

No. 22-2020

IN THE SUPREME COURT OF THE UNITED STATES

ADVOCATES FOR FAIR ADMISSIONS PRACTICES, INC.,

Petitioners,

v.

UNIVERSITY OF NORTH GREENE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR PETITIONER

Team 4
Counsel for Petitioner

QUESTIONS PRESENTED

I. The Equal Protection Clause of the Fourteenth Amendment restricts States from having any authority to use race as a factor in affording educational opportunities. *Grutter v. Bollinger*, 539 U.S. 306 (2003), has permitted public universities to use race as a factor when admitting students. Should this Court overrule *Grutter* and hold that institutions of higher education cannot use race as a factor in admissions?

II. Under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act, a university's admissions process must be narrowly tailored to a compelling governmental interest. A university's admissions process is not narrowly tailored to a compelling governmental interest when it discriminates on the basis of race and fails to use available, workable race-neutral alternatives. Does the University of North Greene's admissions process, which discriminates on the basis of race and fails to use available, workable race-neutral alternatives, violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act?

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CITATIONS OF THE OPINIONS AND ORDERS IN COURTS BELOW

The Fourteenth Circuit's opinion, affirming the district court, has not yet been published, but it can be found as the Record on Appeal. The district court's Memorandum opinion is unpublished but can be found at 2021 WL 56789 (N.D. Greene 2021).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution (U.S. Const. amend.

XIV, § 1) states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) states:

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

STATEMENT OF THE CASE

I. Statement of the Facts.

The Parties. Advocates for Fair Admissions Practices, Inc. (“AFAP” or “Petitioner”) is a nonprofit organization formed to “defend human and civil rights secured by law, including the rights of individuals to equal protection under the law, through litigation and any other lawful means.” R. at 3. Several members of AFAP are Asian Americans who applied to and were rejected by the University of North Greene (“University” or “Respondent”). R. at 3. Founded in 1789, the University is a public college and is a constituent institution of the State of Greene’s University System. R. at 3. The University has established as an institutional goal the admission of underrepresented populations to enhance the educational process. R. at 3.

The University’s Admissions Process. Each year the University admits roughly 1,500 students. R. at 4. In 2019, the University received around 25,000 applicants. R. at 4. To filter through applications, the University’s application process consists of six components: (1) pre-application recruitment efforts; (2) student submission of applications; (3) the University’s “first read” of application materials; (4) admissions officer and alumni interviews; (5) subcommittee meetings of admissions officers to recommend applicants to the full admissions committee; and (6) full admissions committee meetings to make and communicate final decisions to applicants. R. at 4. The University scores applicants using six types of numeric ratings assigned during the reading stage: academic ratings, extracurricular ratings, athletic ratings, school support ratings, personal ratings, and overall ratings. R. at 5.

At any point during or after the third stage, the University uses a system of “tips” for certain applicants. R. at 4. “Tips” act as a plus factor used to benefit an applicant and potentially move them into the University’s admitted class. R. at 4. The University provides a handbook to

admissions officers and alumni interviewers which includes several factors for awarding “tips.” R. at 9. The factors considered for awarding “tips” include outstanding and unusual intellectual ability, appealing personal qualities, outstanding capacity for leadership, athletic ability, legacy status, and geographic, ethnic, or economic factors. R. at 9. The University admits that race is considered a factor in awarding “tips” during the University’s “first read” when assigning an applicant’s overall rating. R. at 9. In addition, the University admits that race is considered in both subcommittee and full committee meetings. R. at 9. Throughout the admissions process, admissions officials are provided with “one-pagers,” which provide information regarding the demographic characteristics of the applicant pool. R. at 9. These “one-pagers” are how the University keeps track of the racial makeup of its admitted class. R. at 9.

After subcommittees make their recommendations, the University is left with an applicant pool comprised of more students than it can admit. R. at 8. To narrow the pool further, the University conducts a “chop process.” R. at 8. University officials are informed of applicant demographics, including race, before deciding which applicants will be chopped. R. at 8.

Analyses of the University’s Use of Race in Admissions. In 1990, the University was investigated by the U.S. Department of Justice Office of Civil Rights (“OCR”). R. at 10. OCR found descriptions of Asian American applicants “that could have implications for stereotyping.” R. at 10. However, OCR concluded that there was no demonstrated negative impact on Asian American applicants. R. at 10.

The University formed a few committees to study race in its admissions process between 2014 and 2017. In 2014, the University formed the Richardson Committee in response to accusations that its admissions process is unfair, but the committee disbanded shortly after its formation. R. at 14. In 2015, the University formed the King Committee, which published a report

detailing the University's purported justifications for the use of race in its admissions process. R. at 11–12. Finally, in 2017, the University formed the Spartan Committee to study race neutral alternatives in university admissions. R. at 14.

The University's Rejection of Race-Neutral Alternatives. The University has been presented with a plethora of race-neutral alternatives to its race-conscious admissions policy: increasing recruitment efforts, expanding partnerships with schools that serve applicants of modest socioeconomic backgrounds, increasing financial aid, increasing transfer admissions, increasing the weight for socioeconomic background, and adopting place-based preferences. R. at 15.

