No. 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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August 24, 2022

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INTRODUCTION

UNC's argument is not with SFFA; it is with *Brown*. That landmark decision fulfilled the Fourteenth Amendment's promise by requiring that "education … be made available to all on equal terms." 347 U.S. 483, 493 (1954). As the United States explained then, no neutral principle "could support a constitutional distinction between universities on the one hand, and public elementary or high schools on the other." U.S.-*Brown*-Br.19. Yet *Grutter* draws just that distinction.

In defending *Grutter*'s detour from *Brown*, UNC makes the same arguments that *Brown* rejected. It claims that the postbellum era vindicates its reading of the Fourteenth Amendment. It argues that racial classifications make everyone better off. It warns that universities cannot discard race quite yet. And it contends that the legality of its practices should be decided by North Carolinians, not this Court. The segregationists agreed. *See Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 322-26 (2013) (Thomas, J., concurring).

The path forward is clear. Universities must treat each applicant "as an *American*, and not as a member of a particular … race." U.S.-*Brown*-Br.3. "The rule of *stare decisis*," as the Government stressed in *Brown*, must give way to "the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law." *Id.* at 26. This Court should overrule *Grutter*; reaffirm the principle of racial neutrality in the Declaration, the Constitution, Title VI, and *Brown*; and reverse the decision below.

ARGUMENT

"It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 867 (2017). This Court should reject UNC's arguments on standing, *Grutter*, and race-neutral alternatives.

I. SFFA has standing.

Though Harvard has surrendered, UNC keeps challenging SFFA's standing. It concedes that associations can sue on behalf of their members. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-19 (2007). And it agrees that SFFA satisfies *Hunt*'s three-part test for associational standing: SFFA's members have standing; this litigation is germane to SFFA's purpose; and no member's participation is required. Pet.App.243-45 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). But UNC insists that all membership associations must prove they have "indicia of membership" and that SFFA lacked those indicia when it sued because its members didn't sufficiently fund or control the organization.

All five courts to consider this argument have rejected it. *SFFA v. Univ. of Tex. at Austin*, 37 F.4th 1078, 1084-86 & n.8 (5th Cir. 2022) (collecting cases). Rightly so. UNC's theory fails both legally and factually.

Legally, the indicia-of-membership test doesn't apply. In *Hunt*, this Court examined whether apple

dealers had "indicia of membership" only because the agency representing them was *not* a "voluntary membership organization." 432 U.S. at 342-45. Because SFFA "is, on its face, a traditional voluntary membership organization," the indicia-of-membership test is "inapplicable." *SFFA v. Harvard*, 980 F.3d 157, 183 (1st Cir. 2020); Pet.App.241-43.

Factually, "even if such a test applies, 'SFFA would easily satisfy it.'" Pet.App.237. SFFA's members "voluntarily joined SFFA," "support its mission," "receive updates," and "'have input and direction.'" Pet.App.234-35. And their ability to resign is a powerful mechanism of "control" because "there would be no lawsuit without [them]." *Citizens Coal Council v. Matt Canestrale Contr., Inc.*, 40 F. Supp. 3d 632, 640-43 (W.D. Pa. 2014). These unchallenged findings confirm that SFFA "in a very real sense ... represents" its members. *Hunt*, 432 U.S. at 345.

That SFFA initially charged no dues and received outside funding is irrelevant. The NAACP, for example, "initially set membership dues at one dollar" to "attract mass support" and survived "due in large measure to external financial support." Alexander, *An Army of Lions: The Civil Rights Struggle Before the NAACP* xv (2012). SFFA took similar steps to grow its membership. Dkt.113 at 2-5, 18-19 & Ex.I at 8. And some of the most well-known membership organizations still rely heavily on outside donations. *E.g.*, *2018 Annual Report* 36-43, NAACP, bit.ly/3HrCPb5; *Our Donors*, Sierra Club, bit.ly/3tYxPUH (last visited Aug. 24, 2022). UNC's position would hinder less-resourced individuals (students, immigrants, veterans, etc.)

from vindicating their rights through membership organizations.

SFFA's minor changes to its bylaws in 2015 played no role in the district court's reasoning. *See* Pet.App.237-45. From the beginning, SFFA has been a "voluntary membership association" that "'adequately represents'" its members. Pet.App.241-43; *accord Harvard*, 980 F.3d at 183-84 & n.22 (SFFA was a "traditional voluntary membership organization" "[w]hen suit was filed in November 2014"). And even if these bylaw amendments somehow mattered, this Court is free to consider them. *SFFA v. Harvard*, 261 F. Supp. 3d 99, 110 n.14 (D. Mass. 2017).

Universities always lob meritless standing challenges in these cases. They never succeed. This Court should reach the questions it agreed to review.

