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 ROBERT C. "BOBBY" SCOTT, MEMBER OF CONGRESS; AND 64 OTHER MEMBERS OF CONGRESS, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted with the written consent of all parties pursuant to Rule 37.3(a).[1]

This brief is filed on behalf of United States Representatives Robert C. "Bobby" Scott, Nancy Pelosi, Steny H. Hoyer, James E. Clyburn, Katherine Clark, Hakeem Jeffries, Joyce Beatty, Judy Chu, Raul Ruiz, Jerrold Nadler, Rosa L. DeLauro, Maxine Waters, Carolyn B. Maloney, Raúl M. Grijalva, Gregory W. Meeks, Adam Smith, Mark Takano, John Yarmuth, Ritchie Torres, Eleanor Holmes Norton, Rashida Tlaib, Barbara Lee, Sheila Cherfilus-McCormick, Danny K. Davis, Bonnie Watson Coleman, G.K. Butterfield, Mark DeSaulnier, Donald McEachin, Ilhan Omar, Stacey E. Plaskett, Joaquin Castro, Jamie Raskin, Pramila Jayapal, Anthony Brown, André Carson, Dwight Evans, Alma Adams, Suzanne Bonamici, Henry C. "Hank" Johnson, Jr., Jan Schakowsky, Troy A. Carter, Frederica S. Wilson, Earl Blumenauer, Lucy McBath, Kweisi Mfume, Adriano Espaillat, Jesús G. "Chuy" García, Haley Stevens, Terri A. Sewell, regorio Kilili Camacho Sablan, Juan Vargas, Ruben Gallego, Alan Lowenthal, Mark Pocan, Sylvia Garcia, Jamaal Bowman, Nanette Diaz Barragán, Steve Cohen, Mark Veasey, Betty McCollum, Deborah K. Ross, Tony

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[1] Blanket letters of consent from Petitioner and Respondents to the filing of *amicus* briefs have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, undersigned counsel state that no counsel for any party authored this brief in whole or in part, and no person or entity made contributions towards the preparation or submission of this brief.

Cárdenas, Karen Bass, Kathy Manning, and Andy Levin.

As elected representatives, *Amici* have firsthand knowledge of the compelling interest that the federal, state, and local governments have in promoting diversity in programs and through their laws, regulations, policies, and practices. Ours is a very diverse society that is becoming more so. It is vital for all people representing diverse groups of our society to participate fully in the processes of government and in government programs of interest to them. It is also vital for them to be able to work together for the common good in public and private settings. A considerable part of *Amici*'s time and effort as legislators and representatives is devoted to promoting these interests.

One important component of the diversity that *Amici* seek to promote is racial and ethnic diversity. A number of *Amici* are African American, Hispanic/Latino,[2] and Asian American or Pacific

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[2] Court opinions, statistical data, and secondary sources, all depending on their author, publication date, and political viewpoint, use various racial demographic terms to describe racial minorities in America. As such throughout this brief, the terms Black American and African American are used interchangeably as are Hispanic and Latino, notwithstanding scholarship that argues these terms have similar, yet distinct definitions. *See* Christine Tamir, *The Growing Diversity of Black America*, Pew Research Center (Mar. 25, 2021); Mark Hugo Lopez, *et al.*, *Who is Hispanic?*, Pew Research Center (Sept. 23, 2021) ("The terms "Hispanic" and "Latino" are pan-ethnic terms meant to describe – and summarize – the population of people living in the U.S. of that ethnic background. In practice, the Census Bureau most often uses the term "Hispanic," while

(Continued …)

Islanders, and/or represent large numbers of constituents who are African American, Hispanic/Latino, Asian American or Pacific Islanders, and/or Native Americans. *Amici* are keenly aware that ours is a society "in which race unfortunately still matters." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). At the same time, *Amici* are deeply committed to the constitutional guarantee of equal protection of the laws for all persons. Accordingly, they have a profound interest in how this case is resolved because the Court's decision will affect the legislative and policy options available to them to address the needs and concerns of their constituents.

SUMMARY OF THE ARGUMENT

For nearly seventy years, *Brown v. Board of Ed. of Topeka, Ks.*, 347 U.S. 483, 492 (1954) has stood as a beacon of equal educational opportunity for all Americans. Emphasizing the need to address "the effect of segregation itself on public education," and the role education plays in "our democratic society" to foster "good citizenship," the *Brown* Court envisioned an ideal where all students have meaningful educational opportunities, can learn from one another, and can do so in a way that avoids the racial and ethnic isolation that was so pernicious at that time.

This Court extended these principles to the higher education context—first in *Bakke*, and then in *Grutter*—by permitting the use of race as one of many

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Pew Research Center uses the terms "Hispanic" and "Latino" interchangeably when describing this population.").

factors to achieve the educational benefits of diversity on a college campus. As a result of *Bakke* and *Grutter*, some progress has been made in achieving and maintaining meaningful levels of diversity on university campuses. But the promise of *Brown* remains unfulfilled. In the almost twenty years since *Grutter* was decided, racial segregation in K-12 education has persisted and educational inequities along racial and ethnic lines have worsened. There is still a significant underrepresentation of African Americans, Hispanics, and many Asian Americans in colleges and universities across the country. *Grutter* remains a necessary tool to address not only this problem, but also to enhance all students' educational experiences at colleges and universities. Considerations of lived experiences of university applicants, including experiences connected to race and ethnicity, are vital for promoting "cross-racial understanding," breaking down racial barriers, and promoting speech on campus that confers "substantial" benefits on all students. *Grutter*, 539 U.S. at 330, 338. Universities have a First Amendment freedom to provide these benefits on their campuses through the narrowly tailored consideration of race and ethnicity in the admissions process.

