

REDLINING REIMAGINED: EXPLORING “RACE-NEURAL ALTERNATIVES” IN THE LIKELY WAKE OF AFFIRMATIVE ACTION

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INTRODUCTION

In his dissenting opinion in *Fisher v. University of Texas at Austin*, Justice Thomas explained his belief that affirmative action programs embody the “faddish theory that racial discrimination may produce educational benefits.”¹ A mere six years later, the conservative

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“Redlining Reimagined” pays lip-service to SFFA’s argument that granting socioeconomic ‘pluses’ to applicants in college admissions will create comparable racial diversity in the classroom. *See, e.g., infra*, note 189 and accompanying text. The practice of redlining began in the 1940s, when the Home Owner’s Loan Corporation assigned color-codes to neighborhoods to convey credit ratings. Sarah L. Swan, *Discriminatory Dualism*, 54 *GEORGIA L. REV.* 869, 879–80 (2020). “[R]ed neighborhoods were ‘hazardous’ communities where banks simply would not lend,” and perniciously, “[n]eighborhoods with even just one black family were automatically redlined.” *Id.* (citation omitted). Redlining was rendered an unlawful form of discrimination upon the passage of the Fair Housing Act in 1968, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–19 (2012), but its impacts remain. *See, e.g.,* Samantha Ondrade, *Enforcement of the Fair Housing Act and Equal Credit Opportunity Act to Combat Redlining*, 70 *DOJ FED. L. & PRAC.* 247, 251 (2022). SFFA’s suggestion that applicants’ zip codes could serve as a proxy for their race acknowledges the racist lending practices that continue to exacerbate generational wealth-gaps in the United States. *See id.* (“[D]ata from 2019 show that the typical white family has eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family.” (citation omitted)). But paradoxically, SFFA’s most stringent suggestion of race-neutral admissions would have universities ignore a student’s discussion of her experience with redlining. On the other hand, the very race-neutral alternatives proposed by SFFA throughout this litigation would dramatically reduce the proportion of minority students admitted to top universities. *See infra*, Part III. To use a purportedly race-neutral practice as a tool to exclude people of color is to reimagine redlining. I thank Professor Andrew Foster for inspiration for this title.

1. 579 U.S. 365, 389 (2016) (*Fisher II*) (Thomas, J., dissenting) (internal quotation marks omitted).

originalist Justices² have a new opportunity to declare affirmative action programs unconstitutional, thanks to the activist Edward Blum.³ In *Students for Fair Admissions v. President and Fellows of Harvard College*⁴ and *Students for Fair Admissions v. University of North Carolina*,⁵ Blum’s non-profit organization urges the Supreme Court to overrule *Grutter v. Bollinger*.⁶ *Grutter* and its progeny established that a university may consider an applicant’s race in admissions without offending the Constitution, so long as the university considers race to further a compelling interest, and its consideration is narrowly tailored to achieve that interest.⁷

Students for Fair Admissions (SFFA) suggests that universities replace race-conscious admission with race-*neutral* alternatives to promote diversity.⁸ SFFA’s proposed alternatives include merit-based percentage plans⁹ and advantaging socioeconomic diversity instead of racial or ethnic diversity.¹⁰ Blum and SFFA claim that race-neutral plans will achieve a comparable student body diversity. This rationale, however, paradoxically recognizes the lasting economic impact of Jim Crow laws and the social dilemmas faced by non-white students, but purports to remove race from the admissions process.

This Commentary examines the parties’ arguments in both cases and assesses possible outcomes. If the Court adheres to the rule of *stare decisis*, it should uphold Harvard and UNC’s admissions programs and retain affirmative action’s constitutionality. This Commentary, however,

2. For an overview of the Court’s recent originalist approach, see Elias Neibart, Originalism as Intellectual History, 28 HARVARD J. OF LAW & PUB. POL. PER CURIAM 1, 2 (2022) (discussing the Court’s originalist interpretation in *N.Y. State Rifle Ass’n v. Bruen*, 142 S. Ct. 2111, 2126 (2022)).

3. For a discussion on Blum’s history challenging affirmative action, see Sarah Hinger, *Meet Edward Blum, the Man Who Wants to Kill Affirmative Action in Higher Education*, AMERICAN CIVIL LIBERTIES UNION, Oct. 18, 2018, <https://www.aclu.org/news/racial-justice/meet-edward-blum-man-who-wants-kill-affirmative-action-higher>.

4. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (No. 20-1199) (2022).

5. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d 580 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (No. 21-707) (2022).

6. 539 U.S. 306 (2003).

7. *See infra*, Part II.

8. *See* Brief for Petitioner at 54–55, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707) (arguing that “there [is] no evidence . . . that racial diversity yield[s] the benefits of student body diversity in the broader sense—meaning a diversity of backgrounds, experiences, and viewpoints,” and that race-neutral alternatives to affirmative action programs only create a “marginal difference in racial diversity” (emphasis removed)).

9. *See infra*, note 130 and accompanying text for an example of how percentage plans operate.

10. For more information on SFFA’s proposed race-neutral alternatives, *see infra*, Part III.

chiefly explores the likely circumstance that Justice Thomas will seize his long-awaited opportunity to overrule *Grutter* and strike down affirmative action.

I. FACTS

A. *Students for Fair Admissions*

Edward Blum established SFFA in 2014.¹¹ SFFA is a “nonprofit membership group of over 20,000 students, parents and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional.”¹² In furtherance of this belief, SFFA pledges to “support and participate in litigation that will restore the original principles of the civil rights movement.”¹³ SFFA summarizes those principles as they connect to university admissions by stating: “A student’s race and ethnicity should not be factors that either harm^[14] or help that student to gain admission to a competitive university.”¹⁵

Through SFFA, Blum invites students who were rejected from colleges or universities—“especially . . . from Harvard, Yale, the Univ. of North Carolina and the Univ. of Texas”—to provide testimonials for potential or pending lawsuits.¹⁶ For each targeted university, Blum also created a website for rejected students to report data such as their application year, extracurricular activities, test scores, and race.¹⁷

11. Certificate of Incorporation, Students for Fair Admissions, Inc., COMMONWEALTH OF VIRGINIA, STATE CORPORATION COMMISSION (Jul. 30, 2014), <https://cis.scc.virginia.gov/> (search “07807811” in “Entity ID” query of the “Business Entity Search;” select “Image Request;” select “Articles of Incorporation.”).