II. *Grutter* should be overruled.

Grutter should be overruled because it egregiously erred, inflicts harm, and generated no legitimate reliance interests. UNC does not dispute that these criteria are what matter, or that stare decisis is at its weakest in constitutional cases. Its attempts to salvage *Grutter* fail.

A. *Grutter* is grievously wrong.

The "critical" starting point under stare decisis is "the strength of the grounds on which [the precedent] was based." *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2244 (2022). *Grutter*'s grounds are ex-

ceptionally weak. Sensing this, UNC offers a new originalist defense, repeats an old misreading of *Brown*, and parrots *Grutter*'s diversity rationale.

1. UNC's originalist arguments are not reasons to keep *Grutter* under stare decisis, since *Grutter* didn't use originalist reasoning. *Grutter* relied solely on this Court's cases, starting in the 1950s. It didn't discuss ratification debates, antebellum statutes, or any other historical evidence. Not because those points were unfamiliar; the same evidence was cited in *Bakke* to justify giving race-based admissions something less than strict scrutiny. *See* 438 U.S. 265, 396-98 (1978) (op. of Marshall, J.). But *Grutter* rejected that position, 539 U.S. 306, 323-26 (2003), and UNC doesn't ask this Court to overrule any precedents, *see Ramos v. Louisiana*, 140 S.Ct. 1390, 1415 n.4 (2020) (Kavanaugh, J., concurring in part) ("the Court typically does not overrule a precedent unless a party requests overruling"). UNC's "new … originalist defense" thus "implicitly acknowledg[es] the weakness of [*Grutter*'s] own reasoning." *Janus v. AFSCME*, 138 S.Ct. 2448, 2469 (2018). And its new defense is "not entitled to receive the special deference" accorded to "precedent." *Citizens United v. FEC*, 558 U.S. 310, 385 (2010) (Roberts, C.J., concurring).

Regardless, UNC's originalist arguments fail. UNC uses them to rebut what it calls an "unprecedented *per se* rule" that would bar all racial classifications. UNC-Br.27. But to overrule *Grutter*, this Court needn't revisit whether the tiers of scrutiny can be reconciled with the constitutional text, *cf. Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2327

(2016) (Thomas, J., dissenting), or which part of the Fourteenth Amendment bars racial discrimination, *cf. United States v. Vaello Madero*, 142 S.Ct. 1539, 1551 n.4 (2022) (Thomas, J., concurring). It need only resolve whether an interest in "diversity" can justify racial discrimination in education.

On that critical question, UNC has no originalist evidence. Only one of its arguments even touches on higher education: its assertion that the Freedmen's Bureau gave money to Berea College when that school "sought to achieve 'a fifty-fifty ratio of black and white students.'" UNC-Br.32. That argument founders. Most importantly, Berea did not use race-based admissions during this period; it admitted students "without distinction by class or color." Wilson, *Berea College: An Illustrated History* 2 (2006). A Christian school founded by abolitionists, Berea refused to "exclud[e] students on the basis of color" because it "believed that God alone was the creator of 'all peoples of the earth.'" *Id.* at 1; *accord id.* at 19 (explaining that Berea traced "'impartial conduct to all'" to our nation's founding documents). Besides, Berea was a private school unbound by the Fourteenth Amendment. Mere federal funding wouldn't have implicated the Constitution. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982). And Congress's goal was not "promoting diversity," UNC-Br.32, but educating the newly freed

slaves, Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J.S. Hist. 271, 291-92 (1995).[1]

Even less persuasive is UNC's assertion that Congress contemporaneously "enacted race-conscious legislation." UNC-Br.31. The weaknesses with this argument are well-documented. Meese-Br.20-27. Federal statutes say little because the Equal Protection Clause applies to "State[s]," and "[u]ntil the middle of the 20th century" this Court denied that the Constitution imposes an equal-protection limit on Congress. *Vaello Madero*, 142 S.Ct. at 1544 (Thomas, J., concurring). Tellingly, when proslavery Democrats criticized these statutes as "class legislation," their criticisms were purely political. *See* Rappaport, *Originalism and the Colorblind Constitution*, 89 Notre Dame L. Rev. 71, 93 & n.88 (2013). Given their bad-faith motives, they would have argued that these laws were unconstitutional if they thought an equal-protection principle bound Congress; and even when responding to their political arguments, Republicans pointed out that the laws were colorblind. *See id.* at 99; Moreno 282-84.