This freedom is particularly important given the fabric of our society today. Despite the educational benefits of diversity on college campuses that have been attained since *Grutter*,[3] the ongoing failure to

[3] *See e.g.*, Nancy L. Zisk, *The Future of Race-Conscious Admissions Programs and Why the Law Should Continue to* (Continued …)

fulfill *Brown*'s promise, particularly at the K-12 level, has impacted all Americans. As with all racial and ethnic groups, Asian Americans are not monolithic, and many Asian American subgroups remain underrepresented in higher education. While race-conscious admissions policies may not be a panacea, they remain necessary to ensure that universities can assemble classes of students that are best prepared to thrive in an increasingly diverse, global, and ever-changing world.

Moreover, *Grutter* is not only an extension of *Brown*; it is firmly rooted in this Court's jurisprudence on the permissible consideration of race in admissions to institutions of higher education. It endorsed and extended *Bakke* and was affirmed by this Court in *Fisher*. Petitioner raises no new legal theory to justify overturning settled precedent.

Finally, race-conscious admissions policies do not run afoul of Title VI of the Civil Rights Act of 1964. Title VI, like *Brown*, has historically been used to dismantle segregation and enhance educational

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Protect Them, N.E. U. L. Rev. 56, 95 (2020) (highlighting the well-established scholarly consensus from the past seventeen years confirming that students "attending universities with race-conscious admissions programs achieve higher grades, graduate at higher rates, and secure greater earnings than their peers at less selective schools." (citing Br. of Student *Amici Curiae* in Support of Defendant's Motion for Judgment on the Pleadings on Counts IV and VI at 3, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019)); Mitra Akhtari, *et al.*, *Affirmative Action and Pre-College Human Capital* (Nat'l Bureau Econ. Rsch., Working Paper No. 27779, Sept. 2020), http://www.nber.org/papers/w27779.

opportunities for all Americans. It remains a vital tool to promote desegregation and educational equity and is entirely consistent with *Grutter*. For all these reasons, this Court should reaffirm *Grutter*.

ARGUMENT

I. The promise of *Brown* has not been fully realized, underscoring *Grutter*'s continued importance

The Supreme Court in *Brown* famously overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896), striking down the "separate but equal" doctrine. *Brown v. Board of Ed. of Topeka, Ks.*, 347 U.S. 483, 492 (1954). Almost seventy years later, Petitioner and its *amici* seek to use *Brown* as a basis for overturning *Grutter* and its progeny. Both Petitioner and the Republican members of the U.S. Senate and House of Representatives, as *amici*, assert that *Brown* and the Equal Protection Clause preclude the use of race in "affording educational opportunities."[4] In making this argument, Petitioner misconstrues *Brown* as advancing the notion of a "colorblind" Constitution. However, *Brown* does not stand for an absolute commitment to "colorblindness." Rather, the promise of *Brown* has always been about undertaking affirmative efforts to reduce racial isolation and promote educational equity. *Grutter*'s endorsement of the efforts of institutions of higher education to consider race and ethnicity to achieve the educational benefits of diversity is consistent with that promise. Because of race-conscious admissions policies

[4] *See* Pet'r Br. at 47; Br. of U.S. Senators and Representatives as *Amici Curiae* Supporting Pet'r at 8.

employed before and after *Grutter*, many post-secondary students have experienced educational and professional benefits.[5] Yet, recent history shows that the promise of *Brown* remains unfulfilled, underscoring the need to reaffirm *Grutter* and the principles it upholds.

A. The promise of *Brown* is intended to foster educational equity and diversity

Brown is grounded in promoting educational equity and diversity in the context of a segregated society. Indeed, *Brown*'s focus was on "the effect of segregation itself on public education." 347 U.S. at 492. In considering how to address the effects of segregation, the *Brown* Court was concerned about the "importance of education to our democratic society," its role in fostering "good citizenship," and its function as an "instrument in awakening the child to cultural values." *Id.* at 492-93. The Court also noted that the segregation it outlawed "has a detrimental effect upon the colored children," "generates a feeling of inferiority" amongst Black students, and that this "sense of inferiority affects the motivation of a child to learn." *Id.* at 494. *Brown* thus sought to reverse these regressive effects of segregation.

Moreover, *Brown*'s ultimate objective was to ensure that all students, regardless of race, had meaningful, equitable educational opportunities.[6]

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[5] *See supra* n. 3.

[6] Linda S. Greene, *From* Brown *to* Grutter, 36 Loy. U. Chi. L. J. 1, 11 (2004) ("*Brown* suggests that full equality should be (Continued …)

Brown was premised in large part on the principle of anti-subordination—the theory that the Government should not contribute to nor legitimize practices that "enforce the inferior social status of historically oppressed groups."[7]

Consistent with this purpose, *Brown* affirmatively emphasized the importance of integrating schools. It noted that segregation could adversely impact "the educational and mental development" of Black students and "deprive them of some of the benefits they would receive in a racial(ly) integrated school system." *Brown*, 347 U.S. at 494.

The Court in *Brown* made clear that it was necessary to "consider public education in the light of its full development and its present place in American life throughout the Nation." *Id.* at 492-93. Unfortunately, notwithstanding the progress that has been made in higher education because of race-conscious admissions programs, recent developments in the K-12 context underscore that educational

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measured by the extent to which the state provides children the necessary tools for the attainment of full citizenship.").