12. STUDENTS FOR FAIR ADMISSIONS, INC., <https://studentsforfairadmissions.org> (last visited Nov. 6, 2022).

13. *Id.*

14. No constitutional affirmative action program allows race to be used to harm applicants’ admission chances. *See Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (“[S]o long as a race-conscious admissions program uses race as a ‘plus’ factor . . . a rejected applicant ‘will not have been foreclosed from all consideration for that seat because he was not the right color or had the wrong surname.’”) (quoting *Regents of California v. Bakke*, 438 U.S. 265, 318 (1978)). Though SFFA contends that Harvard and UNC’s admissions policies discriminate against white and Asian-American applicants, the district court in both cases found that neither university used race as a negative factor in its admissions decisions. *See Findings of Fact and Conclusions of Law at 110, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39 (2015) (No. 14-CV-14176-ADB).

15. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (emphasis in original removed).

16. *See* STUDENTS FOR FAIR ADMISSIONS, INC., <https://studentsforfairadmissions.org> (last visited Nov. 6, 2022), “Were You Rejected from a College or University?” Query.

17. *See, e.g.*, UNIV. OF N.C. NOT FAIR, <http://uncnotfair.org> (last visited Nov. 6, 2022), HARVARD UNIV. NOT FAIR, <http://harvardnotfair.org> (last visited Nov. 6, 2022).

B. Harvard College

Harvard, the oldest college in the United States,¹⁸ flaunts a “complex and highly competitive” admissions process.¹⁹ Though Harvard seeks to admit roughly 1,600 undergraduate students annually,²⁰ it received over 35,000 applications for matriculation in 2014²¹ and over 65,000 in the 2021–22 admissions cycle.²²

Students apply to Harvard by submitting the Common Application,²³ an online platform that allows students to apply to member colleges through one streamlined application.²⁴ The Common Application allows students to note their demographic information such as race, foreign language proficiency, and military service.²⁵ This information, however, is collected on a voluntary basis and is not required.²⁶ By contrast, students are required to submit their “standardized test scores, transcripts, extracurricular and athletic activities, awards, parents’ and siblings’ educational information, parents’ occupation and marital status, teacher and guidance counselor recommendations, intended field of study, personal statement, and additional supplemental essays or academic material.”²⁷ Applicants may apply to Harvard by “Early Action”²⁸ or “Regular Decision,” but the review process for each pool is identical.²⁹

The Harvard admissions office assigns each student six ratings: the “academic rating, extracurricular rating, athletic rating, school support

18. HARVARD COLL., *The History of Harvard*, <https://www.harvard.edu/about/history/#:~:text=On%20September%20%2C%201636%2C%20Harvard,the%20American%20colonies%2C%20was%20founded.> (last visited Nov. 7, 2022).

19. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 165 (1st Cir. 2020).

20. *Id.*

21. *Id.*

22. HARVARD COLL. ADMISSIONS & FIN. AID, *Admissions Statistics*, <https://college.harvard.edu/admissions/admissions-statistics> (last visited Nov. 7, 2022).

23. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 166 (2020).

24. THE COMMON APPLICATION, *What is the Common App?*, <https://www.commonapp.org/apply> (last visited Nov. 7, 2022).

25. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d at 166.

26. *Id.*

27. *Id.*

28. Harvard’s Early Action program allows students to apply “by November 1 in order to be notified of a decision in mid-December.” For more information, see HARVARD COLL. ADMISSIONS & FIN. AID, *Restrictive Early Action*, <https://college.harvard.edu/admissions/apply/first-year-applicants> (last visited Nov. 7, 2022).

29. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 166 (2020).

rating, personal rating, and overall rating.”³⁰ The personal rating “attempts to measure the positive effects applicants have had on the people around them and the contributions they might make to the Harvard community.”³¹ This score generally reflects the applicant’s essays, letters of recommendation, and alumni interview report.³² Importantly, race itself does not play a role in a student’s personal score; though, experiences tied to an applicant’s race could inform their personal rating.³³

After Harvard assigns students preliminary scores, it determines which students to admit.³⁴ Considering a variety of factors, including race, admissions subcommittees make recommendations to the full admissions committee.³⁵ Certain students come before the admissions subcommittees by way of a “tip,” which indicates the first reader’s particular interest in a candidate.³⁶ Readers typically assign tips to “ALDC” students: athletes, legacies, students who appear on the Dean’s Interest List, and children of faculty and staff.³⁷ Yet, tips may be given for any reason, including the socioeconomic background or race of a candidate.³⁸

After the subcommittees recommend students, the full admissions committee convenes to “lop,” or narrow, its pool of preliminary admits.³⁹ During this “lop,” the full admissions committee considers the demographic characteristics of the prospective admitted class as a whole, including the racial and socioeconomic diversity of the candidates.⁴⁰

Harvard regularly convenes committees to study its admissions program, including in 2015 when it created the “Committee to Study the Importance of Student Body Diversity,” also known as the “Khurana Committee.”⁴¹ First, the Committee collected “input and

30. *See id.* at 167–70 (describing the function of each rating in the Harvard admissions process).

31. *Id.* at 168.

32. *Id.*

33. *Id.* at 169 (“[F]or example, experiences with prejudice or discrimination and how the applicant has overcome this adversity—could inform [that applicant’s] personal rating.”).

34. *Id.*

35. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 170 (2020).

36. *Id.* at 178.

37. *Id.* at 171–72.

38. *Id.*

39. *Id.* at 170.

40. *Id.*

41. The Khurana Committee is named after its chairperson, Rakesh Khurana. *Students for*

data from students, alumni, faculty and staff, and other stakeholders in Harvard’s admissions process.” Then, the Committee summarized the common benefits of a diverse campus the shareholders identified in the Khurana Report.⁴²

Additionally, Harvard created the “Smith Committee,”⁴³ which studies the possible race-neutral alternative plans that Harvard could implement in lieu of its race-conscious admissions program.⁴⁴ After modeling several changes to Harvard’s current admissions program, the Smith Committee determined that no race-neutral alternative would suffice to replace the holistic, race-conscious system, but that Harvard should consider revisiting race-neutral alternatives in 2023.⁴⁵

C. University of North Carolina at Chapel Hill

The University of North Carolina at Chapel Hill (UNC) is one of seventeen universities in North Carolina’s public university system.⁴⁶ UNC is a renowned public university—in 2022, it placed fifth in the U.S. News & World Report’s best college rankings for public universities.⁴⁷

UNC’s admitted students tout exceptional GPAs and standardized testing scores. In 2012, admitted students had an average GPA of 4.48 and an average SAT score of 1,339 out of a possible 1,600.⁴⁸ The University’s reputation draws a large pool of applicants: over 57,000 students applied for admission in UNC’s Class of 2026.⁴⁹ Of these applicants, only 16.8 percent were accepted.⁵⁰

Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 172–73 (2020).