Currently, the University has twenty-three times more wealthy students than it does poor students. R. at 33. The Spartan Committee found that relying on socioeconomic status as a race-neutral alternative would lead to “many non-white students in the University's class coming from modest socioeconomic circumstances.” R. at 16. However, the University ultimately rejected this as a race-neutral alternative because it would come “at the cost of other forms of diversity,” although the committee did not specify what other forms of diversity would be affected. R. at 16. In fact, the Spartan Committee rejected all of the available race-neutral alternatives either because they did not achieve the University's desired racial makeup or because the University found them incompatible with the University's educational goals. R. at 15–17.

The University also rejected Simulation F, a race-neutral alternative advanced by AFAP in this litigation. Under Simulation F, the University would eliminate LDC tips, which are preferences for legacy applicants, applicants on the Dean's Interest List, and children of faculty or staff. R. at 9, 26. The University would also eliminate its consideration of race and increase the tip for low-income applicants. R. at 26. Although the average SAT score would marginally decrease, the average student's high school GPA would remain unchanged, and adoption of simulation F

would cause the school's share of Asian American and "Hispanic and Other" applicants to increase. R. at 26. Other public universities have eliminated their race-conscious admissions programs, but the University maintains that it is unable to do the same without sacrificing some educational benefit. R. at 15–17, 35.

II. Procedural History.

AFAP filed suit on November 17, 2019, alleging that by discriminating against Asian American applicants in favor of white applicants and other minority applicants, the University's race-conscious undergraduate admissions process violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 ("Title VI"). R. at 17. AFAP is seeking a declaratory judgment, injunctive relief, and attorney's fees and costs, based on the University's failure to meet this Court's standards for the use of race in admissions. R. at 17–18. Specifically, AFAP argues that the University (1) impermissibly uses race as more than a "plus" factor in admissions; (2) engages in racial balancing; (3) intentionally discriminates against Asian American applicants; and (4) considers race despite the existence of race-neutral alternatives. R. at 17–18.

After denying the University's motion to dismiss AFAP's suit for lack of Article III standing, the district court held a thirteen-day bench trial. R. at 18. The University defended its use of race in admissions, arguing that the University's interest in a diverse learning environment justifies the use of race as a factor in its admissions process. R. at 20. Even though the district court found "a statistically significant and negative relationship between Asian American identity and the personal rating assigned by University admissions officers," the district court entered judgment for the University on all counts after finding the University had met its burden to show that its admissions process does not violate the Equal Protection Clause or Title VI. R. at 18, 33.

After the district court entered its judgment, AFAP appealed to the United States Court of Appeals for Fourteenth Circuit. R. at 18. The Fourteenth Circuit found that although “the University’s admitted share of applicants vari[ed] relatively little” from 2009 to 2018, the consistency in racial makeup was not caused by racial balancing. R. at 22. Additionally, the court found the University’s use of one-pagers permissible based on the University’s purported use of the information. R. at 22–23. Finally, despite Petitioner’s evidence that “Asian American applicants with high grades and high test scores are admitted at lower rates than applicants of other races,” the court found that the University does not intentionally penalize Asian American applicants. R. at 24. Ultimately, the circuit court affirmed the district court’s ruling. R. at 3.

SUMMARY OF THE ARGUMENT

***Grutter* must be overruled.** *Grutter v. Bollinger* is egregiously wrong, has proven unworkable, contradicts this Court’s precedent, has disadvantaged society, and lacks any legitimate reliance interest; therefore, *Grutter* must be overruled. The Equal Protection Clause of the Fourteenth Amendment restricts States from having the authority to use race as a factor in granting educational opportunities. However, *Grutter* has created a dangerous exception to this constitutional guarantee and opened the door for universities to discriminate against students based on race.

When deciding to overrule precedent, this Court is concerned with several factors, such as the nature of the error, the quality of the reasoning, the workability of the rules imposed, the disruptive effect of other areas of the law, and the absence of reliance interest. These factors are encompassed within three broad considerations that guide the Court’s analysis: whether the prior decision is not just wrong, but egregiously wrong; whether the prior decision caused significant negative jurisprudential or real-world consequences; and whether overruling the prior decision will

unduly upset reliance interest. *Grutter* fails every factor of the *stare decisis* framework. For the first time, this Court is presented with the opportunity to overrule *Grutter* and uphold the self-evident truth that all men are created equal.

The University's discriminatory admissions process fails strict scrutiny. A university that receives federal funding is prohibited from discriminating against applicants on the basis of race in its admissions process. Yet, the University's current process goes beyond constitutional limits by using race as a factor at nearly every step of its admissions process. Armed with applicants' demographics, the University admits students in a manner that achieves its desired racial makeup. Additionally, University officials use the provided demographics information to intentionally target one type of applicant: the Asian American.