[7] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 Harv. L. Rev. 1470, 1472-73 (2004). *See also id.* at 1538-39 ("*Grutter* embodies an antisubordination understanding of the [Equal Protection] clause."); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Miami L. Rev. 9, 27 (2003) ("[I]n *Grutter v. Bollinger*, the Court upheld the University of Michigan Law School's race conscious admissions policy, reasoning about diversity in ways that clearly reflected antisubordination values.").

inequities and racial isolation have only increased, further exacerbating segregation and inequities along the pipeline toward higher education. For this reason, the use of race-conscious admissions programs, such as those permitted in *Grutter*, remain necessary to prevent further regression from the *Brown* ideal.

B. Since *Grutter*, segregation in K-12 educational settings has increased, and, as a result, educational inequities have worsened

In *Grutter*, the Court recognized that race-conscious admissions policies must have an ending point and suggested perhaps "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343. The Court reasoned that because "the number of minority applicants with high grades and test scores ha[d] indeed increased," *id.*, the number of qualified minority candidates for admissions would continue to grow, thus vitiating the need for race-conscious admissions policies.

In the almost twenty years since *Grutter* was decided, however, the Court's hope has not come to pass, in large part because segregation has persisted in the K-12 schools that feed universities and other post-secondary institutions. Such segregation and resegregation trends are contrary to the intent of *Brown*. As an April 2016 report from the nonpartisan Government Accountability Office explained, from 2000 through 2014, the percentages of high poverty schools comprised of mostly Black or Hispanic students increased from 9% to 16%, and low-poverty schools with relatively low numbers of Black and

Hispanic students increased from 60% to 68%.[8] Other recent research has demonstrated that public schools are more segregated by race and class than they were at any time since the late 1960s.[9] This segregation is correlated with reduced academic outcomes for racial and ethnic minorities and socioeconomically disadvantaged students.[10]

There are many reasons for the resegregation of K-12 schools. One reason is that many jurisdictions with longstanding desegregation court orders have allowed school districts to return to neighborhood assignment systems that reinforce patterns of residential segregation.[11] Apart from the resegregation that has flowed from residential shifts, there have also been increased efforts by school

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[8] U.S. Gov't Accountability Off., GAO-16-345, Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination (2016), at 10-11; *see also* Nat'l Ctr. for Educ. Statistics, Report: Racial/Ethnic Enrollment in Public Schools (May 2017), https://nces.ed.gov/programs/coe/indicator_cge.asp.

[9] Erica Frankenberg, *et al.*, *Harming Our Common Future: America's Segregated Schools 65 Years after* Brown, The Civil Rights Project (2019), www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf.

[10] *See id.* at 8-9.

[11] Emma Bast, Chloe Moon, & Jessica Smiley, *Race-Conscious Programs in Education*, 19 Geo. J. Gender & L. 197, 220 (2018).

districts to redraw their boundaries in ways that have encouraged resegregation. Since 2000, 128 school districts have successfully seceded from their larger (more diverse) districts, a move that is usually pursued by schools in neighborhoods that have higher property values and income and fewer nonwhite and poor students.[12] These secessions widen an already existing resource gap between typically white and wealthier neighborhood schools and predominately nonwhite school districts that are left with fewer resources after the secession.[13]

These resegregation trends since *Grutter* have maintained inequities in both achievement and college preparation between White Americans and Black/Latino Americans and many subgroups of Asian Americans. A 2019 study by well-known educational economists concluded that "[f]or the past two decades of student cohorts, both the race-achievement gap and the SES-achievement gap have remained essentially flat."[14] Similarly, a 2018 study analyzed the academic data of 20 cohorts of children

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[12] *See* EdBuild, Fractured: The Breakdown of America's School Districts (2019); P.R. Lockhart, *Smaller Communities Are 'Seceding' from Larger School Districts. It's Accelerating School Segregation* (Sept. 6, 2019), Vox, https://www.vox.com/2019/9/6/20853091/school-secession-racial-segregation-louisiana-alabama.

[13] *Id.*

[14] Eric A. Hanushek, Paul E. Peterson, Laura M. Talpey & Ludger Woessmann, *The Unwavering SES Achievement Gap: Trends in U.S. Student Performance* (HKS Working Paper No. RWP19-012, 2019), https://ssrn.com/abstract=3357905, at 12.

between ages 5-14 from 1986 through 2012 and concluded that there had been "no systematic progress towards equity in achievement along either income/poverty or racial/ethnic lines" and that "there remain significant race/ethnicity gaps in math and reading achievement, even when looking at racial/ethnic by poverty groupings, such that the gap between poor White students and their Black and Hispanic poor peers has widened with time."[15] This latter finding is striking because it illustrates that this widening of achievement gaps is correlated not solely with poverty but also with race and ethnicity.[16]

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[15] Katherine W. Paschall, Elizabeth T. Gershoff & Megan Kuhfeld, *A Two Decade Examination of Historical Race/Ethnicity Disparities in Academic Achievement by Poverty Status*, 47 J. Youth Adolescence 1164, 1177 (2018).

[16] This is another reason why it is premature to rely on admissions processes that rely solely on socioeconomic factors to the exclusion of race. *See* Liz Willen, *Column: Why Some In Higher Education Are Freaking Out About New Affirmative Action Showdown*, The Hechinger Report (Jan. 25, 2022), https://hechingerreport.org/column-why-some-in-higher-education-are-freaking-out-about-new-affirmative-action-showdown ("For 40 years, the Supreme Court has protected affirmative action that helps colleges open doors for racial minorities. It's a concept many say is more urgent than ever, with racial gaps in higher education widening, threatening years of progress for underrepresented students. Such gaps could grow even larger once the nation's highest court considers two lawsuits, one arguing that Harvard actively discriminates against Asian American applicants, the other that the University of North Carolina discriminates against Asians and Whites. If the court agrees and eliminates consideration of race, the decision could upend college admissions, leaving minorities who

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By contrast, the Court-ordered desegregation policies of the 1970s and 1980s substantially reduced racial segregation and dramatically increased per-pupil spending by an average of more than 20% per student.[17] In addition, test scores for African American students improved and the achievement gap narrowed. Specifically, at the height of school integration efforts in 1988, 44% of African American students nationwide attended integrated schools.[18] The achievement gap in reading on the National Assessment of Educational Progress had fallen from 39 points in 1971 to 18 points, and the mathematics achievement gap had fallen by 20 points over the same time period.[19] Simply put, in the two decades the federal government was most active in supporting and advancing affirmative efforts in school integration, the United States was able to cut the achievement gap nearly in half.