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[1] Nor did *Brown* somehow endorse "race-conscious admissions at Berea." UNC-Br.36. UNC syllogizes that Kentucky banned integrated colleges in 1904, that this Court upheld Kentucky's ban under *Plessy*, and that *Brown* overruled *Plessy*. But no language in *Brown* endorses using race. And by 1904, as UNC's main authority explains, Berea had already abandoned the admissions policy that UNC calls "race conscious." *See* Nelson, *Experiment in Interracial Education at Berea College, 1858-1908*, 59 J. Negro History 13, 19-24 (1974).

And the laws were colorblind. The Freedmen's Bureau—which was created *before* the Fourteenth Amendment was ratified—was a temporary, emergency entity. Moreno 273-74. It was tasked with aiding newly freed slaves, as well as (mostly white) refugees. Rappaport 99; Moreno 276-77. Its programs were race neutral: They either mandated colorblindness, or they drew nonracial classifications based on "freedman" and "refugee" status. Moreno 274-80; Rappaport 96-101. UNC also gestures toward other federal statutes that it claims awarded race-based benefits. UNC-Br.30-31. But those laws either drew no racial classifications, or the classifications they drew were not meant to be racial given the surrounding historical context. Rappaport 102-13. Even if some were imprecise, many racial classifications could have survived strict scrutiny during this unique era. *Parents Involved*, 551 U.S. at 773 n.19 (Thomas, J., concurring).

Post-ratification history aside, questions of original meaning are controlled by "the text." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2136-37 (2022). Section 1 of the Fourteenth Amendment defines citizens, gives them the privileges and immunities of citizenship, and guarantees all persons "the equal protection of the laws." This provision, as the United States documented in *Brown*, was enacted to "abolish all legal distinctions based on race or color." U.S.-*Brown*-Rearg.-Br.187. Though UNC criticizes SFFA's example, UNC-Br.29, the historical record is flush with statements reflecting the amendment's colorblind purpose, U.S.-*Brown*-Rearg.-Br.32-65. Its House spokesman, for example, traced the

amendment to the Declaration and said it would ensure that "'the law which operates upon one man shall operate *equally* upon all.'" *Id.* at 43. Soon after ratification, this Court observed that the amendment requires laws to be "the same for the black as for the white"—to ban "expres[s]" racial classifications, no matter the race affected, because these classifications are "a stimulant to … race prejudice." *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879). The amendment also provided the constitutional authority for the Civil Rights Acts of 1866 and 1875, both of which mandated colorblindness. Rappaport 130-32. And as UNC admits, the immediate goal was eliminating the black codes—"'class legislation'" that subjected people of one race "'to a code not applicable to another.'" UNC-Br.30. But "what do the racial classifications at issue here do, if not" subject people of different races to different rules? *Parents Involved*, 551 U.S. at 747 (plurality).

2. *Brown* is the definitive word on how this text applies to public education. UNC is not using race to remediate its own history of discrimination against blacks and Hispanics. *Cf.* UNC-Br.35. So under *Brown*, the Fourteenth Amendment requires UNC to "'determin[e] admission … on a nonracial basis.'" *Parents Involved*, 551 U.S. at 747-48 (plurality) (quoting *Brown v. Bd. of Educ. of Topeka* (*Brown II*), 349 U.S. 294, 300-01 (1955)). It denies UNC "'any authority … to use race as a factor.'" *Id.* That principle was presaged by Justice Harlan's dissent in *Plessy*, championed by the plaintiffs in *Brown*, and adopted in both *Brown* opinions. *Id.* at 746-48; *id.* at 772-73 (Thomas,

J., concurring). UNC agrees that *Brown* is correct because Justice Harlan was correct. But UNC misses Justice Harlan's thesis: "Our constitution is color-blind." 163 U.S. 537, 559 (1896) (dissent). "The law regards man as man, and takes no account … of his color." *Id.*

UNC's attempt to make *Brown* about hegemonic exclusion—rather than a right to racial equality in education—is both familiar and wrong. UNC's distinction between "racial classifications designed to include rather than exclude" has been "repeatedly pressed" and "repeatedly rejected." *Parents Involved*, 551 U.S. at 742 (plurality). It was rejected in *Grutter*, and the distinction did not save the supposedly inclusive policies in *Bakke* or *Gratz*. Rightly so. UNC's idea of inclusion treats admissions like racial scorekeeping, where no rejectee is excluded so long as other members of his race are admitted in fair numbers. But treating people as subcomponents of racial groups, rather than individuals, is "fundamentally at odds" with *"Brown* itself." *Id.* at 743. *Brown* vindicated "'the *personal* interest … in admission … on a nondiscriminatory basis.'" *Id.* (quoting *Brown II*, 349 U.S. at 300).