42. *Id.* See also Harvard Univ., Report of the Committee to Study Race-Neutral Alternatives (Apr. 2018), https://projects.iq.harvard.edu/files/diverse-education/files/report_of_the_committee_to_study_race-neutral_alternatives_final.pdf. For a discussion on the specific interests espoused in the Khurana Report, see *infra*, note 331 and accompanying text.

43. *Students for Fair Admissions*, 980 F.3d at 175–76.

44. *Id.* at 178.

45. *Id.* at 179.

46. Univ. of N.C. System, Institutions and Affiliates, <https://www.northcarolina.edu/institutions/> (last visited Nov. 7, 2022).

47. US NEWS & WORLD REPORT, *Top Public Schools*, <https://www.usnews.com/best-colleges/rankings/national-universities/top-public> (last visited Feb. 10, 2023).

48. See Defendant’s Answer at 33, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d 580 (M.D.N.C. 2021) (No. 1:14-CV-954) (averages calculated from data provided by race).

49. UNIV. OF N.C. AT CHAPEL HILL ADMISSIONS CASE, Admissions, <https://admissionslawsuit.unc.edu/about/admissions/#:~:text=UNC%2DChapel%20Hill%20received%2057%2C219,of%20the%202022%20entering%20class> (last visited Nov. 7, 2022).

50. *Id.*

Like at Harvard, students apply to UNC through the Common Application.⁵¹ Once UNC receives applications, its readers give each candidate a comprehensive, holistic, and individualized review.⁵² The first reader reviews the student’s application, enters a recommended decision, and provides comments.⁵³ This process is repeated by a second reader, who recommends admission, deferral, waitlist admission, or rejection.⁵⁴ After the readers have assigned each applicant a preliminary decision, the University conducts a “school group review.”⁵⁵ To do so, the Admissions Director lists every applicant from the same high school ordered from highest to lowest GPAs so that the Director can ensure the Office’s decisions are “defensible within the context of the student’s high school.”⁵⁶

In making their preliminary decisions, readers are “guided by a non-exhaustive list of more than forty criteria,” including “academic performance, athletic or artistic talents, and personal background.”⁵⁷ The criteria are intended to consider “all aspects of an applicant’s background and value[] many kinds of diversity.”⁵⁸

For example, geographic diversity plays a large role in UNC admissions. Since 1986, the University of North Carolina System has mandated a “cap” of non-resident students at all System schools.⁵⁹ For UNC, this cap remains at 18 percent.⁶⁰ Consequently, admissions outcomes for North Carolina residents are, on average, more favorable—for fall admits of the Class of 2026, 43.1 percent of North Carolinian applicants were admitted compared to 8.2 percent of out-of-state applicants.⁶¹ Beyond the “cap,” UNC prioritizes admitting

51. Brief by University Respondents at 8, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

52. *Id.*

53. DEPARTMENT OF EDUCATION, UNC Compliance Resolution, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11072016-a.html> (Nov. 27, 2012).

54. *Id.*

55. *Id.*

56. *Id.*

57. Brief by University Respondents at 9, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

58. DEPARTMENT OF EDUCATION, UNC Compliance Resolution, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11072016-a.html> (Nov. 27, 2012).

59. UNC POLICY MANUAL, § 700.13 (“Policy on Non-Resident Undergraduate Enrollment”) (2022), https://www.northcarolina.edu/apps/policy/doc.php?id=789#_ednref1 (Originally adopted Mar. 14, 1986; Most recently adopted Apr. 7, 2022).

60. *Id.*

61. UNIV. OF N.C. AT CHAPEL HILL ADMISSIONS CASE, Admissions, <https://admissionslawsuit.unc.edu/about/admissions/#:~:text=UNC%2DChapel%20Hill%20received%2057%2C219,of%20the%202022%20entering%20class> (last visited Nov. 7, 2022).

students from rural North Carolina.⁶² In 2017, the System President declared that UNC would increase its rural enrollments by 5 percent by fall 2021.⁶³

To promote well-rounded diversity, “[w]hen UNC does consider race, it does so only alongside other factors.”⁶⁴

II. LEGAL BACKGROUND

The Fourteenth Amendment directs that “[n]o state shall make or enforce any law” that deprives citizens of due process or equal protection of the laws.⁶⁵ So, when a state or its official deprives a citizen of her constitutional right while “acting under color of state law,” she has recourse through private, civil action.⁶⁶ The Fourteenth Amendment naturally binds public universities, such as UNC.

But “private conduct, however discriminatory or wrongful” is not regulated by the Fourteenth Amendment.⁶⁷ Accordingly, Congress enacted the Civil Rights Act of 1964 to better safeguard against discrimination in federally-funded institutions.⁶⁸ The Civil Rights Act binds colleges and universities to adhere to Title VI, which provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁶⁹ Title VI accordingly constrains Harvard’s admissions policies.

Title VI’s protections are coextensive with the standard imposed on public parties by the Equal Protection Clause of the Fourteenth Amendment.⁷⁰ Thus, students at Harvard and at UNC are protected by the same guarantees: significantly, that their universities may not

62. UNC SYSTEM, Five-Year Goals, <https://www.northcarolina.edu/institutions-and-affiliates/university-of-north-carolina-chapel-hill-five-year-goals-and-associated-benchmarks/> (Jan. 2017).

63. *Id.*

64. Brief of University Respondents at 10, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

65. U.S. CONST. AMEND. XIV, § I.

66. 42 U.S.C. § 1983.

67. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

68. Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

69. *Id.* at Title VI (codified at 42 U.S.C. §§ 2000d, 2000d-1–2000d-7).

