principle that "stare decisis carries enhanced force when a decision[ ] . . . interprets a statute") (citing *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015)). Not so. A rule of heightened deference to precedent is misplaced.

No doubt, *stare decisis* serves important purposes. It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). But *stare decisis* is "pragmatic and contextual, not 'a mechanical formula of adherence to the latest decision.'" *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). The doctrine counsels respect for precedent but does not pose "an

inexorable command." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (internal quotation marks omitted). And surely *stare decisis* "isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (footnote omitted).

When the Court interprets the Constitution, *stare decisis* is "at its weakest." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Loosening the grip of precedent makes sense because an incorrect constitutional ruling "can be altered only by constitutional amendment or by overruling [the Court's] prior decisions." *Id.* (citation omitted). Precedents rooted in statutory interpretation are ordinarily entitled to greater deference, on the assumption that "Congress can correct any mistake it sees." *Kimble*, 576 U.S. at 456.

Applied here, these principles militate against the strong rule of *stare decisis* that Harvard invokes. Title VI is far from an ordinary statute since its contours are shaped by constitutional interpretation. Racial discrimination that violates the Equal Protection Clause thereby violates Title VI. *See Bakke*, 438 U.S. at 287; *Grutter*, 539 U.S. at 343; *Gratz*, 539 U.S. at 276 n.23. Congressional *amici* take this statute-follows-the-Constitution principle seriously. It makes little sense in the ordinary course for Congress to invest scarce legislative resources amending a statute whose meaning tracks the Court's constitutional interpretation.

Race-conscious admissions policies by colleges and universities accepting federal aid depend for their validity, in short, on whether *Grutter* remains sound. If it is overruled, as we urge, race-conscious admissions policies in higher education will simply return to "the familiar and well-established analytic approach

of strict scrutiny." *Parents Involved*, 551 U.S. at 745. Title VI will then extend the same approach to federal aid recipients.

Respondents' policies defy Title VI by intentionally using race when deciding whom to admit without the narrow tailoring required by precedent. Harvard's status as a private institution has no bearing on that outcome. Its status as a federal aid recipient obligates it to avoid racial discrimination, with exceptions that do not apply on the facts as documented below. Any discomfort with that obligation can be avoided, of course, by renouncing federal-taxpayer support.

III. ASIAN-AMERICANS ARE OFTEN VICTIMS OF DISCRIMINATORY POLICIES.

A. The record shows that Asian-Americans bear the brunt of respondents' admissions policies.

Respondents' violations of federal law are not cost-free: they impose outsized burdens on Asian-American[4] students. Admission to a highly selective university is a zero-sum phenomenon: class size limits the number of available places. Every place filled by a student because of race denies that place to a student whose merits are overlooked. "[P]roviding a boost to African-Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission." *Fisher II*, 579 U.S. at 410 n.4 (Alito, J., dissenting).

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[4] We acknowledge that the term "Asian-American" is remarkably imprecise. It treats as a single group people from widely disparate cultural, ethnic, linguistic, and religious backgrounds. We use the term only because the challenged admissions policies classify students in that way.

Consider how Harvard's policies impact Asian-American applicants. They form the group most likely to secure a coveted "1" or "2" score on Harvard's academic and extracurricular scales. Harvard App. 172. Yet they are the *least* likely to score well in personal ratings. *Id.* at 172–73. This disparity suggests that admissions officers offset Asian-Americans' academic and extra-curricular achievements by penalizing them in the subjective portions of the application.

Harvard's own investigation in 2013 found "negative effects" that worked against Asian-Americans. *Id.* at 148. Investigators were concerned enough that their internal memo warned against sharing the analysis publicly. *See id.* Still, Harvard's administrators professed to be untroubled by the discrepancy and took no action to remedy it. *See id.* at 158.

The district court found that "implicit biases may be affecting Harvard's ratings." *Id.* at 263. Yet it declined to intervene, reasoning that "[r]ace conscious admissions will always penalize to some extent the groups that are not being advantaged by the process, but this is justified by the compelling interest in diversity and all the benefits that flow from a diverse college population." *Id.*

Those purported benefits offer cold comfort to students who face insurmountable odds. Consider the daunting statistics from Harvard. An Asian-American applicant in the fourth-lowest decile has a 0.9% chance of admission, while an African-American applicant in the same decile has a 12.8% chance. Those fourth-decile odds for African-Americans are higher than the 12.7% chance of admission that an Asian-American student confronts while occupying the *highest* decile. *See id.* at 179–80.

UNC's policies are no better. The record shows that university admissions officers there are preoccupied with the perceived *overachievement* of Asian-American applicants. *See*, *e.g.*, UNC App. 40 (UNC officer expressing "disappointment that an applicant with perfect test scores was Asian and not 'Brown'"). This preoccupation affects class composition. Most minorities "could score as low as a 26 on the ACT and be recruited, whereas . . . Asian-American students needed at least a 29." *Id.* at 48. As at Harvard, minority students besides Asian-Americans are more likely to score well on personal ratings even though Asian-Americans consistently earn higher grades and essay scores. *Id.* at 72–73. One expert's model found that by "turning off" all racial preferences, an additional 709 Asian-American students would be admitted. *Id.* at 105. Remarkably, the expert who pronounced UNC's use of race "holistic" chose to avoid "variables in which multiple inputs interacted with each other such as gender and race." *Id.* at 107.

On this record, race-conscious policies at Harvard and UNC harm Asian-American students.

B. Treating Asian-Americans unequally in college admissions departs from decisions protecting Asian immigrants against the denial of equal protection.