In reality, all racial classifications exclude. *Id.* at 759 (Thomas, J., concurring). The only difference between inclusion and exclusion is "'whose ox is gored.'" *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 n.* (1995) (Thomas, J., concurring in part and concurring in judgment). When Harvard, for example, rejects Asian Americans based on stereotypical assumptions about their personalities, it certainly "'deprive[s]'"

members of a "'minority group of equal educational opportunities.'" UNC-Br.35. Universities might deem this discrimination "'politically acceptable,'" but "history" teaches "greater humility" about the "current generation's" ability to "distinguish good from harmful uses of racial criteria." *Parents Involved*, 551 U.S. at 742 (plurality) (cleaned up). For that reason, the law treats "all" racial classifications as "'inherently suspect'" and makes them satisfy "the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224. Race cannot be used, as even *Grutter* recognized, except for "'the most compelling reasons.'" 539 U.S. at 326.

3. The educational benefits of diversity are not a "'most compelling'" reason to use race. UNC does not defend *Grutter*'s stereotypical assumption that racial diversity increases viewpoint diversity. Though UNC parrots *Grutter*'s more race-specific assertions, it does not rehabilitate them.

Like *Grutter*, UNC's arguments are mostly circular. It says racial diversity prepares students for the "increasingly diverse communities and workplaces that await them." JA1378; *accord Grutter*, 539 U.S. at 331. It says racial diversity creates "legitimacy in the *eyes* of the citizenry" by ensuring that elite colleges are "*visibly* open" to all races. *Grutter*, 539 U.S. at 332 (emphasis added). And it says racial diversity helps minority students "not feel isolated." *Id.* at 319. These interests come dangerously close to saying that racial diversity is important because it achieves racial diversity. At a minimum, they betray a focus on proportional representation—ensuring that the student body "looks like" the country more broadly. How else

would universities match the workplace, meet society's aesthetic expectations, or prevent minorities from feeling unusually isolated? Neither proportional representation nor racial diversity in a vacuum, however, are legitimate interests that can sustain race-based admissions. *Parents Involved*, 551 U.S. at 729-33.

Also like *Grutter*, UNC has no real evidence that race-based admissions "promot[e] 'cross-racial understanding.'" 539 U.S. at 330. Touting its own report—a citation-free document created for litigation—UNC asserts that racial diversity will "destroy stereotypes, bridge divisions, and promote empathy." JA1378. But even if racial diversity created these benefits, UNC's "'means'" of pursuing racial diversity counteracts them. *Parents Involved*, 551 U.S. at 743 (plurality). Racial classifications increase "'racial hostility,'" create "'conflict,'" and "'reinforce'" stereotypes. *Id.* at 746. Tellingly, the only evidence that tries to measure whether race-based *admissions* create these benefits is pseudoscience. As in *Grutter*, UNC proffers surveys that ask students to grade their own appreciation for other races. JA1524. These surveys suffer from considerable "'social desirability pressures'" where students feel pressured to say what the university wants to hear. Killenbecks-Br.17. And these "subjective self-reports" are not the hard evidence that strict scrutiny demands. *Grutter v. Bollinger*, 288 F.3d 732, 804 (6th Cir. 2002) (en banc) (Boggs, J., dissenting). The same goes for the intervenors' evidence about "white fragility." JA1618-20.

Nor does UNC attempt to quantify "*how much* diversity is required to yield the claimed benefits." *Grutter*, 288 F.3d at 804 (Boggs, J., dissenting). UNC says it hasn't achieved enough diversity now, and it doesn't know when it ever will. Br.61; UNC-Br.57-59. That missing evidence is fatal because the relevant question is not diversity versus non-diversity; it's diversity under race-based admissions versus diversity under race-neutral alternatives. *Fisher I*, 570 U.S. at 312. Most universities do not consider race in admissions already. Harv.Br.40. That list includes the top three public universities in the country (and eight out of the top ten). *See Top Public Schools*, U.S. News & World Report, bit.ly/3JHKyEh (last visited Aug. 24, 2022). Does anyone think students from UNC have "legitimacy in the eyes of the citizenry" but students from the University of Michigan do not? Or that students from UNC have more "cross-racial understanding" than students from the University of Georgia? The notion is self-refuting. Tellingly, 19 States are confident that their universities will continue to be "diverse and thriving" after *Grutter* is overruled. Okla.-Br.3-19. And another three (California, Michigan, and Washington) already live in that world. CERF-Br.8, 12.

To overrule *Grutter*, though, this Court needn't consult any social science; explicit racial preferences are unconstitutional *even if* they create educational benefits. *Brown* teaches that racial classifications have no place in education, "regardless of" any "tangible factors" tied to educational outcomes. *Parents Involved*, 551 U.S. at 746 (plurality). Racial classifications are too dangerous, and education is too important, for children's futures to depend on their skin

color. On this point, "history will be heard." *Id.* Segregationists also argued that racial discrimination provided "educational benefits" by providing "more leadership opportunities" and bettering "interracial relations." *Fisher I*, 570 U.S. at 320-25 (Thomas, J., concurring). These familiar assertions from "elites bearing racial theories" haven't improved over time. *Parents Involved*, 551 U.S. at 781 (Thomas, J., concurring).