70. See *Regents of California v. Bakke*, 438 U.S. 265, 287 (1978) (“Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”).

consider race in their admissions decisions “unless the admissions process can withstand strict scrutiny.”⁷¹

To pass strict scrutiny, a university must prove that its “purpose or interest [in considering race] is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.”⁷² To do so, the university must justify its policy by showing a compelling interest.⁷³ Then, the university must demonstrate that its policy is narrowly tailored to achieve the interest and that the policy is the least restrictive means available to achieve that purpose.⁷⁴

In *Regents of the University of California v. Bakke*, the Court first measured affirmative action programs against strict scrutiny.⁷⁵ Alan Bakke, a white applicant to the University of California-Davis Medical School, sued the University after being twice rejected by its regular admissions committee.⁷⁶ The University had a “special admissions program” that filled sixteen seats in its incoming medical school class.⁷⁷ Originally, the program was open to all students who self-identified as “economically and/or educationally disadvantaged,” but by 1974 it was limited to students from “minority group[s],” which the University identified as “Black,” “Chicano,” “Asian” or “American Indian.”⁷⁸ The general admissions and special admissions groups were subject to different admissions committees, and while general applicants had to obtain a 2.5 GPA to be considered for admission, special applicants did not.⁷⁹

Four Justices would have avoided ruling on the program’s constitutionality, instead resolving the case by holding the program violated Title VI.⁸⁰ In the Court’s controlling opinion, Justice Powell

71. *Fisher v. University of Texas*, 570 U.S. 297, 309 (2013) (Fisher I).

72. *Bakke*, 438 U.S. at 305. (internal quotations omitted).

73. *Id.* at 299.

74. *See id.* (“When [classifications] touch upon an individual’s race or ethnic background, [the individual] is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling . . . interest.”).

75. The Court previously considered affirmative action in *DeFunis v. Odegaard*, but ultimately dismissed the case as moot because the plaintiff was subsequently admitted into the university and would graduate within months of the Court’s ruling. 416 U.S. 312, 319–20 (1974).

76. *Regents of California v. Bakke*, 438 U.S. 265, 266 (1978).

77. *Id.* at 275.

78. *Id.* at 274.

79. *Id.* at 275.

80. *Id.* at 421 (Stevens, J., concurring in judgment) (“The University’s special admissions program violated Title VI . . . It is therefore our duty to affirm the judgment ordering Bakke admitted.”).

concluded that race-based affirmative action programs must be reviewed under strict scrutiny⁸¹ and that the special admissions program failed to pass muster.⁸²

The University offered several justifications for special admissions, including the need to increase the number of minority students in the medical profession and remedy the effects of social discrimination.⁸³ Justice Powell found only one interest “compelling” for the purpose of strict scrutiny: that a racially and ethnically diverse student body “may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render . . . their vital service to humanity.”⁸⁴

Though the University proffered a compelling interest, Justice Powell found the admissions program was not narrowly tailored.⁸⁵ Because the “special admissions” enrollees filled sixteen positions in the incoming class, Justice Powell viewed the program as creating a quota system, which he opined was necessarily too rigid to satisfy strict scrutiny.⁸⁶

Though *Bakke* stands for the proposition that quota systems are *per se* unconstitutional, Justice Powell’s opinion helped inform future affirmative action programs. For example, Justice Powell advised that using race as a “‘plus’ in a particular applicant’s file” may satisfy strict scrutiny.⁸⁷ Additionally, he reasoned that admissions programs that consider race or ethnicity as one factor among many do not present a facial intent to discriminate.⁸⁸ Thus, he directed that future courts presume “good faith” on behalf of universities if they claim to evaluate students “on an individualized, case-by-case basis.”⁸⁹

The Court next considered affirmative action programs in the companion cases of *Grutter v. Bollinger*⁹⁰ and *Gratz v. Bollinger*.⁹¹ In

81. *Id.* at 290–91.

82. *Regents of California v. Bakke*, 438 U.S. 265, 315 (1978).

83. *Id.* at 305–06.

84. *Id.* at 314.

85. *Id.* at 317.

86. *Id.*

87. *Id.*

88. *Regents of California v. Bakke*, 438 U.S. 265, 318 (1978).

89. *Id.* at 318–19 (“[A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases.”).

90. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

91. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

Grutter, the challenged program came from the University of Michigan Law School, which considered “soft variables” including an applicant’s race and ethnicity in its individualized review process.⁹² Additionally, the University sought to achieve a “critical mass” of students from a minority racial or ethnic background to “encourage[] underrepresented minority students to participate in the classroom and not feel isolated.”⁹³ The University maintained, however, that there was “no number, percentage, or range of numbers or percentages that constitute[d] critical mass,” and the University primarily offered admission based on students’ undergraduate GPAs and LSAT scores.⁹⁴ The Law School’s Dean testified that the critical mass ensured that minority students did not feel like “spokespersons for their race.”⁹⁵ Additionally, he explained that “[i]n some cases . . . an applicant’s race may play no role, while in others it may be a determinative factor” in admission.⁹⁶

As in *Bakke*, the Court found that Michigan’s desire to attain a diverse student body qualified as a compelling interest.⁹⁷ In doing so, the Court chose to “defer” to the Law School’s “educational judgment that such diversity is essential to its educational mission.”⁹⁸ The Court then found that Michigan’s program was narrowly tailored and did not create a quota system,⁹⁹ as race was only used as a “plus” in “a highly individualized, holistic review of each applicant.”¹⁰⁰ Accordingly, the Court ruled that the policy was constitutional.¹⁰¹

The Court further clarified the actions universities must take for their affirmative action programs to be narrowly tailored.¹⁰² Rejecting the idea that strict scrutiny was “strict in theory, but fatal in fact,”¹⁰³ the Court refused to require universities to “exhaust[] every conceivable race-neutral alternative” for their affirmative action programs to pass

92. *Grutter*, 539 U.S. at 315.

93. *Id.* at 318.

94. *Id.*

95. *Id.* at 319.

96. *Id.* (internal quotation marks omitted).

97. *Id.* at 328.

98. *Grutter v. Bollinger*, 539 U.S. 328 (2003). Justice O’Connor, in deferring to Michigan’s proffered educational mission, cited studies supporting Michigan’s contention that diversity promoted better learning outcomes for all its students. For a summary of the findings, see *id.* at 330–33.

99. *Id.* at 334–35.

100. *Id.* at 337.

101. *Id.* at 343–44.

102. *Id.* at 338–39.