The University is holding fast to its discriminatory process, even though the University's consideration of race is unnecessary to reap the educational benefits of diversity. The University has several race-neutral alternatives available that would further the University's goal to create a diverse student body. However, despite the existence of these workable race-neutral alternatives, the University continues to favor its race-conscious admissions process. The University's use of a race-conscious admissions process when workable race-neutral alternatives are available flies in the face of the Fourteenth Amendment's equal protection guarantee. For these reasons, we ask this Court to reverse the holding of the Fourteenth Circuit.

ARGUMENT

I. *Grutter* Must Be Overruled.

The Equal Protection Clause of the Fourteenth Amendment restricts States' authority to use race as a factor in granting educational opportunities. *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*

No. 1, 551 U.S. 701, 747 (2007). However, because of this Court’s decision in *Grutter v. Bollinger*, universities consistently apply race as a factor in admissions. *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Grutter* has essentially created an exception to the self-evident truth found in *Brown* and, by doing so, abandoned our nation’s founding principle that “all men are created equal,” regardless of skin color. Decl. of Indep., 1 Stat. 1 (July 4, 1776). While history shows the principle of equality has been violated, as seen in *Dred Scott v. Stanford* and *Plessy v. Ferguson*, this Court has taken appropriate measures to correct mistakes and ensure equality and justice prevail. The way to stop discrimination based on race “is to stop discriminating on the basis of race.” *Parents Involved*, 551 U.S. at 748. As such, this Court should abandon the idea that universities may use of race as a factor in admissions and overrule *Grutter*.

The doctrine of *stare decisis* is rooted in Article III of the Constitution and requires respect for precedent and the wisdom of the judges who have come before. U.S. Const. art. III, § 1; *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2306 (2022) (Kavanaugh, J., Concurring). However, *stare decisis* does not require that the Court should never overrule precedent. *Id.* at 2307. This Court has shown that when a mistake occurs, it will overrule precedent to ensure that justice prevails. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Crawford v. Washington*, 541 U.S. 36 (2004); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954). The Court’s most notable cases, including *Brown*, which is largely considered the most important and greatest decision in this Court’s history, have entailed overruling precedent. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., Concurring in Part).

The decision to overrule precedent should not be taken lightly. To overrule constitutional precedent, the Court requires something more than the belief that the precedent was wrongly

decided. *Id.* at 1414. To identify when a case should be overruled, the Court has identified a framework that requires weighing several factors that fold into three broad categories. *Id.* at 1414–15. To overrule a prior constitutional decision, the Court will consider whether the prior decision is not just wrong, but egregiously wrong; whether the prior decision caused significant negative jurisprudential or real-world consequences; and whether overruling the prior decision will unduly upset reliance interest. *Id.*

When overruling precedent, past cases have shown that the Court is concerned with how overruling the precedent will affect the American people’s belief in the rule of law if they were to lose respect for the Court as an institution. *Dobbs*, 142 S. Ct. at 2278. The public must perceive that the Court bases its decisions on principle and is separate from political pressure. *Id.* Here, the Court’s decision to overrule *Grutter* may be based on the self-evident principle that all men are created equal. Such rationale will strengthen the American people’s belief in the rule of law and create greater respect for the Court as an institution.

For the first time, this Court is presented with the question of whether *Grutter* should be overruled. Based on the *stare decisis* factors and the American people’s belief in the rule of law, to ensure equality and justice, *Grutter* must be overruled.

A. The *stare decisis* factors strongly favor overruling *Grutter*.

Grutter was egregiously wrong from the start, has caused significant real-world consequences, and lacks any legitimate reliance interest; therefore, *Grutter* fails every factor of the traditional *stare decisis* analysis. *Stare decisis* is not an inexorable command, and it is at its weakest when used to interpret the Constitution. *Dobbs*, 142 S. Ct. at 2262. This Court has noted the high value placed on having a matter settled right. *Id.* To protect the Constitution, this Court has proven a willingness to reconsider and, if necessary, overrule a constitutional decision. *Id.*

The *Dobbs* Court identified five factors to weigh when determining whether a case should be overruled: the nature of the error, the quality of the reasoning, the workability of the rules imposed, the disruptive effect of other areas of the law, and the absence of reliance interest. *Id.* at 2265. These five factors fold into three broad considerations: whether the prior decision is not just wrong, but egregiously wrong; whether the prior decision caused significant negative jurisprudential or real-world consequences; and whether overruling the prior decision will unduly upset reliance interest. *Ramos*, 140 S. Ct. at 1414–15 (Kavanaugh, J., Concurring in part). These considerations guide the analysis to determine what constitutes strong grounds to overrule a prior constitutional decision. *Id.* Here, the *stare decisis* factors strongly weigh in favor of overruling *Grutter*.

1. *Grutter* was egregiously wrong the day it was decided.

Grutter was wrong the day it was decided. Since its founding, our country has recognized the self-evident truth that “all men are created equal.” Decl. of Indep., 1 Stat. 1 (July 4, 1776). This Court previously held in *Brown* that the Constitution denies any authority to use race as a factor in affording educational opportunities. *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. at 747 (2007). However, *Grutter* departs from this self-evident truth and implies that all men are created equal, except for when it relates to university admissions. There are no exceptions to *Brown*. If *Brown* is our law, *Grutter* cannot be.