Rather than bowing to "the evanescent views of a handful of social scientists," the Constitution "enshrines principles independent of social theories." *Id.* at 766, 780. Racial neutrality is a "'moral imperative'" that cannot yield to speculative, contested claims of public-policy benefits. *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (op. of Kennedy, J.). If paeans to diversity are "all it takes to overcome the presumption against discrimination by race, we have witnessed an historic trivialization of the Constitution." Scalia, *The Disease as the Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 147 Wash. U. L.Q. 147, 148 (1979).

B. *Grutter* has spawned significant negative consequences.

Once *Grutter* licensed unconstitutional racial discrimination, negative consequences were inevitable. UNC ignores how elite schools use *Grutter* to discriminate against Asian Americans. Nor does UNC grapple with the Harvard Plan's antisemitic origins. Those facts are reason enough to overrule *Grutter*. But *Grutter* has also destabilized the law, spawned more racial classifications, and harmed who it tries to help.

1. *Grutter* is a precedential outlier. It lets universities use race to diversify their students; but universities cannot use race to diversify the faculty who teach those students. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (plurality). *Grutter* lets universities pursue racial diversity to promote cross-racial understanding; but K-12 schools—whose students arguably need those lessons most—cannot do the same. *Parents Involved*, 551 U.S. at 722-25; *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting). And *Grutter* lets universities use race to prepare students for a diverse workforce; but the workforce itself cannot use race to diversify its employees. *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1560-63 (3d Cir. 1996) (en banc).

Apart from *Grutter*, this Court has "consistently denied" the constitutionality of policies that "restrict the rights of citizens on account of race." *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967). It's been strictest in education. *Parents Involved*, 551 U.S. at 746-47 (plurality). "Remaining true" to the constitutional imperative of racial neutrality by overruling *Grutter* thus "better serves the values of stare decisis." *Adarand*, 515 U.S. at 231.

2. Instead of "eliminating" racial classifications, *Grutter*'s deviations from racial neutrality have spawned more. 539 U.S. at 343. Explicit racial classifications "stimulate our society's latent race consciousness," *Shaw v. Reno*, 509 U.S. 630, 643 (1993), and *Grutter* tells universities they can use race if they call it "diversity." No wonder, then, that universities

have spent millions erecting bureaucracies that specialize in "*diversity*, equity, and inclusion." Mauro, *Massive DEI Efforts Have Not Increased Grad Rates for Students of Color: Study*, College Fix (Aug. 10, 2022), bit.ly/3SypeOP. These DEI programs promote racially exclusionary classes, spaces, and graduations. Br.64-65; HLLI-Br.6-8. UNC doesn't defend these programs, or explain why they don't put the lie to its "talk" of racial togetherness. *Grutter*, 539 U.S. at 349 (Scalia, J., dissenting). Unsatisfied with DEI, universities have started to promote "antiracism." O'Malley, *Universities Go Beyond DEI to Become Anti-Racist Institutions*, Insight into Diversity (Feb. 11, 2022), bit.ly/3JWFxrl. Antiracism teaches that "[t]he only remedy to past discrimination is present discrimination." Kendi, *How to Be an Anti-Racist* 19 (2019). This open embrace of racial classifications has trickled down to K-12 schools—with disturbing results. *See* PDE-Br.6-37; HLLI-Br.8-10; PLF-Br.12-22.

Explicit racial classifications have also spread beyond education. There's a reason why so many large corporations, law firms, and trade associations filed amicus briefs for UNC; they seek cover for their own race-based practices. Corporations force their business partners to meet racial quotas. HLLI-Br.12 & n.12; LFAA-Br.14-16. Major firms offer "diversity" fellowships for students of certain races. *Member Diversity Fellowships & Scholarships*, NALP, bit.ly/2Ol8Vpa (last visited Aug. 24, 2022). Some have even offered race-based pricing. *Uber Eats Faces Discrimination Allegations Over Free Delivery From Black-Owned Restaurants,* TechCrunch, tcrn.ch/3PHYwr5. And the American Medical Association advocates for

racial preferences when rationing medical care. *The American Medical Association Embraces Racial Discrimination*, Do No Harm (Mar. 29, 2022), bit.ly/3dxsWiq. Buoyed by *Grutter*, these organizations justify many of their programs by invoking "diversity." *Grutter* has thus failed its own "'acid test'" by transforming America into "'a quota-ridden society.'" 539 U.S. at 343.