103. *Id.* at 327 (quoting *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995)).

narrow tailoring.¹⁰⁴ Nor would universities need to implement race-neutral alternatives that would sacrifice their “reputation[s] for excellence” to satisfy narrow tailoring.¹⁰⁵ Instead, the Court advised that universities must conduct a “serious, good faith *consideration* of workable race-neutral alternatives that [would] achieve the diversity” they seek.¹⁰⁶ If universities do not make this consideration, their affirmative action programs would not be narrowly tailored and would consequently fail strict scrutiny.¹⁰⁷

Applying this principle to the facts posed in *Grutter*, the Court advised that Michigan Law did not have to actually implement race-neutral alternatives to test their efficiency.¹⁰⁸ Instead, the University’s good-faith consideration of race-neutral alternatives and its conclusion that the alternatives would reduce its academic standards or threaten its diversity¹⁰⁹ were sufficient to satisfy narrow tailoring.¹¹⁰

But Justice O’Connor, writing for the majority, ended the Court’s opinion with a sunset provision: “We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate [affirmative action] as soon as practicable . . . We expect that 25 years from now, the use of [affirmative action] will no longer be necessary.”¹¹¹ In a partial dissent, Justice Thomas seized on the provision.¹¹² He concurred only on the Court’s opinion insofar as it “confirms that further use of race in admissions remains unlawful,” and that “racial discrimination in higher education admissions will be illegal in 25 years.”¹¹³

104. *Grutter v. Bollinger*, 539 U.S. 339 (2003).

105. *Id.* at 339.

106. *Id.* (emphasis added).

107. *Id.*

108. *Id.* (“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”).

109. *Id.* (“Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission.”).

110. *Grutter v. Bollinger*, 539 U.S. 339 (2003).

111. *Id.* at 343.

112. For a sociological analysis of Justice Thomas’s dissent, see andré douglas pond cummings, *Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: “The Sun Don’t Shine Here in This Part of Town”*, 21 HARV. BLACKLETTER L.J. 1 (2005).

113. *Grutter*, 539 U.S. at 351 (Thomas, J., dissenting).

In *Gratz*, Justice Thomas joined the Court in striking down an affirmative action program as unconstitutional.¹¹⁴ *Gratz* dealt with the University of Michigan’s undergraduate admissions for its College of Arts and Sciences.¹¹⁵ Under this program, students were awarded points by demonstrating admirable qualities, such as high GPA or SAT scores, the difficulty of courses taken in high school, and residency or legacy status.¹¹⁶ If a student accrued one hundred points, she was automatically admitted.¹¹⁷ Students of underrepresented racial or ethnic backgrounds were automatically awarded twenty points.¹¹⁸ Because the admissions policy automatically granted points and did not provide “individualized consideration” as Justice Powell suggested in *Bakke*,¹¹⁹ the Court concluded that the program was not narrowly tailored.¹²⁰

The Court’s next consideration of affirmative action at the university level¹²¹ was the *Fisher* litigation. After being denied admission from the University of Texas at Austin (UT), Abigail Fisher¹²² sued UT for violating the Equal Protection Clause and Title VI through its affirmative action program.¹²³

Aside from considering applicants’ GPAs and standardized test scores, UT assigned each applicant a score on its “Personal Achievement Index.”¹²⁴ The Index intended to measure applicants’ “leadership and work experience, awards, extracurricular activities, community service, and other special circumstances,” such as “growing up in a single-parent home, speaking a language other than English at

114. *Gratz v. Bollinger*, 539 U.S. 244, 272 (2003).

115. *Id.* at 251.

116. *Id.* at 255.

117. *Id.* at 255.

118. *Id.* at 256.

119. *Id.* at 272–73.

120. *Id.* at 275–76. The Court also found that the program violated Title VI of the Civil Rights Act.

121. In 2007, the Court considered affirmative action enrollment programs at primary and secondary schools. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dis. No. 1*, 551 U.S. 701, 747–48 (holding that public schools may not assign students to schools solely on the basis of race to achieve swifter racial integration).

122. Edward Blum, founder of SFFA, financially supported Fisher’s suit against the University of Texas through his nonprofit Project on Fair Representation. For more information, see PROJECT ON FAIR REPRESENTATION, Cases, *Abigail Fisher v. University of Texas*, <https://projectonfairrepresentation.org/abigail-fisher-v-university-of-texas/> (last visited Nov. 7, 2022), and Madeline Carlisle, *Edward Blum on His Long Quest to End Affirmative Action*, TIME MAGAZINE, Oct. 27, 2022, <https://time.com/6225372/edward-blum-affirmative-action-supreme-court-interview/>.

123. *Fisher v. University of Texas*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009).

124. *Fisher v. University of Texas*, 570 U.S. 297, 304 (2013) (Fisher I).

home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family."¹²⁵ After *Grutter*,¹²⁶ UT reflected the race or ethnicity of candidates in their Index scores, granting a "plus" to diverse candidates.¹²⁷ Like Michigan Law in *Grutter*,¹²⁸ UT sought to obtain a "critical mass" of racially and ethnically diverse students to remedy "'anecdotal' reports" of discomfort from minority students in small classrooms.¹²⁹ Additionally, UT complied with Texas' Top Ten Percent Law by automatically granting admission to all Texans who graduated in the top 10 percent of their high school class.¹³⁰

Instead of reaching the merits, the Court remanded the case to the Fifth Circuit because it applied the wrong legal standard.¹³¹ The Fifth Circuit found that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the Universit[y]." ¹³² Though the *Grutter* Court held that courts should defer to a university's "educational judgment that . . . diversity is essential to its educational mission,"¹³³ this deference is limited to the university's belief that a diverse student body would serve its educational goals.¹³⁴ The reviewing court must still ensure that the university has a "reasoned, principled explanation" for its decision to use affirmative action.¹³⁵ And the university must prove that its program is narrowly tailored without any deference.¹³⁶

In *Fisher I*, the Court concluded that a university must show that its affirmative action plan is narrowly tailored to achieve "the benefits of a student body diversity that 'encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but

125. *Id.*

126. *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003) (*abrogating* *Hopwood v. Texas*, 78 F.3d 932, 955 (5th Cir. 1996) (holding the University of Texas at Austin "failed to show a compelling state interest in remedying the present effects of discrimination sufficient to maintain the use of race in its admissions system")).

127. *Fisher I*, 570 U.S. at 306 ("The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.").

128. *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003).

129. *Fisher I*, 570 U.S. at 305–06.

130. TEX. EDUC. CODE ANN. § 51.803 (West 2009); *accord Fisher I*, 570 U.S. at 305.

131. *Fisher v. University of Texas*, 570 U.S. 297, 313 (2013) (*Fisher I*).

132. *Fisher v. University of Texas*, 631 F.3d 213, 232.

133. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

134. *Fisher I*, 570 U.S. at 310.

135. *See id.* at 310–11.