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are vastly underrepresented at many selective schools and flagship universities even further behind[.]").

[17] Rucker C. Johnson, Long-run Impacts of School Desegregation & School Quality on Adult Attainments 16–17 (Nat'l Bureau of Econ. Research, Working Paper No. 16664, 2005), https://gsppi.berkeley.edu/ruckerj/johnson_schooldesegregation_NBERw16664.pdf.

[18] Gary Orfield, *et al.*, Brown *at 60: Great Progress, a Long Retreat and an Uncertain Future*, UCLA Civil Rights Project (2014).

[19] Linda Darling-Hammond, *Education and the Path to One Nation, Indivisible*, Learning Policy Institute (2018), at 4.

In sum, segregation and stratification by both income and race in the K-12 setting have not improved since *Grutter*, and in fact have regressed, which has resulted in worsening educational inequities and stagnating academic achievement in the years leading up to college. As a result, the promise of *Brown* has not yet been fulfilled. Even the Republican minority of the House Committee on Education and Labor agreed, stating in 2021 that "too many students attend racially and economically isolated schools, and that better integrated schools have academic benefits for all students."[20] Likewise, the conservative Hoover Institution recognized in a 2019 report that "school integration was the only federal reform that has successfully narrowed the achievement gap"[21] and that "th[e] closing of the black-white achievement gap stopped a quarter of a century ago when the desegregation efforts slowed and stopped."[22]

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[20] H.R. Rep. No. 117-176, at 38 (2021) (citing Jennifer Ayscue, *et al.*, The Nat'l Coalition on School Diversity, *Research Brief: The Complementary Benefits of Racial and Socioeconomic Diversity in Schools* (2017), https://school-diversity.org/pdf/DiversityResearchBrief No10.pdf).

[21] Press Release, Hoover Institution, Stanford University, *No Change in Student Achievement Gap in Last 50 Years* (Apr. 1, 2019), https://www.hoover.org/news/no-change-student-achievement-gap-last-50-years ("The only program that seems to have had national impacts over this period has been school desegregation...During the early period of our study, the gap narrowed, but this closing of the black-white achievement gap stopped a quarter of a century ago when the desegregation efforts slowed and stopped.").

[22] *Id.*

Moreover, the COVID-19 pandemic only exacerbated educational inequities faced by minority students, further forestalling any potential sunset of race-conscious admissions policies. Minority students faced disproportionate learning loss and declines in test scores and graduation rates during the pandemic.[23] These circumstances will likely have generational effects on the ability to mitigate educational inequities and cannot be ignored when considering the continuing need for race-conscious admissions programs.

C. Race-conscious admissions policies remain necessary

Given the above trends, the progress that the *Grutter* Court expected has not come to pass in the

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[23] *See* Rachel F. Moran, *Persistent Inequalities, the Pandemic, and the Opportunity to Compete*, 27 Wash. & Lee J. Civ. Rts. & Soc. Just. 589, 629 (2021) (pointing to study from the Northwest Evaluation Association finding that "Black and Latinx students suffered disproportionate declines in reading in the upper elementary grades [during the pandemic,]" and arguing that the losses "will impose long-term harms[.]"); Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis, & Ellen Viruleg, McKinsey & Company, *COVID-19 and Student Learning in the United States: The Hurt Could Last A Lifetime*, at 5-6 (2020) (noting that COVID-19 exacerbated learning loss and increased dropout rates for Black and Hispanic students); U.S. Gov't Accountability Off., GAO-22-105816, *Teachers Reported Many Obstacles of High-Poverty Students and English Learners as Well as Some Mitigating Strategies*, at 9 (2022) (citing study that found that "elementary students (grades 1-6) in majority-Black schools are now academically 12 months behind those in majority-White schools").

last twenty years. In fact, as the Court stated then, "race unfortunately still matters." 539 U.S. at 333.

This is evident in the experiences of Respondents. Even with the use of a race-conscious admissions program, the University of North Carolina (UNC) "continues to face challenges admitting and enrolling underrepresented minorities, particularly African American males, Hispanics, and Native Americans." *SFFA v. University of North Carolina*, 567 F. Supp. 3d 580, 593 (M.D.N.C. 2021). These challenges exist despite UNC "demonstrat[ing] that the University has engaged in ongoing, serious, good faith considerations of workable race neutral alternatives in an effort to find options to its race conscious process in admissions." *Id.* at 664. UNC concluded that such race neutral alternatives would "exact significant consequences on the University's ability to recruit and enroll an academically prepared student body that is diverse along the several dimensions it values." *Id.* at 665-66.

Similarly, the United States Court of Appeals for the First Circuit found that "no workable race-neutral alternatives exist[ed]" for Harvard. *SFFA v. Harvard*, 980 F.3d 157, 193-95 (1st Cir. 2020). Petitioner's preferred race-neutral alternative would reduce African American representation in the admitted class by about 32%. *Id.* at 194-95. Moreover, such an approach "would make Harvard less attractive and hospitable to minority applicants while limiting all students' opportunities to engage with and learn from students with different backgrounds of their own." *Id.* at 195. Without the ability to consider race, the challenges that both UNC and Harvard face in

achieving the compelling interest of creating a diverse student body will become even more severe, and their First Amendment freedoms to foster diversity on campus will have been undercut.