3. *Grutter* also ignores the consequences of race-based admissions on underrepresented minorities. Much ink has been spilled on the so-called "mismatch" problem. But mismatch wasn't litigated below because the district courts barred discovery on it. *See* JA78-79; Harv.Dkt.181 at 2. Even setting this concern aside, every racial preference imposes a "'stigma on its supposed beneficiaries.'" *Adarand*, 515 U.S. at 229. Racial preferences are "'perceived by many as resting on an assumption that those who are granted this special preference are less qualified.'" *Id.* The fact that so many underrepresented minorities *are* highly qualified and *would* succeed without racial preferences is what creates this stigmatic harm. *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part). It steals their accomplishments. *E.g.*, Raspberry, *Affirmative Action that Hurts Blacks*, Wash. Post (Feb. 23, 1987), wapo.st/3dxaLcF. And it commodifies them to create educational benefits for the white majority. *E.g.*, JA1618 (intervenors' expert explaining that white students, not minorities, are the ones who need cross-racial interactions).

C. *Grutter* has generated no legitimate reliance interests.

Overruling *Grutter* would not upset the kind of "very concrete reliance interests," like "'property and contract rights,'" that matter under stare decisis. *Dobbs*, 142 S.Ct. at 2276. SFFA's forward-looking relief will not revoke anyone's admission. And while UNC notes that overruling *Grutter* will require universities to "alter" their admissions policies, UNC-Br.45, keeping unconstitutional policies isn't a valid reliance interest, Br.66. Similarly invalid are UNC's arguments about diversity more broadly, the supposed unavailability of race-neutral alternatives, and *Grutter*'s longevity.

1. Lacking any concrete reliance interest, UNC pivots to an "intangible form of reliance." *Dobbs*, 142 S.Ct. at 2277. It claims that overruling *Grutter* will harm the "value" that this country places on "diversity." UNC-Br.44. But the law does not credit this kind of broad "societal reliance." *Dobbs*, 142 S.Ct. at 2308 n.3 (Kavanaugh, J., concurring). Even if it did, UNC's predictions are wrong. While UNC is right that our nation is proud of its "'rich diversity,'" UNC-Br.37 (quoting Reagan), our nation also knows that "the bell of liberty rings hollow unless applied equally to Americans of every race, creed, and color," Reagan, *Message on the Observance of National Afro-American (Black) History Month* (Feb. 1, 1988), bit.ly/3S67QHz. Eliminating racial preferences will not decrease *real* diversity because individuals are *not* defined by their skin color. Hence why large majorities of Americans—including racial minorities—support eliminating race as

a factor in college admissions. Br.66-67; *accord A Majority of Americans Thinks Public Schools Are on the Wrong Track*, Grinnell Coll. (Mar. 23, 2022), bit.ly/3QyczAM ("A strong majority (68%) said colleges and universities should not be allowed to take the race of their applicants into consideration," with "no notable difference in views by racial identity."). And while some businesses filed briefs here, the Chamber of Commerce filed a brief opposing race-based admissions in *Bakke*. As the "spokesman for the American business community" writ large, the Chamber knew that race is not "usefully correlated" with a person's "values, aspirations and concerns," and so the supposed educational benefits of "diversity" could not sustain race-based admissions. Chamber-*Bakke*-Br.1, 27-28.

2. Nor will overruling *Grutter* hinder UNC's ability to "assemble a diverse student body." UNC-Br.44-45. UNC has workable race-neutral alternatives now. *Infra* III. Those alternatives will be even more effective in a world where *Grutter* is overruled and all universities must compete on an even, race-neutral playing field. Br.70-71. Most state universities are already succeeding under race-neutral admissions. *See* Br.70, 85-86; States-Br.9-19; Project-21-Br.31-32.

Though the Universities of Michigan and California insist that they're suffering, their experiences prove the opposite. Both enroll more underrepresented minorities today than they did under racial preferences. UM-Br.21; *Proposition 209: Primer on UC History and Impacts* 3 (2020), bit.ly/3C7W7Tt. Though they wish their black and Native American

numbers were higher, they do not explain how the *educational benefits* of diversity depend on, say, Native American enrollment of 0.37% versus 0.5% or black enrollment of 3.87% versus 4.2%. *See* UC-Br.23-24. Despite its brief here, Michigan tells the world that it's "highly diverse": It "prepares its students to become leaders," its students receive "a high-quality education," and "[e]ighty to ninety percent" of its students "feel a sense of belonging." *The Michigan Almanac* 43, 49, 93 (June 2022), bit.ly/3AccFIA. California similarly advertises that it just won a national "Diversity Award" after enrolling its "most diverse class … in history." *Annual Accountability Report* 122 (2022), bit.ly/3QBSlpn. It boasts a "rich learning environment," where undergraduates report "significant improvements" across all skills and where graduate students report overwhelming competence on "[v]aluing other's worldviews" and "[a]wareness of [their] own cultural values and biases." *Id.* at 143, 146, 152. In fact, whites are only the *third* largest racial group on campus (Asians are first, followed by Hispanics). *UC Undergraduate Admissions Summary* (2011-2021), bit.ly/3QOb4OY. Californians are apparently satisfied, as they just voted overwhelmingly to retain their ban on racial preferences. Br.67.