136. *Id.* at 311.

a single though important element.”¹³⁷ Accordingly, it vacated the judgment of the Fifth Circuit and remanded the case for further proceedings. Justices Scalia and Thomas concurred in the decision, but they noted their readiness to overrule *Grutter*’s holdings that diversity is a compelling interest¹³⁸ and that an affirmative action program could satisfy strict scrutiny.¹³⁹

Three years later, after the Fifth Circuit affirmed summary judgment in favor of UT,¹⁴⁰ Abigail Fisher returned to the Supreme Court.¹⁴¹ In *Fisher II*, the Court reached a long-awaited decision on the merits.

First, the Court examined the goals of UT’s program. Finding that UT sought “the destruction of stereotypes, the promotion of cross-racial understanding, [and] the preparation of a student body for an increasingly diverse workforce and society,”¹⁴² the Court reaffirmed that pursuing a diverse student body is a compelling interest.¹⁴³

Next, the Court considered whether UT’s plan was narrowly tailored.¹⁴⁴ The Court surveyed the University’s statistical and anecdotal evidence that race-neutral policies would not achieve a critical mass of diversity before concluding that UT’s decision to continue its affirmative action program was “a reasonable determination.”¹⁴⁵ Accordingly, the Court found that UT maintained its “heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan.”¹⁴⁶

Before holding that the program satisfied strict scrutiny,¹⁴⁷ the Court addressed Fisher’s suggestion that UT’s admissions program would be “more race neutral” if it admitted students solely on their class rank.¹⁴⁸ Such a program would operate like the Ten Percent Law.

137. *Id.* at 314–15 (quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)).

138. *Id.* at 315 (Scalia, J., dissenting) (“The petitioner in this case did not ask us to overrule *Grutter*’s holding that a “compelling interest” in the educational benefits of diversity can justify racial preferences in university admissions . . . I therefore join the Court’s opinion in full.”).

139. *Id.* (Thomas, J., dissenting) (“I write separately to explain that I would overrule *Grutter v. Bollinger* . . . and hold that a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”).

140. *Fisher v. University of Texas*, 758 F.3d 633, 660 (5th Cir. 2014).

141. *Fisher v. University of Texas*, 579 U.S. 365 (2016) (*Fisher II*).

142. *Id.* at 381–82.

143. *Id.* at 381.

144. *Id.* at 388.

145. *Id.* at 384.

146. *Id.* at 383.

147. *Fisher v. University of Texas*, 579 U.S. 365, 388 (2016) (*Fisher II*).

148. *Id.* at 386.

The Court reasoned that, even if minority enrollment increased, an admissions program that solely focused on class rank would “sacrifice all other aspects of diversity in pursuit of enrolling a high number of minority students.”¹⁴⁹ Additionally, the Court feared that a rank-exclusive plan would create “perverse incentives” for applicants,¹⁵⁰ such as “encourag[ing] parents to keep their children in low-performing segregated schools, and discourag[ing] students from taking challenging classes that might lower their grade-point averages.”¹⁵¹ The Court warned that “suggested alternatives” must be both “available” and “workable” to undermine the narrow tailoring of a chosen affirmative action plan.¹⁵²

Justice Thomas dissented, again signaling his readiness to overrule *Grutter* entirely:

The Constitution abhors classifications based on race because every time the government places citizens on racial registers . . . it demeans us all. That constitutional imperative does not change in the face of a faddish theory that racial discrimination may produce educational benefits. The Court was wrong to hold otherwise in *Grutter v. Bollinger*. I would overrule *Grutter*.¹⁵³

The *Fisher* litigation rocked the affirmative action landscape, associating hefty new requirements and various constitutional pitfalls with the consideration of race in college admissions.¹⁵⁴ In short, *Fisher*

149. *Id.*

150. *Id.* at 387.

151. *Id.* (quoting *Gratz*, 539 U.S. at 304, n.10 (Ginsburg, J., dissenting)).

152. *Id.* at 387–88 (quoting *Fisher I*, 570 U.S. at 312).

153. *Id.* at 389 (Thomas, J., dissenting) (citations omitted).

154. After the *Fisher* litigation, universities attempting to use affirmative action had to comply with the following requirements to comply with strict scrutiny:

Pursuing the educational benefits that come from a diverse student body is a compelling interest. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 380 (2016); accord *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding same). Universities receive a marginal judicial deference: If a university claims that a diverse student body would serve its educational goals, a reviewing court should believe it. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 310 (2013). The university must still provide a “reasoned, principled explanation” for this conclusion *Id.* at 311. Some explanations are insufficient. For example, “asserting an interest in the educational benefits of diversity writ large is insufficient” to prove a compelling interest. *Fisher II*, 579 U.S. at 381.

Additionally, the university’s goals “must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.” *Id.* Finally, to ensure that the interest is compelling, universities cannot loft a “permanent justification for racial preferences,” and must use either “sunset provisions in race-conscious admissions policies” or “periodic reviews to determine whether racial preferences are still necessary.” *Grutter*, 539 U.S. at 342.

The university receives no judicial deference for the narrow tailoring inquiry. *Fisher I*, 570 U.S. at 311. Rather, “it remains at all times the University’s obligation to demonstrate, and

I and *II* require a university to detail its “compelling interests” with an exacting pen,¹⁵⁵ to prove with *empirical evidence* that it cannot pursue its compelling interest while maintaining an appropriate level of diversity with *any* race-neutral alternatives,¹⁵⁶ and to consistently re-quantify its need for affirmative action.¹⁵⁷

III. PROCEDURAL HISTORY

A. *SFFA v. Presidents and Fellows of Harvard College*

SFFA first challenged Harvard’s admissions process in 2014.¹⁵⁸ Harvard filed a motion to dismiss for lack of Article III standing, but the district court denied its motion.¹⁵⁹ The court did, however, grant Harvard’s motion to stay until the Supreme Court issued its ruling in the pending *Fisher* litigation.¹⁶⁰

the Judiciary’s obligation to determine, that admissions processes” are narrowly tailored. *Id.* at 311–12. If a university’s program has any of the following factors, it is not narrowly tailored: (1) It implements racial balancing or maintains quotas, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978); *accord* *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 311 (2013) (holding same); (2) it automatically rewards candidates from a certain race “plus” points, *Fisher I*, 570 U.S. at 312; or (3) a race-conscious program is used despite race-neutral alternatives that are workable and available to the university. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 377 (2016).