This concern is not just hypothetical. In the states that have barred consideration of race and ethnicity in admissions to institutions of higher education, efforts to achieve a diverse student body have been significantly limited. Studies have shown a negative trend in underrepresented minority admissions in public universities among the nine states that banned race-conscious admissions.[24] Notable examples are in California and Texas. After California banned the use of race in its colleges' admissions, various University of California schools experienced a drop in minority enrollment.[25] Similarly, when Texas completely

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[24] Mark C. Long & Nicole A. Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in Public Universities*, 41 Educ. Eval. & Pol'y Analysis 188, 197 (2020) ("[W]e find a sizable decrease in URMs' share of admittees immediately following the affirmative action bans"); Huacong Liu, *How do Affirmative Action Bans Affect the Racial Composition of Postsecondary Students in Public Institutions*, J. of Educ. Pol'y 1, 13, https://doi.org/10.1177/0895904820961007 (Oct. 1, 2020) (finding a decrease in enrollment of URMs in all five states studied that banned affirmative action, with "the negative associations [between the ban and URM enrollment being] significant in Michigan, New Hampshire, and Oklahoma.").

[25] Joni Hersch, *Affirmative Action and the Leadership Pipeline*, 96 Tulane L. Rev. 1, 23 (2021) (citing studies that found that at UC Berkeley, the African American proportion of students dropped from 6-7% to 3% within the last two decades and that the admission rates of Black students to the UC Los

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banned consideration of race in connection with university admissions and implemented its Top 10% admissions program, it was never able to achieve diversity at nearly the same levels that it previously had using race-conscious admissions policies.[26] Again and again, race-neutral alternatives focused solely on socioeconomic status have failed to foster the racial and ethnic diversity achieved through race-conscious admissions policies.[27]

This experience counsels that *Grutter* should be upheld and that this Court should continue to permit some measure of race-conscious admissions policies. The constitutionality of specific policies should be addressed through the narrow tailoring analysis, on a

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Angeles and UC Berkeley law schools were cut in half compared to before the ban).

[26] Mark C. Long & Marta Tienda, *Winners and Losers: Changes in Texas University Admissions post*-Hopwood, 30 Educ. Evaluation Pol'y Analysis 255, 270 (2008) (a study that concluded the top 10% initiative, where Texas high school seniors in the top 10% of their class gained automatic admission to any Texas public university, did not restore the underrepresented minority enrollment numbers to the levels before the banning of affirmative action).

[27] *See, e.g.*, Audrey Anderson, *Guest Column: Supreme Court May Decide Future of Affirmative Action*, Nashville Business Journal (Dec. 3, 2021), https://www.bizjournals.com/nashville/news/2021/12/03/supreme-court-may-decide-affirmative-action.html ("[E]xperience from states that adopted laws prohibiting public colleges from considering race in admissions shows that even with such added measures, racial diversity generally decreases when colleges no longer consider race in admissions.").

case-by-case basis, as *Grutter* already permits. Specifically, the narrow tailoring inquiry can be met by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342. Such periodic reviews are a mechanism to guard against the permanent use of race-conscious admissions in a society that aspires toward racial equality. Moreover, the narrow tailoring inquiry can still operate to ensure that race is used in a manner that maintains individual, holistic reviews of applicants. With the Court's continued guidance, it is possible to narrowly tailor racial considerations in admissions.

II. *Grutter* is consistent with *Brown*'s promise to provide educational opportunities for all

A. *Grutter* extended *Brown's* promise

In *Grutter*, the continued existence of segregation in the United States and in the pipeline toward higher education remained a concern and was an important consideration underpinning the Court's opinion. Indeed, the Court stated that "[b]y virtue of our Nation's struggle with racial inequality, [underrepresented minority] students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences." 539 U.S. at 338. Thus, it emphasized the importance of integration. In lauding the "substantial" benefits of diversity, the *Grutter* Court stated that diversity in the classroom promotes "'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better

understand persons of different races.'" *Id.* at 330 (internal citations omitted).

Grutter, therefore, was an extension of *Brown*'s promise. Both *Brown* and *Grutter* extolled the importance of integrated education in reaching broader societal goals. The *Brown* Court recognized that "education...is the very foundation of good citizenship"—a statement that was quoted almost fifty years later in *Grutter*. *Grutter*, 539 U.S. at 331 (quoting *Brown*, 347 U.S. at 493). *Grutter* followed on this principle when it stated that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332.

Petitioner's argument that *Brown* forecloses any consideration of race in higher education admissions finds no basis in this Court's jurisprudence. After *Brown*, each of *Bakke*, *Grutter*, and *Fisher* affirmed the constitutionality of narrowly tailored race-conscious admissions policies, as discussed below. *See infra* Section III. Moreover, both *Bakke* and *Grutter* hearkened back to *Brown*, implicitly recognizing the consistency of the legal principles involved. *Bakke*, 438 U.S. at 307-18 (analyzing *Brown*); *Grutter*, 539 U.S at 331-34 (citing *Brown*).

For these reasons, relying on *Brown* to overturn *Grutter* would be a perverse result, contrary to *Brown*'s promise. Indeed, it would flip *Brown* entirely on its head. Preservation of at least some ability to consider race in university admissions is vitally important to protect the equal protection ideals espoused in *Brown.*

B. *Grutter* remains vital because *Brown*'s promise remains unfulfilled

The resegregation and continued segregation of K-12 schools—and the communities in which those schools exist—provide a crucial predicate for the continued use of race-conscious admissions policies at this time. *See supra* Sections I.B-I.C. A major point recognized in *Grutter* is that "diversity will, in fact, yield educational benefits." 539 U.S. at 328, 330. This is particularly true when many students have not had opportunities to interact with others who are different from them, as the above statistics about K-12 segregation confirm. *See supra* Sections I.B-I.C.