In *Plessy v. Ferguson*, the petitioner was assigned to a coach car that belonged to his particular race; when he insisted on going to a coach car used by a different race, he was forcibly ejected from the train and imprisoned. *Plessy v. Ferguson*, 163 U.S. 539 (1896), overruled by *Brown*, 347 U.S. 483. The *Plessy* Court upheld a statute, creating the “separate but equal” doctrine,

permitting inequality based on race. *Id.* at 552. The Court reasoned that a statute that merely implies a legal distinction between differing races does not destroy the legal equality of the two races. *Id.* at 543.

Plessy has long been recognized as one of the most infamous cases in this Court's history. *Plessy* betrayed our commitment to equality before the law and was "egregiously wrong" the day it was decided. *Dobbs*, 142 S. Ct. at 2265. This Court in *Brown* corrected the wrong in *Plessy* by holding that the Constitution denies any authority to use race as a factor in affording educational opportunities. *Brown*, 347 U.S. at 495. However, *Grutter* has created an exception to *Brown* and once again permitted universities to consider race before affording educational opportunities.

In *Grutter*, law school applicants were denied admission as part of a race-conscious admissions policy using race as a plus factor on applications. *Grutter v. Bollinger*, 539 U.S. at 317 (2003). The *Grutter* Court held that the Equal Protection Clause does not prohibit using race in admissions decisions to further a compelling governmental interest. *Id.* at 344. The Court identified student body diversity as a compelling state interest that will justify using race in university admissions. *Id.* at 333. In the conclusion of its opinion, the *Grutter* Court announced that twenty-five years from the time of the opinion, the use of racial preferences would no longer be necessary to further the interest associated with race-based admissions. *Id.* at 343.

The rationale in *Grutter* is based on an idea that all members of a race share the same experiences and views, therefore distinguishing applicants on the basis of race will further a compelling interest in student body diversity. *Grutter* allows universities to draw a race-based distinction between citizens based on nothing but the color of their skin. *Grutter's* rationale is premised on the antiquated assumption that a university can predict an applicant's life experiences, views, and background based solely on race. Such an assumption assumes all members of a

particular race share the same experiences, views, and background. This rationale fails to recognize people are not defined by their race and permits universities, such as the Respondent, to engage in racial stereotyping in their admissions processes.

The Constitution abhors classifications based on race because such classifications result in harm to the favored races, are based on illegitimate motives, and demean the entire citizenry. *Grutter*, 539 U.S. at 353 (Thomas, J., Concurring in part). *Grutter*, and the Respondent, argue the University's use of race furthers a compelling interest in racial diversity among their classes. However, using race to distinguish between applicants exacerbates rather than reduces racial prejudice; it is inherently unconstitutional. *Adarand Constructors, Inc. v. Peña*, 515 U.S. at 229 (1995). Using race to differentiate between two classes of people does not suddenly become justified because a university does it.

The Court in *Grutter* rationalized its opinion based on a false idea that all members of a particular race must share the same experiences and views; therefore, distinguishing applicants on the basis of race will further a compelling interest in diversity. While the Court recognized its decision would be outdated within twenty-five years, it failed to recognize skin color says nothing about who a person is, what they think, or where they were raised. This rationale is clearly faulty, and the decision was egregiously wrong the day it was decided.

2. *Grutter* has caused significant negative jurisprudential consequences in addition to real-world consequences.

Grutter has caused significant consequences by proving it is unworkable, it is inconsistent with prior decisions, and it negatively causes real-world effects on the citizenry. After establishing that the prior decision was egregiously wrong, the Court's analysis shifts to consider jurisprudential consequences such as workability, consistency, and coherence with prior precedent. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (Kavanaugh, J., Concurring in part). Further,

in this step, the Court looks to more than the law by scrutinizing the precedent's real-world effects on the citizenry. *Id.* Here, *Grutter* fails the second *stare decisis* factor.

In *Brown v. Board of Education*, a class action suit was brought after African Americans sought to be admitted to public schools on a nonsegregated basis. *Brown*, 347 U.S. 487. This Court held that the segregation of children based on race, even when facilities are equal, deprives minority children of equal educational opportunities and is, therefore, unconstitutional. *Id.* at 495. This Court reasoned that separating students of similar age and qualifications based solely on their 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.

In *Regents of University of California v. Bakke*, after a white male applicant was denied admission to a state medical school, he challenged the school's special admission program, which was designed to assure the admission of a specific number of students in minority groups. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 270 (1978). In part I of the *Bakke* opinion, this Court held that the medical school's special admissions program designed to fulfill a quota was unlawful and directed that the student be admitted. *Id.* at 271. However, in part V of the *Bakke* opinion, this Court reversed a finding by the lower court and held that race or ethnic background may be deemed a “plus” in an applicant's file. *Id.* at 317.