Nor should universities that adopt race-neutral alternatives fear a "cascade of litigation." UNC-Br.43. Race-neutral policies present "different considerations than the explicit racial classifications at issue" here. *Parents Involved*, 551 U.S. at 745 (plurality). Facially neutral policies do not implicate the Fourteenth Amendment unless they're intended to discriminate based on race. *Arlington Heights v. Metro. Hous. Dev.*

Corp., 429 U.S. 252, 265 (1977). Many race-neutral alternatives can and should be adopted without failing that test. *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Proj., Inc.*, 576 U.S. 519, 545 (2015) ("authorities may choose to foster diversity … with race-neutral tools"). Indeed, in the nine States where race-based admissions are banned, UNC identifies no lawsuit challenging any race-neutral alternative at any university.

3. Additional factors weaken any reliance interests. *Grutter* is less than two decades old. UNC tries to deepen *Grutter*'s roots by tracing it to *Bakke*. But *Grutter* was granted precisely because *Bakke* did *not* resolve the legality of race-based admissions. Whether Justice Powell's opinion was binding under *Marks* "'baffled and divided the lower courts.'" *Grutter*, 539 U.S. at 325. If universities were relying on Justice Powell, they were doing so at their peril—especially Harvard and UNC, whose federal circuits hadn't weighed in. *See id.*

In addition to counting too far back, UNC's assertion that SFFA wants to overrule "almost fifty years" of precedent counts too far forward. UNC-Br.28. The *Fisher* cases did not reaffirm *Grutter*. They specifically noted that no one had asked the Court to overrule *Grutter*. *Fisher I*, 570 U.S. at 311. In *Fisher I*, this Court arguably overruled part of *Grutter*. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 665 (5th Cir. 2014) (Garza, J., dissenting). And in *Fisher II*, this Court sustained Texas's admissions program only as of 2008—a mere five years into *Grutter*'s 25-year window. 579 U.S. 365, 278-80 (2016).

If anything, this Court's precedents have put universities "on notice" for years about the eventual demise of race-based admissions. *Janus*, 138 S.Ct. at 2484. Calling this issue "hotly contested" would be an understatement. *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring). The position that prevailed in *Grutter*—that race-based admissions survive strict scrutiny—has always been the *least* supported position on this Court. Justice Powell was the only one to take it in *Bakke*. And aside from Justice O'Connor, the *Grutter* majority all maintained, even after *Grutter*, that they would subject these programs to something less than strict scrutiny. *Parents Involved*, 551 U.S. at 836-37 (Breyer, J., dissenting). (Two of those Justices were essential to the four-Justice majority in *Fisher II*.) These opinions were sharply divided, with some Justices repeatedly stating that they would overrule *Grutter*. *E.g.*, *Schuette v. BAMN*, 572 U.S. 291, 316 (2014) (Scalia, J., concurring in judgment); *Fisher II*, 579 U.S. at 389 (Thomas, J., dissenting).

Grutter presents a particularly weak case for reliance because the opinion demands its own demise. *Grutter* tells universities that their use of race must be temporary and decrease over time. 539 U.S. at 343. True, universities aren't weaning themselves off *Grutter*, *e.g.,* Brown-Br.2-4, but that inaction just proves racial preferences have failed their own "'acid test,'" *Grutter*, 539 U.S. at 343. UNC also omits *Grutter*'s requirement that race-based admissions policies contain "sunset provisions." *See* UNC-Br.47. And it fails to appreciate *Fisher II*'s warning that, under strict scrutiny, universities cannot even assume that their

race-based admissions are lawful from year to year. 579 U.S. at 388.