The university has the burden to demonstrate that it seriously considered “available” and “workable” race-neutral alternatives to its affirmative action program, and that those alternatives “do not suffice” to create the same level of diversity. *Fisher I*, 570 U.S. at 312. **Yet**, universities are not required to implement or test every conceivable race-neutral alternative, nor are they required to “choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups.” *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

155. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013) (holding that universities must provide a “reasoned, principled explanation” for its conclusion that “a diverse student body would serve its educational goals”).

156. *Fisher I*, 570 U.S. at 312 (holding that the university has the burden to prove that it seriously considered “available” and “workable” race-neutral alternatives to its affirmative action program, and that those alternatives “do not suffice” to create the same level of diversity); *accord* *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 377 (2016) (reaffirming that an affirmative action program is not narrowly tailored when it is used despite workable and available race-neutral alternatives).

157. *See Fisher I*, 570 U.S. at 311–312 (“[I]t remains at all times the University’s obligation to demonstrate . . . that [its] admissions processes ‘ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.’”) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)) (emphasis added).

158. *Complaint, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 261 F.Supp.3d 99 (D. Mass. 2017) (No. 14-cv-14176-ADB), 2014 WL 6241935.

159. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 261 F.Supp.3d 99, 111 (D. Mass. 2017).

160. *Id.*

After the Court reaffirmed the use of race in admissions in *Fisher II*,¹⁶¹ trial began. After hearing fifteen days of evidence, including testimony from several expert witnesses, the District of Massachusetts ruled in favor of Harvard, finding that its admissions program did not violate Title VI of the Civil Rights Act.¹⁶² SFFA appealed to the First Circuit.¹⁶³

The First Circuit affirmed that SFFA had standing to sue¹⁶⁴ under “associational standing” because (1) at least one of its members possessed standing to sue Harvard itself; (2) “the interests that the suit seeks to vindicate” are relevant to SFFA; and (3) personal participation of the plaintiffs was not required to sustain the claim or to seek damages.¹⁶⁵

On the merits, the First Circuit affirmed that Harvard’s affirmative action program survived strict scrutiny.¹⁶⁶ The court confirmed that Harvard’s proffered goals—including “equipping Harvard’s graduates . . . to adapt to an increasingly pluralistic society” and “producing new knowledge stemming from diverse outlooks”—were precise enough to demonstrate a compelling interest.¹⁶⁷

Then, the court determined that Harvard’s policy was narrowly tailored.¹⁶⁸ It rejected SFFA’s arguments that Harvard engaged in racial balancing,¹⁶⁹ used race as a mechanical plus factor,¹⁷⁰ and did not consider race-neutral alternatives.¹⁷¹ Additionally, the court held that Harvard did not engage in intentional discrimination against Asian applicants.¹⁷² The First Circuit closed by reminding Harvard of its “ongoing obligation to engage in constant deliberation and continued

161. *Fisher v. University of Texas*, 579 U.S. 365, 377 (2016) (*Fisher II*).

162. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 132 (D. Mass. 2019); *accord* Findings of Fact and Conclusions of Law, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (No. 14-cv-14176-ADB) (holding same).

163. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020).

164. *Id.* at 184.

165. *Id.*

166. *Id.* at 184, 204.

167. *Id.* at 186–87 (discussing how Harvard’s admissions program is supported with sufficient evidence, as required by *Fisher I* and *Fisher II*).

168. *Id.* at 188–205.

169. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 189 (1st Cir. 2020).

170. *Id.* at 192.

171. *Id.* at 195.

172. *Id.* at 196.

reflection regarding its admission policies.”¹⁷³ SFFA filed a petition for writ of certiorari.¹⁷⁴

B. *SFFA v. University of North Carolina*

SFFA filed its complaint against UNC on the same day it filed against Harvard,¹⁷⁵ claiming that UNC’s admissions policy similarly offended the Fourteenth Amendment and Title VI.¹⁷⁶ Like Harvard, UNC unsuccessfully challenged SFFA’s standing to sue, and had its proceedings stayed pending the outcome of *Fisher II*.¹⁷⁷ The district court also granted UNC’s motion¹⁷⁸ to bar SFFA from arguing in trial that “the use of racial preferences” should be “forbidden outright.”¹⁷⁹

At trial, the court granted a Motion to Intervene to diverse students and graduates of UNC.¹⁸⁰ While the University presented evidence of its quest for specific benefits stemming only from a diverse student population,¹⁸¹ the students showed that the University’s continued use of affirmative action was justified by testifying to their lived experiences as UNC students.¹⁸² Weighing this evidence, the court found that UNC’s “efforts in pursuing the educational benefits of

173. *Id.* at 204 (quoting *Fisher II*, 579 U.S. at 388).

174. Petition for Writ of Certiorari, *Students for Fair Admission v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (No. 20-1199).

175. Complaint, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d 580 (M.D.N.C. 2021) (No. 1:14-cv-00954), 2014 WL 6386755 (filing date Nov. 17, 2014) *accord* Complaint, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 261 F.Supp.3d 99 (D. Mass. 2017) (No. 14-cv-14176-ADB), 2014 WL 6241935 (filing date Nov. 17, 2014).

176. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d 580, 585–86 (M.D.N.C. 2021).

177. *Id.* at 587.

178. *Id.* at 588.

179. *Id.* (noting that, while SFFA was foreclosed from arguing that *Grutter* should be overruled during trial, SFFA preserved the argument for appeal).

180. *Id.*

181. *See id.* at 588–92 (describing the University’s specific goals, including UNC’s “long-standing commitment to diversity and inclusion, and identifies the key resolutions, strategic framework, plan of action, and campus programming necessary to capture the benefits that diversity provides,” as well as the University’s reasons for their commitment, including remedying the “vestiges of prior discrimination” and instructing students on how to “live and work in” a “diverse place”).