The promise of *Brown*, along with the preservation of the narrowly tailored use of race in admissions, remains necessary to achieve educational diversity that benefits all students, including Asian American students, who are not a monolithic group and span numerous countries and cultures.[28] In fact, data from the U.S. census shows that Asian American populations are growing and becoming more diverse based on origin, with groups like Bhutanese, Nepalese, and Burmese Americans experiencing the fastest growing rates among Asian Americans in the

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[28] Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, Pew Research Center, (Apr. 29, 2021), https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans ("A record 22 million Asian Americans trace their roots to more than 20 countries in East and Southeast Asia and the Indian subcontinent, each with unique histories, cultures, languages and other characteristics.").

United States.[29] Despite this, certain subgroups of Asian Americans are significantly underrepresented in higher education and in the professional sector. Some Southeast Asian Americans, including Hmong Americans, Laotian Americans, and Bhutanese Americans, have among the lowest educational attainment in the country.[30] For example, Filipino Americans are 60% less likely than other Asian Americans to major in science, technology, engineering, or math (STEM).[31] Hmong Americans are similarly underrepresented in the STEM fields.[32]

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[29] *Id.* ("Eleven of the Asian groups more than doubled in size during this span. Some of the smaller origin groups – such as Bhutanese, Nepalese and Burmese – experienced the fastest growth rates, with their populations growing tenfold or more between 2000 and 2019.").

[30] *Id.*; Stacey Lee & Kevin K. Kumashiro, *Asian America Needs Affirmative Action in Higher Education*, The Conversation (Aug. 7, 2017), https://theconversation.com/asian-america-needs-affirmative-action-in-higher-education-44070 ("Southeast Asian-Americans have among the lowest educational attainment in the country (*e.g.*, fewer than 40 percent of Americans over the age of 25 of Laotian, Cambodian or Hmong descent have a high school diploma).").

[31] Marcene Robinson, *Filipino, Vietnamese, Thai Students "Invisible" Victims of STEM Inequality*, University of Buffalo (Sept. 20, 2021), https://www.buffalo.edu/ubnow/stories/2021/09/asian-stem-disparities.html (citing findings from University of Buffalo study which analyzed data on educational achievements during and after high school).

[32] Deepa Shivaram, *Southeast Asians are Underrepresented in STEM. The Label 'Asian' Boxes Them Out More*, (Dec. 12, 2021), https://www.npr.org/2021/12/12/1054933519/southeast-

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Asian Americans are also underrepresented in corporate and political leadership—including in the halls of Congress, in law firm partnerships, and in C-suites.[33] Indeed, much like the glass ceiling that women have encountered for generations, Asian Americans have hit the "Bamboo Ceiling."[34] This

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asian-representation-science; Moriah Balingit, *The Forgotten Minorities of Higher Education*, The Washington Post Magazine (Mar. 18, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/03/18/feature/does-affirmative-action-help-or-hurt-asians-who-dont-fit-the-model-minority-stereotype.

[33] Cong. Rsch. Serv., R46705, Membership of the 177th Congress: A Profile (2022) (3.9% of the 117th Congress identify as Asian, South Asian, or Pacific Islander); Nat'l Ass'n for Law Placement, 2021 Report on Diversity in U.S. Law Firms (2022) (In 2021, only 4.30% of partners at law firms were persons of color, including Asian Americans, who made up only 9% of equity partners.); Crist | Kolder Associates, Volatility Report, America's Leading Companies (2021) (Only 5.7% of Fortune 500 and S&P 500 CEOs are Asian American, and Asian Americans make up only 6.1% of executives at these companies.).

[34] Lee & Kumashiro, *supra*; Jennifer Lee, Zocalo Public Square, *Why Asian-Americans Shouldn't Chuck Affirmative Action Out The Window*, https://www.zocalopublicsquare.org/2015/06/09/why-asian-americans-shouldnt-chuck-affirmative-action-out-the-window/ideas/nexus (June 9, 2015) ("A recent study of Silicon Valley's tech industry showed that while Asian Americans make up 27.2 percent of the professions in tech, they comprise only 13.9 percent of executives. Even in the field of education, where Asian Americans are overrepresented, they are severely underrepresented in leadership positions at the department and university levels. They make up less than 1 percent of corporate board members and about 2 percent of college presidents."); Ass'n of Asian Am. Investment Managers, *Good Workers-Not Good*

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underrepresentation limits the potential of not only the affected individuals, but of our workforce. Across various industries, diversity is shown to increase a company's performance.[35] Moreover, companies with the most ethnically and racially diverse leadership financially outperform companies that are the least diverse.[36]

Grutter thus remains a vital tool to foster educational opportunities for all Americans, including Asian Americans. Petitioner's desire to overrule *Grutter* not only ignores this important point but would undercut the ability of colleges and universities to dispel harmful stereotypes, including the "Model Minority" myth regarding Asian Americans.[37] For

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Leaders: Unconscious Biases that Stall AAPI Advancement, https://aaaim.org/goodworkers-notleaders (Sept. 13, 2021) ("[T]he 'bamboo ceiling' is a daily obstacle. It manifests itself in regular microaggressions…Across industries, research shows that AAPI professionals fill middle management ranks, but their percentages plummet in senior management and C-suites.").

[35] Scott E. Page, The Diversity Bonus: How Great Teams Pay off in the Knowledge Economy 165 (2017) ("Racial diversity significantly increases performance in advertising, finance, entertainment, legal services, health services, hotels, bars and restaurants, and computer manufacturing.").