Another reason why universities cannot rely on *Grutter* is because—as UNC admits—legislatures can ban race-based admissions anytime. UNC-Br.46. So unlike decisions recognizing new "individual liberties," *Grutter* guarantees nothing to no one. *Dobbs*, 142 S.Ct. at 2347 (dissent). Quoting *Dobbs*, UNC asks the Court to let this "'democratic process'" keep playing out. UNC-Br.45. But unlike abortion, the Constitution is not "neutral" on racial equality in education. *Dobbs*, 142 S.Ct. at 2305 (Kavanaugh, J., concurring). On that question, the democratic process played out in 1868. The whole "idea" of the Fourteenth Amendment "'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015). The right to be free from racial discrimination "'may not be submitted to a vote.'" *Id.*

III. UNC fails strict scrutiny.

Even under existing precedent, UNC's admissions program fails strict scrutiny because it has workable race-neutral alternatives. The district court disagreed because SFFA's alternatives would change UNC's class in small ways. Pet.App.134 & n.43, 139-44; Br.85. UNC barely defends these conclusions, other than stubbornly rejecting "an[y] alternative that would 'compromise UNC's tenuous momentum.'" UNC-Br.57. But a race-neutral alternative is not un-

workable just because it may not achieve current levels of racial diversity; that's a quota. UNC must show that no race-neutral alternative can achieve the educational benefits of diversity "'about as well.'" *Fisher I*, 570 U.S. at 312. UNC never tried. It asked only whether alternatives would achieve its "actual levels" of racial diversity, JA883-84, and ignored other forms of diversity, JA890-91; *see* JA547-59.[2]

Because the *results* of SFFA's alternatives aren't intolerable, UNC attacks SFFA's models instead. UNC-Br.50-52. But its criticisms are immaterial. SFFA presented three alternatives (Simulations 3, 8, and 13) using a dataset of real UNC applicants (over 162,000 total). JA1069, 1144-49, 1152-53. This approach provided a "deeper level of understanding" because only these applicants received UNC's holistic ratings. JA556-57; Pl's.Ex.118.3 at 61-62. Although using this closed dataset required an assumption that the applicant pool wouldn't change, "no model is perfect," *Harvard*, 397 F. Supp. 3d at 166, and the district court never found that this limitation meaningfully affected SFFA's conclusions, *e.g.,* Pet.App.143-44. In fact, SFFA used a broader dataset in its remaining simulations to show that its conclusions *didn't*

[2] SFFA has not "concede[d]" that UNC properly "consider[s] race as only one factor among many." UNC-Br.47. UNC fixates on applicants' race and awards enormous preferences. Br.40-44; JA537-43. Nor is it surprising that SFFA found racially charged assessments in online chats (rather than reviewable application files). *See Document Appointments*, Off. of Undergrad. Admissions, unc.live/3wb59et. Whether this aspect of UNC's admissions process violates existing precedent is a question that SFFA has preserved for the Fourth Circuit, if necessary. Br.83 n.8.

change. JA595, 1150-51, 1154-57. And while the district court found it "optimistic" to assume that all eligible in-state applicants would apply, the court ultimately evaluated the simulations as is. Pet.App.134 n.43, 139-44. Given UNC's heavy burden, it needed to show how SFFA's methodology "affect[ed] the results," not just raise "theoretical objections." *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 653-54 (5th Cir. 1983).

SFFA's alternatives don't place too "much weight on socioeconomic status." UNC-Br.52. These preferences are *smaller* than the racial preferences UNC gives African Americans. JA560; Br.43-44; *see also* JA1146, 1148, 1150. If SFFA's socioeconomic boosts are too large, then UNC's racial preferences are unconstitutionally large. Nor is it unworkable to give sizable preferences to students who have overcome obstacles. JA558-60, 563-64, 587. Regardless, the handful of students who would receive the largest tips could be rejected without meaningfully changing the composition of the class. JA588. UNC also never disputes that it can afford to implement every proposed alternative. JA588-90.

As for the Modified-Hoxby plan, this alternative wouldn't require UNC to "abandon holistic admissions." UNC-Br.51-53. Unlike Texas's top-ten percent plan (which admitted students on grades alone), the Modified-Hoxby plan admits students based on GPA, test scores, and numerous socioeconomic factors that UNC claims to value. JA574-79, 1156; Def's.Ex.110 at 59-60; Pl's.Ex.118.2 at 44. Besides, maintaining a "ho-

listic" admissions process is not an end in itself; alternatives fail only if they would not achieve the educational benefits of diversity, *Fisher I*, 570 U.S. at 312, and UNC never proved that the Modified-Hoxby plan would not, Br.84.

Finally, SFFA's percentage plans are not "convoluted" or "nonsensical." UNC-Br.53. UNC may not want to create an "academic index" for each student (like the Ivies do) or "run each student through [a] model," UNC-Br.53, but these alternatives aren't "impractical," JA440, 570-74, 1152-56. Nor would any court "mandate" that UNC adopt a particular plan. UNC-Br.53. The point of the simulations is that a workable race-neutral alternative *exists*. UNC can adopt any race-neutral admissions policy it likes. The only thing it must stop considering is race.

CONCLUSION

This Court should reverse.

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August 24, 2022