As the law stands, it is impossible to navigate. Universities are forbidden from using race to fill a quota within their classes. However, they are permitted, and even encouraged, to use race as a plus factor, or “tips” as the Respondent calls them, to ensure sufficient minorities are present. R. at 9. The two holdings issued in *Bakke* contradict each other and are largely inconsistent with this Court's prior case law. The Court's finding in *Grutter* was primarily based upon compliance

with the holding in *Bakke*. *Grutter*, 539 U.S. 306. *Grutter*'s reliance upon the inconsistent holding in *Bakke* is what has made *Grutter* unworkable and inconsistent with prior precedent.

Through a "tips" based system, universities are encouraged to simply conceal their efforts to fill a race-based quota. When a plus factor is given to one group based upon their race, a minus factor is given to another group, Asian Americans in the present case, based upon an uncontrollable factor, their race. As stated in *Brown*, when race is used to distinguish between otherwise similar students, it creates a feeling of inferiority as to status that will directly affect hearts and minds. In Justice Thomas's book *My Grandfather's Son*, the justice wrote:

In the year following Dr. King's assassination, affirmative action had become a fact of life at American colleges and universities, and before long I realized that those blacks who benefited from it were being judged by a double standard. As much as it stung to be told that I'd done well in the seminary despite my race, it was far worse to feel that I was now at Yale because of it.

Clarence Thomas, *My Grandfather's Son* 74–75 (2008). Justice Thomas has personally experienced the negative effects of affirmative action. *Grutter* continues to allow race-based admissions while turning a blind eye to the dangers warned of in *Brown*.

In no other area of law do we permit race to be used as a factor to distinguish between citizens. *Batson v. Kentucky*, 476 U.S. 79, 90 (1986) (holding race alone is not a valid reason for a peremptory challenge to be used); *Loving v. Virginia*, 338 U.S. 1, 12 (1967) (holding race cannot be used as a factor in issuing marriage licenses); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding race cannot be used as a factor for selling residential property); *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (holding it unconstitutional to use race as a factor in voting). "Education is perhaps the most important function of state and local governments." *Brown*, 347 U.S. at 493. If education indeed plays such an essential role in our country, why do we permit it to be the only area of law allowed to distinguish citizens based on their race? As this Court stated in *Parents Involved*, "The

way to stop discrimination on the basis of race is to stop discrimination on the basis of race.” *Parents Involved*, 551 U.S. at 748. *Grutter* is unworkable, inconsistent with prior case law, and causes real-world harm to the citizenry.

3. *Grutter* lacks any legitimate reliance interest.

No legitimate reliance interest exists in treating people differently based on skin color; therefore, *Grutter* lacks reliance interest. In fact, not only does *Grutter* not have a legitimate reliance interest, it imposes upon a legitimate reliance interest. Every American has a legitimate reliance interest in constitutionally protected rights. *Ramos*, 140 S. Ct. 1408. A reliance interest is weakest when it goes against the Constitution. *See Batson*, 476 U.S. 79; *Smith*, 321 U.S. 649. *Grutter* has undermined the fundamental principle that all men are created equal. *Grutter* has placed a universities “compelling interest” above self-evident truths. Because *Grutter* is our law, citizens are deprived of fundamental rights that have been self-evident since our country's founding.

Even though *Grutter* has been our law for twenty years, our culture has not relied upon the decision. According to a study conducted by the Pew Research Center, “nearly three-quarters of Americans or more say gender, race or ethnicity . . . should not factor into admissions decisions.”¹ If *Grutter* supported a legitimate reliance interest, it would be displayed among the people.

Further, *Grutter* recognized the lack of reliance interest by stating that its holding should not be effective within twenty-five years. *Grutter*, 539 U.S. at 343. The limitation on *Grutter*'s holding is based upon the principle that race-conscious admissions policies must be limited in time. *Id.* at 342. No significant reliance interest can exist where universities are on notice that race-

¹ Gómez, *U.S. Public Continues to View Grades, Test Scores as Top Factors in College Admissions*, Pew Rsch. Ctr. (Apr. 26, 2022), [pewrsr.ch/3MB2vVa](https://www.pewresearch.org/3MB2vVa).

based admissions policies must have an end date. However, universities are increasing their use of race instead of winding down the practice. Here, the Respondent has admitted to using race in multiple aspects of its application process. *See* R. at 9. The purpose of *Grutter* was never to create a reliance interest, and it is now time for universities to depart from race-based admissions and look to alternative means to achieve diversity.

Because *Grutter* is egregiously wrong, has proven unworkable, contradicts this Court's precedent, has disadvantaged society, and lacks any legitimate reliance interest, it must be overruled.

B. Overruling *Grutter* will strengthen the American people's belief in the rule of law and create greater respect for the Court as an institution.

Once it has been established that precedent fails the *stare decisis* factors, the focus shifts to determining how overruling the precedent will affect the American people's belief in the rule of law if people were to lose respect for the Court as an institution. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992), overruled by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). While not considered a factor in the *stare decisis* framework, the second part of the analysis is necessary to ensure the American people understand the Court has based its decision on principle rather than political pressure. *Dobbs*, 142 S. Ct. at 2278. Here, the Court's decision to overrule *Grutter* may be based on the self-evident principle that all men are created equal.