Denying educational opportunities to Asian-American students because of their race flagrantly departs from early decisions safeguarding the equality of Asian immigrants. Take *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). There, San Francisco ordinances made it a crime to operate a public laundry without permission from the county board of supervisors. *See id.* at 366. Chinese nationals Yick Wo and Wo Lee were found guilty under the ordinances and sentenced to prison.

See id. at 369. They contested the ordinances as contrary to the Equal Protection Clause. *See id.*

A unanimous Court interpreted the Fourteenth Amendment broadly, holding that "the equal protection of the laws is a pledge of the protection of equal laws." *Id.* at 369. Under that standard, the ordinances fell considerably short. Although framed in neutral terms, they were applied to punish only Chinese residents. *See id.* at 374 (noting that the board denied permission to more than 200 Chinese-owned laundries while granting it to 80 others). Palpable discrimination like this was enough to render the ordinances unconstitutional.

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Id. at 373–74.

Yick Wo set a high standard when it comes to laws founded on racial discrimination. But it was hardly the Court's only effort to vindicate constitutional rights against anti-Asian prejudice. *See Wong Wing v. United States*, 163 U.S. 228, 237 (1896) ("[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."); *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920) ("It is better that many Chinese immigrants should be improperly

admitted than that one natural born citizen of the United States should be permanently excluded from his country."). In light of these decisions, respondents' admissions policies are severely disappointing. Worse, they are part of a growing trend of laws and policies singling out Asian-Americans for special burdens.

C. Discrimination against Asian-American students here is part of an alarming trend.

1. Unfortunately, Harvard and UNC are not alone in using race in admissions. The practice appears to be widespread among selective universities.

In 2020, the U.S. Department of Justice concluded a two-year investigation into Yale's admissions policies. The Department's finding was unequivocal. "Yale illegally discriminates against Asian American and white applicants in its undergraduate admissions process." Press Release, Dept. of Justice, *Justice Department Finds Yale Illegally Discriminates Against Asians and Whites in Undergraduate Admissions in Violation of Federal Civil-Rights Laws* (Aug. 13, 2020).

A University of California-Berkeley task force accused the university of implementing secret policies intentionally discriminating against Asian-Americans. *See* Andrea Guerrero, Silence at Boalt Hall: The Dismantling of Affirmative Action 38–39 (2002). Yet the former President of the University of California contended that higher percentages of Asian students had "an adverse effect on the [UC] system's attempts to increase Hispanic and black enrollment." *UC Chief Wants a Better Ethnic Mix*, The Tribune (Oakland, Cal.), Dec. 12, 1986, at A-16.

A former admissions officer at Brown and Columbia declared that unless universities engaged in racial discrimination, "our elite campuses would look like

UCLA and Berkeley"—meaning over 40% Asian-American. Ethan Bronner, *Asian-Americans in the Argument*, N.Y. Times (Nov. 4, 2011), http://www.nytimes.com/2012/11/04/education/edlife/affirmative-action-a-complicated-issue-for-asian-americans.html.

2. Magnet schools are also implementing race-conscious policies that harm Asian-Americans. Consider Thomas Jefferson High School for Science and Technology in Alexandria, Virginia. Ranked among the country's top high schools, TJ's admissions standards were recently changed by removing a standardized test and changing the minimum application requirements. *See Coalition for TJ v. Fairfax Cty. Sch. Bd.,* No. 1:21cv296, 2022 WL 579808, at *2–3 (E.D. Va. Feb. 25, 2022). These changes came in the wake of the George Floyd protests, when the Fairfax County School Board committed to increase the number of black and Hispanic students at TJ. *Id.* at *5–6. To that end, the Board adopted a resolution that TJ should have "demographics represent[ing] the [Northern Virginia] region." *Id.* at *1–2.

From the County's perspective, shifting toward a race-conscious approach worked. New admissions policies meant that Asian-American students accounted for 54% of the class, a sudden drop from 73% the year before. *See id.* at *14. All other racial groups saw their representation in the class increase. *See id.*

A coalition of parents and students sued. The district court found that "Asian-American applicants are disproportionately deprived of a level playing field" and that the "decision to overhaul the TJ admissions process was racially motivated." *Id.* at *6. The court

therefore granted summary judgment for the Coalition. *See id.* at *11. That ruling is now on appeal.[5]

Race-conscious policies like those challenged here have victims as well as beneficiaries. Asian-Americans bear an outsized burden. They, no less than anyone else, are entitled to equal treatment without regard to race.

* * *

Grutter is a constitutional anomaly. It invites colleges and universities like respondents to consider a student's race when deciding whom to admit. Respondents have wholeheartedly embraced that invitation, taking an applicant's race into account at every stage of the admissions process. Record evidence suggests, in fact, that Harvard and UNC have gone too far by pursuing racial balancing despite the Court's repeated warnings. Respondents' admissions policies are therefore void.

But the challenge runs deeper than the defects in any particular admissions policy. *Grutter* is wrong. It contradicts the Fourteenth Amendment's fundamental commitment to equality under law. Guided by that commitment, decisions like *Brown* and *Parents Involved* have established that primary and secondary schools may not divide students by race except where necessary to remedy an institution's own past discrimination. That same principle should control

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[5] The Fourth Circuit granted a stay allowing Fairfax County to implement the challenged admission policies for the upcoming school year. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280 CMH-JFA, 2022 WL 986994 (4th Cir. Mar. 31, 2022). The Coalition for TJ applied with the Chief Justice for emergency relief, and that application was denied. *See Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 21A590, at *1 (U.S. Apr. 25, 2022).

this case. The Court should clarify that the Equal Protection Clause guarantees equal opportunity for college students no less than for anyone else. Every American should have an equal opportunity to attend the college of his or her choice based on individual merit—not on race.

CONCLUSION

For the foregoing reasons, the Court should reverse the decisions below.

Respectfully submitted,

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