[36] *Id.* ("Companies in the top quartile for ethnic diversity [financially] outperform those in the bottom quartile by 35 percent.").

[37] Some Members of Congress who have signed on to this *amicus* brief have supported an amendment to the Elementary and Secondary Education Act of 1965 (ESEA) that would require State education report cards to include disaggregated data on racial subgroups. All Students Count Act of 2015, H.R. 717,

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these reasons, admissions policies that consider race as one of many factors are important to the compelling interest of colleges and universities in achieving the educational benefits of diversity on their campuses, thereby ultimately contributing to greater cross-racial understanding and diversity at all levels of our workforce.

III. *Grutter* is part of the fabric of the Supreme Court's jurisprudence on the consideration of race in admission to higher education

Grutter's holding that "student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U.S. at 325, is part of the fabric of the Court's jurisprudence on race-conscious admissions policies and is firmly rooted in *Bakke*. *Grutter*, 539 U.S. at 322-23 (quoting the Court's holding that a "'State has a substantial interest that legitimately may be served by a properly devised admissions program involving the

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114th Cong. (2015). In a floor speech proposing a similar amendment to ESEA, Sen. Mazie Hirono highlighted how the data would highlight varying need among Asian American student subgroups: "When we look at averages, the AAPI group does very well overall, but in fact there is a model minority myth. The current AAPI category hides big achievement gaps between subgroups. For example, 72 percent of Asian Indian adults have a bachelor's degree or higher, but only 26 percent of Vietnamese adults do, and only 14 percent of Hmong adults do. This adult data comes from the 2010 census. But we don't have data on how AAPI children are doing." In *Amicis*' view, efforts to further disaggregate and appreciate the nuances of racial data, including Asian American data, could be taken into account to ensure that race is being considered in a manner that can achieve the goals of educational diversity espoused in both *Bakke* and *Grutter*.

competitive consideration of race and ethnic origin.'"). The *Grutter* Court not only endorsed Justice Powell's opinion announcing the judgment of the Court in *Bakke* but characterized it as "the touchstone for constitutional analysis of race-conscious admissions policies." *Id.* at 323, 325.

As Justice Powell stated in *Bakke*, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315. Justice Powell's opinion was a logical extension of the Court's precedents emphasizing this country's "national commitment" to safeguarding academic freedom and the diverse flow of ideas. *Id.* at 312 (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). Indeed, the attainment of a diverse student body is a core tenet of a university's First Amendment academic freedom and its ability to foster diverse discussions and viewpoints on a college or university campus. *Id.* Thus, the Court's holding in *Grutter* "is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328-29 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96, n.6 (1978); *Bakke*, 438 U.S. at 319, n.53 (opinion of Powell, J.)).

Nor was *Grutter* the Court's last word on race-conscious admissions policies. Ten years after *Grutter*, this Court revisited the issue in *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013)

("*Fisher I*") and reaffirmed that "obtaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'" *Fisher I*, 570 U.S. at 309 (quoting *Grutter*, 539 U.S. at 325).

For more than forty years, then, from *Bakke* until today, colleges and universities have relied on this Court's line of cases in developing and implementing their admissions policies. *See Grutter*, 539 U.S. at 323 ("Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies.") (internal citations omitted). Indeed, during this Court's consideration of *Fisher*, numerous law schools, including Harvard and Yale, emphasized their ongoing reliance on the principles of *Bakke* in structuring their admissions policies.[38] These reliance interests in seeking diversity on college and university campuses have become entrenched in our national culture, which reinforces the importance

[38] *See* Brief of Dean Robert Post and Dean Martha Minow as *Amici Curiae* Supporting Respondents at 26, *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015) (No. 11-345), 2015 WL 6735850 ("Harvard and Yale Law Schools have relied on [*Bakke*] in fashioning resource- and time- intensive processes designed both to identify students who possess the potential to become future leaders and to enrich their own institutional educational environments. Implementing these policies has required dozens of admissions officers and faculty reviewers, multiple rounds of evaluations, and significant expenditures of time and money. In undertaking such review processes, Harvard and Yale Law Schools have determined they cannot isolate race and exclude it from the otherwise comprehensive, individualized assessments necessary to fulfill their educational missions.").

of reaffirming *Grutter* rather than overruling it. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966) because "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture").

Petitioner's argument that *Grutter* is an "outlier" is simply inconsistent with the Court's jurisprudence on race-conscious admissions policies. *See Bakke*, 438 U.S. at 311; *Grutter*, 539 U.S. at 329; *Fisher I*, 570 U.S. at 310. *Grutter* is well-settled law, grounded in the Court's decisions, and affirmed in the last decade. Petitioner presents no new legal theory that justifies abandoning settled precedent, particularly in a context where, as discussed above, *Grutter* remains necessary to fulfill *Brown*'s promise. *See supra* Parts I-II.

IV. Title VI is consistent with the admissions policies at issue here

Title VI of the Civil Rights Act of 1964 remains a critical tool for ensuring diversity on university campuses. It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. 42 U.S.C. § 2000d *et seq.* University admissions policies, like those of Harvard and UNC, that seek to achieve the educational benefits of racial and ethnic diversity are wholly consistent with Title VI, just as they are consistent with the Equal Protection Clause. *Fisher*, 570 U.S. at 309; *Grutter*, 539 U.S. at 325. This is particularly true where race is considered as just one of many factors in the admissions decision-making.

The implementing regulations of Title VI permit recipients of federal funds to undertake "affirmative action" to overcome historical conditions that have limited diversity.[39] There has never been—nor do Petitioner or its *amici* point to—any categorical bar in Title VI against using race to affirmatively *promote* diversity and ensure participation of underrepresented groups in university life.