When deciding a constitutional issue or considering whether to overrule precedent, this Court has a duty to uphold the Constitution and not be affected by outside influences. *Id.* Most recently, this was seen in *Dobbs* when a leaked opinion was released to the public. Despite political and public pressure, this Court interpreted the law and applied it to the case at hand. The Court's influence on political and public powers must stem solely from the strength of its opinions. *Id.* at 2279.

The principle of equality has not changed since the time *Grutter* was decided. The American people expect to be treated the same regardless of skin color. In overruling *Grutter*, this Court will recognize and reaffirm the self-evident principle that all men are created equal. Basing a decision upon such rationale will strengthen the public's confidence in this Court's commitment to upholding the Constitution.

This Court cannot make decisions based on public pressure. By properly interpreting the law, applying the *stare decisis* factors, and deciding the case upon principle, this Court will strengthen the American people's belief in the rule of law and show society that opinions are based upon principle, not social or political powers. *Id.* at 2278.

II. The University's Discriminatory Admissions Process Fails Strict Scrutiny.

Even if this Court declines to overrule *Grutter*, the University's admissions process still must satisfy strict scrutiny. *Fisher v. Univ. of Tex. (Fisher II)*, 579 U.S. 365, 376 (2016) (“[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny” (alterations in original) (quoting *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 309 (2013))); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (“the Court's decisions have established that classifications based on . . . race are inherently suspect and subject to close judicial scrutiny”). Strict scrutiny requires the University's admissions process to be narrowly tailored to furthering a compelling governmental interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Thus, the University's admission process must be “narrowly tailored” to achieve “the only interest that this Court has approved in this context”: the educational benefits of “student body diversity.” *Fisher I*, 570 U.S. at 314–15; *see also Grutter*, 539 U.S. at 325. The University's admissions process is not narrowly tailored to achieve the educational benefits of student body diversity because the University discriminates on the basis of race and has failed to prove the absence of

workable race-neutral alternatives. Therefore, this Court should reverse the holding of the Fourteenth Circuit and find that the University's admissions process violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act ("Title VI").

A. The University's admissions process discriminates on the basis of race.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws". U.S. Const. amend. XIV, § 1. Title VI prohibits recipients of federal funding, including private colleges and universities, from discriminating against students and applicants in a manner that would violate the Equal Protection Clause. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978); *see also* 42 U.S.C. § 2000d. Although this Court has held that universities have a compelling interest in achieving student body diversity, the Equal Protection Clause is violated when a federally funded university engages in racial discrimination. *Grutter*, 539 U.S. at 341 ("[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race" (alterations in original) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432)). Here, the University is engaging in racial discrimination in violation of the Equal Protection Clause and Title VI. The University does not limit its consideration of race to a mere plus factor. Instead, the University goes beyond constitutional limits by intentionally discriminating against Asian Americans and engaging in racial balancing.

1. The University does not limit its use of race to a mere plus factor.

Pursuant to this Court's ruling in *Grutter*, race may be used as a plus factor in university admissions. *Grutter*, 539 U.S. at 336–37. However, a university is prohibited from awarding mechanical "bonuses" based on race or ethnicity. *Id.* at 337. In addition, the ability to use race as a plus factor does not mean that a university is permitted to engage in discrimination against races

that are not awarded a plus. As this Court stated in *Bakke*, “[t]he guarantee of equal protection cannot mean one thing when applied to one individual, and something else when applied to a person of another color.” *Bakke*, 438 U.S. at 289–90.

The Court in *Grutter* found that the University of Michigan’s Law School admissions policy did not violate the Equal Protection Clause and Title VI, even though race was used as a plus factor. *Grutter*, 539 U.S. at 334. A central consideration was the fact that the law school did not limit what qualities and experiences may contribute to student body diversity. *Id.* at 338. Similarly, the Court in *Fisher* found that the admission process used by the University of Texas satisfied strict scrutiny because “there [was] no dispute that race [was] but a ‘factor of a factor of a factor’ in the holistic-review calculus.” *Fisher v. Univ of Tex. (Fisher II)*, 579 U.S. 365, 375 (2016). The circumstances here are distinguishable from both *Grutter* and *Fisher*.

Unlike in *Grutter*, here the University’s process is not “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant,” and the University does not “give[] substantial weight to diversity factors besides race.” *Grutter v. Bollinger*, 539 U.S. at 306, 338 (2003). The University uses a “tips” based system. R. at 9. Tips are plus factors that might “tip” or move an applicant into the University’s pool of admitted students. R. at 9. While the University does consider other diversity factors, such as a student’s status as a “First Generation” college student, during recruitment, the University does not expressly consider those factors throughout the admissions process. R. at 9, 14. A student’s status as a “First Generation” college student is not a basis for a tip like race is. R. at 9, 14. Furthermore, the University fails to consider other factors that contribute diversity, such as religion, even though people’s religious faith is frequently “the most fundamental part of [their] identity.” *Hassan v. N.Y.C.*, 804 F.3d 277, n.14 (3d Cir. 2015). Racial diversity is not a compelling governmental

interest; only student body diversity is a compelling governmental interest. *Grutter*, 539 U.S. at 338. The University ignores that more than just race contributes to student body diversity. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978). Racial diversity is not a compelling interest approved by this Court—a university may only consider race to achieve the broader benefits of student body diversity.