In fact, such efforts remain a necessary tool for achieving the educational benefits of diversity and a bulwark against further regression from the *Brown* ideal. For decades, the combination of Title VI and federal funding from the Elementary and Secondary Education Act were used by the federal government to ensure that K-12 school districts were complying with *Brown* consent decrees and desegregation mandates.[40] The Department of Justice characterized these efforts as a "nationwide offensive."[41] Through

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[39] 28 C.F.R. § 42.104(b)(6)(ii) ("Even in the absence of...prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.").

[40] Philip Tegeler, *The Compelling Government Interest in School Diversity: Rebuilding the Case for an Affirmative Government Role*, 47 U. Mich. J.L. Reform 1021, 1030 (2014) (citing 20 U.S.C. § 7231(a)(4) (2006)) ("ESEA…included [a magnet school program] to 'ensure that all students have equitable access to a high quality education that will prepare all students to function well in a…economy comprised of people from many different racial and ethnic backgrounds.'").

[41] Department of Justice Civil Rights Division, Title VI Legal Manual, https://www.justice.gov/crt/fcs/T6manual (April

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this offensive, the combined force of the two statutes allowed the federal government to withhold resources from recalcitrant states and K-12 school districts—including both public and private ones—that were maintaining segregation or fostering resegregation despite their acceptance of federal dollars.[42]

Title VI has fostered similar efforts in the higher education context. Since the 1960s, Title VI has been used to launch investigations and provide recommendations that would enhance diversity on campus.[43] In 1992, when Mississippi's segregated

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2021) ("The Civil Rights Act of 1964 was a product of the growing demand during the early 1960s for the federal government to launch a nationwide offensive against racial discrimination…Congress recognized the need for a statutory nondiscrimination provision to" prevent funds being used to finance racial discrimination.) *See also* Kelsey D. McCarthy, *The Battle of the Branches: The Impact of the Judiciary and Title VI on Desegregation in the American Public School System*, 52 San Diego L. Rev. 967, 975 (2015) (characterizing the origins of Title VI as "officially providing Congress with the 'power of the purse' in its ability to" to compel compliance with school desegregation).

[42] Erica Frankenberg & Kendra Taylor, *ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation*, The Russell Sage Foundation, J. Soc. Sci. 32, 32 (2015) ("ESEA provided federal funds in such quantities to schools that…that Title VI…became a critical tool in desegregating schools in the South").

[43] *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 382-83 (2014) (Sotomayor, J., dissenting) ("In 1966, the Defense Department conducted an investigation into the University's compliance with Title VI of the Civil Rights Act, and made 25 recommendations for increasing opportunities for minority students…In 1970, a student group launched a number

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university system was not in compliance with Title VI, this Court held that the state's efforts to use purely race-neutral policies to dismantle its dual system were insufficient as a matter of law. *United States v. Fordice*, 505 U.S. 717 (1992). As the Court concluded, "[t]o the extent that the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution and Title VI." *Id.* at 743. Given this history and context, the notion that Title VI might be used *against* efforts that employ race as merely one of many factors to achieve diversity and integration on college campuses turns Title VI on its head, much like Petitioner seeks to turn *Brown* on its head.

Further, it appears that Petitioner and its *amici* seek to invalidate the admissions programs of Harvard and UNC through a disguised Title VI disparate impact theory, relying heavily on comparisons of admissions rates between different subgroups. But such a theory is invalid, as there is no private right of action for disparate impact claims under Title VI. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

Petitioner's attempt to use Title VI in this way makes little sense. Since *Bakke* was decided in 1978, Congress has never stated that Harvard's admissions plan (or any similar plan) violated Title VI. Likewise, Congress has never passed a law that race-conscious admissions policies run afoul of Title VI, even across

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of protests, including a strike, demanding that the University increase its minority enrollment…The University's Board of Regents responded, adopting a goal of 10 percent black admissions by the fall of 1973.").

more than twenty sessions of Congress and despite the fact that Congress has been one-party controlled by Republicans or Democrats over portions of the last forty years. Therefore, to the extent that Petitioner and its *amici* attempt to suggest that Title VI should preclude Harvard's and UNC's admissions policies, there is a longstanding record of Congressional intent that refutes this argument.

To the contrary, recent legislative efforts on Title VI, through the Equity and Inclusion Enforcement Act, show that Congress has sought to *enhance* the rights of minority students and prevent the academic achievement losses and educational inequities that have been fostered by recent trends toward resegregation.[44] This reinforces that Title VI, like the Equal Protection Clause, should permit narrowly tailored, race-conscious measures to attain diversity on university campuses. Such measures remain true to the promise of *Brown.*

[44] Equity and Inclusion Enforcement Act, H.R. 2574, 116th Cong. § 2 (2019).

CONCLUSION

The lower courts should be affirmed.

Respectfully Submitted,

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4. James E. Clyburn
5. Katherine Clark
6. Hakeem Jeffries
7. Joyce Beatty
8. Judy Chu
9. Raul Ruiz
10. Jerrold Nadler
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12. Maxine Waters
13. Carolyn B. Maloney
14. Raúl M. Grijalva
15. Gregory W. Meeks
16. Adam Smith
17. Mark Takano
18. John Yarmuth
19. Ritchie Torres
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32. Jamie Raskin
33. Pramila Jayapal
34. Anthony Brown
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56. Jamaal Bowman
57. Nanette Diaz Barragán
58. Steve Cohen
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60. Betty McCollum
61. Deborah K. Ross
62. Tony Cárdenas
63. Karen Bass
64. Kathy Manning

65. Andy Levin