In addition, unlike in *Fisher*, here race is not merely a “factor of a factor of a factor.” *Fisher II*, 579 U.S. at 375. Instead, an applicant’s race is considered at nearly every stage of the application process: race may be considered during the University’s “first read” of application materials, during officer and alumni interviews, during admissions subcommittee meetings, and during full admissions committee meetings. R. at 4. Race is determinative for at least 45% of all admitted African American, Hispanic, and “Other” applicants. R. at 24, 34. Race does not affect a “small portion of admissions decisions;” instead, the University gives an impermissible amount of weight to race as a factor in its admissions process. *Fisher II*, 579 U.S. at 384–85.

2. The University intentionally penalizes Asian Americans.

The University’s admissions process not only uses race as more than a plus factor in violation of *Grutter*, it also goes a step further: it intentionally penalizes Asian American applicants. In 1990, the U.S. Department of Justice Office of Civil Rights (OCR) investigated potential anti-Asian bias in the University’s admissions process. R. at 10. OCR found “descriptions of Asian American applicants . . . that could have implications for the stereotyping of Asian American applicants.” R. at 10. At the time of OCR’s report, those stereotypes “could not be shown to have negatively impacted the ratings” given to Asian American applicants. R. at 10. The negative impact of the Asian stereotypes perpetuated by admissions officials is now evident. Even though Asian American applicants receive some of the highest ratings across most of the

admissions categories, Asian American applicants are denied admission at a higher rate than other groups. R. at 33. This is because of the personal rating component, which is an entirely subjective rating assigned by admissions officials. *See* R. at 7. The district court found “a statistically significant and negative relationship between Asian American identity and the personal rating assigned by University admissions officers.” R. at 33. If the University excluded the personal rating, Asian American applicants would be admitted at a significantly larger rate. R. at 33. This Court should not allow such blatant racial discrimination to continue.

3. The University engages in impermissible racial balancing.

This Court has repeatedly stated that racial balancing is impermissible discrimination. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“racial balancing [] is patently unconstitutional”); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“Racial balance is not to be achieved for its own sake). Schools are permitted to pay attention to the number of minority admittees in the past to determine the number that is needed to provide a “pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007). “Working forward from some demonstration of the level of diversity that provides the purported benefits” is allowable, but “working backward to achieve a particular type of racial balance” is constitutionally impermissible. *Id.* at 729. Here, the University’s claimed interest in student body diversity is a pretext for discrimination, as the University engages in racial balancing.

Throughout the admissions process, admissions officers are provided with “one-pagers,” which provide information about the demographic characteristics of the University’s applicant pool and compare it to the previous year. R. at 9. After the full admissions committee votes on applicants, it has a pool of potential admits that exceeds the number students that can be admitted.

R. at 8. To finalize its class, the University conduct a “chop” process to narrow the pool. R. at 8. Before compiling their “chop list,” committee members are again informed of every applicant’s race. R. at 8. The University admits that this information is used to ensure that there is not a significant change in class characteristics, including race, from year to year. R. at 9. The University’s admitted share of applicants by race varied little from 2009 to 2018 because the University seeks to admit a certain percentage of each race. *See* R. at 22. The University’s use of “one-pagers” allows the admissions committee to easily ascertain whether it has admitted its desired racial balance.

The University’s bare assertion that it does not seek to meet a certain quota every year is not enough to prove the absence of racial balancing. In her *Gratz* dissent, Justice Ginsburg predicted that schools might be less than candid if courts attempted to take away their race-based admission programs. *See Gratz v. Bollinger*, 539 U.S. 244, 304–05 (2003) (Ginsburg, J., dissenting) (observing that universities “may resort to camouflage” to keep their race-conscious programs and that these admissions programs might be preserved through “winks, nods, and disguises”). Protection from racial discrimination is a core purpose of the Fourteenth Amendment. *Grutter*, 539 U.S. at 341. Recognition of this important constitutional guarantee should not be dependent upon determinations that involve “camouflage” or “winks, nods, and disguises.” *Id.*; *see also* Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 Colum. L. Rev. 1589, 1590–91 (2003) (acknowledging that the use of the strict scrutiny diversity defense in *Grutter* was a litigation strategy because a defense based upon the history of discrimination against African Americans was not permissible).

B. The University’s race-conscious admissions process is unnecessary.

The University bears the burden of proving that there are no available and workable race-neutral alternatives to its race-conscious admissions process. *Fisher v. Univ. of Tex. (Fisher II)*, 579 U.S. 365, 366 (2016). In *Grutter*, this Court stated, “We expect that 25 years from now the use of racial preference will no longer be necessary to further [student body diversity].” *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). It has been nearly twenty years since *Grutter*, and consideration of race is no longer necessary to achieve student body diversity. In fact, *greater* student body diversity can be achieved using race-neutral alternatives. Thus, the University has failed to meet its burden to demonstrate the absence of workable race-neutral alternatives.

1. The University has several available, workable race-neutral alternatives.

This Court has held that in “order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (quoting *In re Griffiths*, 413 U.S. 717, 721–22); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). A race-conscious admission process is not necessary when there is a workable race-neutral alternative available. *Fisher II*, 579 U.S. at 366. A race-neutral alternative need not be perfect. *See Fisher I*, 570 U.S. at 312. Instead, a race-neutral alternative is considered workable when it achieves the educational benefits of diversity “about as well and at tolerable administrative expense.” *Id.*

There are several workable race-neutral alternatives available to the University—the University could eliminate early action, increase recruitment efforts, increase financial aid, or increase its preferences for the socioeconomically disadvantaged. As was recognized by Justice

Knotts in the Fourteenth Circuit, other public universities have implemented the above-listed race-neutral alternatives and eliminated their race-conscious admissions processes without eliminating student body diversity. R. at 35.

Another option is for the University to implement Petitioner's Simulation F. Under Simulation F, the University would eliminate LDC tips, which are preferences for legacy applicants, applicants on the Dean's Interest List, and children of faculty or staff. R. at 9, 26. The University would also eliminate its consideration of race and increase the tip for low-income applicants. R. at 26. Although the average SAT score would marginally decrease, the average student's high school GPA would remain the same as it is now, and adoption of simulation F would cause the school's share of Asian American and "Hispanic and Other" applicants to increase. R. at 26.

The University may argue that Petitioner's proposed race-neutral alternatives are unworkable because the University objects to the effect of these race-neutral policies on its racial makeup. *See* R. at 15–16; 26. This objection is illegitimate. To prove unworkability, the University must prove that all of the available race-neutral alternatives prevent it from achieving student body diversity, not just "racial diversity." *Fisher I*, 570 U.S. at 311–12. The University may also object to negligible changes in its endowment, chosen majors, and SAT scores that would be caused adopting a race-neutral process. R. at 35. However, none of these objections prove that implementing the available race-neutral alternatives would prevent the University from reaping the educational benefits of student body diversity.

About five years ago, the University's Spartan Committee rejected several workable race-neutral alternatives. R. at 15. There is no evidence that the University has meaningfully considered the available, workable race-neutral alternatives since that time, despite the University's "ongoing

obligation to engage in constant deliberation and continued reflection regarding” its race-conscious admissions process. *Fisher II*, 579 U.S. at 388. This Court must not defer to the University’s consideration of the available race-neutral alternatives. *Fisher I*, 570 U.S. at 312. Rather, this Court must “be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.” *Id.* The University has failed to demonstrate that the educational benefits of diversity are not achieved “about as well” using the proposed race-neutral alternatives. *Id.* Therefore, AFAP’s proposed race-neutral alternatives are workable. The University’s race-conscious admissions process is not necessary, and thus fails strict scrutiny, because there are workable race-neutral alternatives available. *Fisher v. Univ. of Tex. (Fisher II)*, 579 U.S. 365, 366 (2016).

2. The available, workable race-neutral alternatives achieve greater student body diversity than the University’s current discriminatory process.

The University objects to the workable race-neutral alternatives that are available, but its objections are illegitimate. Not only do the available alternatives achieve the educational benefits of diversity “about as well” as the University’s current process, but the available alternatives achieve *greater* overall student body diversity by allowing for increased socioeconomic diversity. *Fisher I*, 570 U.S. at 312.

Race-based admissions processes disproportionately benefit wealthy minorities. That result diminishes the genuine diversity of experiences and viewpoints that underlies *Bakke* and *Grutter*’s student body diversity rationale. Race-conscious processes layer racial preferences on top of wealth preferences, with the result being that even among minority students, wealth is greatly overrepresented. Commentators have noticed the sizeable shift in the number of African American students from immigrant backgrounds at elite universities, rather than students from more economically disadvantaged communities. Goodwin Liu, *Racial Justice*

in the Age of Diversity, 106 Cal. L. Rev. 1977, 1982–83 (2018). The University here is no exception; it admits that there are twenty-three times as many wealthy students on campus as there are poor students. R. at 33. The adoption of race-neutral alternatives that allow for increased socioeconomic diversity will lead to a pool of students with more diverse backgrounds, viewpoints, and life experiences. The University’s own Spartan Committee found that relying on socioeconomic status as a race-neutral alternative would lead to “many non-white students in the University’s class coming from modest socioeconomic circumstances.” R. at 16. The consideration of race is not necessary in order for the University to achieve the educational benefits of student body diversity.

CONCLUSION

Grutter v. Bollinger is egregiously wrong, has proven unworkable, contradicts this Court’s precedent, has disadvantaged society, and lacks any legitimate reliance interest. Overruling *Grutter* will strengthen the American people’s belief in the rule of law and create greater respect for the Court as an institution. Moreover, the University’s current race-conscious admissions process is both discriminatory and unnecessary. For these reasons, the Petitioner respectfully requests that this Court reverse the holding of the Fourteenth Circuit, overruling *Grutter v. Bollinger* and finding that the University’s admissions process violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act.