182. *See* *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d 580, 593–94 (M.D.N.C. 2021) (describing the testimony of the “Student Intervenors,” including that “there were far fewer students of color on campus than they expected,” “they experienced low minority representation,” that “minority students to experience loneliness and tokenism,” and that “[u]nderrepresented minority students also report feelings of isolation and unfair pressure to represent their race or ethnicity”).

diversity [were] substantial and ongoing,”¹⁸³ satisfying a compelling interest for purposes of strict scrutiny.¹⁸⁴

To determine whether the University had narrowly tailored its program, the court found that UNC made a “good faith effort to consider race neutral alternatives,”¹⁸⁵ in two primary ways. First, UNC modeled several race-neutral alternatives to determine how the alternatives would change the admissions profile of their incoming class.¹⁸⁶ For example, UNC presented models predicting its class were it to implement a “Top X Percent” program.¹⁸⁷ Finding that the programs would generally result in a reduced number of Native American and Hispanic students, the court found that none of the race-neutral programs offered a workable alternative to UNC’s current affirmative action program.¹⁸⁸ SFFA urged the court that socioeconomic status should replace UNC’s use of race, but the court found the socioeconomic models proffered by SFFA to be unworkable.¹⁸⁹

Second, UNC augmented its recruitment and financial aid programs, both of which naturally encourage BIPOC, low-income, and other diverse student populations to apply to UNC.¹⁹⁰ By performing better outreach and providing more financial aid, UNC’s recruitment programs enabled UNC to only use affirmative action bonuses as a last resort.¹⁹¹

Because UNC periodically reassessed its use of affirmative action and measured its programs against its specific goals, the district court concluded that UNC’s “highly individualized, holistic review” that considered race as “one plus factor among many factors” satisfied strict scrutiny.¹⁹²

183. *Id.* at 594.

184. *Id.* at 655.

185. *Id.* at 634.

186. *See id.* at 635–36 (describing UNC’s modeled race-neutral alternatives to its affirmative action program, none of which resulted in the same level of diversity that UNC’s program creates).

187. *Id.* at 645–46.

188. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d 580, 647 (M.D.N.C. 2021).

189. *Id.* at 645.

190. *See id.* at 636–40 (detailing UNC’s outreach to low-income students, racially diverse students, and untraditional students through transfer programs, high school recruitment, and scholarship distribution).

191. *Id.*

192. *Id.* at 658.

Instead of appealing to the Fourth Circuit on the merits, SFFA filed a petition for writ of certiorari before judgment.¹⁹³ A few months later, the Supreme Court consolidated SFFA’s cases against Harvard and UNC, granting certiorari on both.¹⁹⁴ On July 22, 2022, the Court deconsolidated the cases to allow the formerly recused Justice Ketanji Brown Jackson to participate in the UNC decision.¹⁹⁵ The Court allotted one hour of oral arguments for each case.¹⁹⁶

V. BRIEFING

A. SFFA

In its merits brief, SFFA invited the Court to overturn *Grutter*.¹⁹⁷ In the alternative, it argued that both Harvard’s¹⁹⁸ and UNC’s admissions policies fail strict scrutiny.¹⁹⁹

First, SFFA called for *Grutter* to be overturned²⁰⁰ under the standards articulated by Justice Kavanaugh in *Ramos v. Louisiana*.²⁰¹ In short, Justice Kavanaugh calls for only “grievously wrong” decisions to be overturned and encourages the Court to conduct a “sober appraisal”²⁰² of the “negative jurisprudential or real-world consequences” and “reliance interests.”²⁰³ In Justice Kavanaugh’s view, these considerations create a “high (but not insurmountable) bar for

193. Petition for a Writ of Certiorari Before Judgment, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707 (Nov. 11, 2021).

194. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (granting cert.).

195. Jonathan Feingold, *Brown Jackson Is Key Voice in Harvard, UNC Bias Cases*, BLOOMBERG LAW (Aug. 26, 2022, 1:00 AM), <https://news.bloomberglaw.com/us-law-week/brown-jackson-is-key-voice-in-harvard-unc-bias-cases>.

196. See SUPREME COURT OF THE UNITED STATES, Docket No. 21-707, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-707.html> (“This case is no longer consolidated with No. 20-1199”) (last visited Nov. 7, 2022).

197. Brief for Petitioner at 49, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

198. Brief for Petitioner at 71, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

199. *Id.* at 83.

200. *Id.* at 50.

201. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part) (“The *stare decisis* factors identified by the Court in its past cases include: the quality of the precedent’s reasoning; the precedent’s consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent.” (emphasis in original)).

202. *Id.* at 1415 (quoting Justice Robert Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944)).

203. *Id.* at 1415.

overruling a precedent.”²⁰⁴ SFFA argued that *Grutter* is “grievously wrong” because it has “no support in the Fourteenth Amendment’s ‘historical meaning.’”²⁰⁵ To this point, it reasoned that *Brown v. Board of Education*²⁰⁶— “where [the Supreme Court] denied ‘any authority . . . to use race as a factor in affording educational opportunities’”²⁰⁷— should foreclose *Grutter*’s constitutionality.²⁰⁸

Beyond *Brown*, SFFA argued that *Grutter* and its progeny created a compelling interest that conflicts with the Court’s “broader equal-protection jurisprudence:” namely, the Court’s holdings that remedying societal discrimination,²⁰⁹ providing role models for minority students,²¹⁰ and protecting a child’s best interests²¹¹ are not “compelling interests” under strict scrutiny.²¹² On narrow tailoring, SFFA argued that *Grutter* created a different “strict scrutiny” for affirmative action, which requires less tailoring than strict scrutiny requires in other contexts.²¹³ Finally, SFFA claimed that *Grutter* allows universities to reject race-neutral alternatives while these alternatives are “at the very least, *more narrowly tailored*” than race-conscious programs.²¹⁴

SFFA also proposed that *Grutter* “has spawned significant negative consequences.”²¹⁵ Chiefly, it argued that universities impose secret racial quotas,²¹⁶ and that they intentionally discriminate against “historically oppressed minorities” by using subjective evaluative criteria in the admissions process.²¹⁷ SFFA also proposed that the only way to challenge affirmative action policies is by suing the

204. *Id.*

205. Brief for Petitioner at 50, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707) (quoting *Ramos*, 140 S. Ct. at 1405).

206. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

207. Brief for Petitioner at 51, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707) (quoting *Parents Involved*, 551 U.S. at 747 (plurality opinion)).

208. *Id.*

209. See *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (providing that two conditions that must be met for remedying discrimination to become a compelling state interest: the discrimination must be “identified” and “the institution that makes the racial distinction” must find strong evidence that racial distinctions are necessary before implementing the program).

210. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (plurality opinion).

211. See *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984) (discussing a child’s best interest as an insufficient interest to prioritize custody for parents of different races).

212. Brief for Petitioner at 51, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

213. *Id.* at 56.

214. *Id.* (emphasis in original).

215. *Id.* at 60.

216. *Id.* at 61.

217. *Id.* at 62–63 (discussing historical discrimination against Jewish students and contemporary discrimination against Asian American students).

universities,²¹⁸ and that “universities’ obsession with race has impeded their progress toward *Grutter*’s true aim: obtaining a diversity of viewpoints.”²¹⁹ Finally, SFFA argued that *Grutter* creates no legitimate reliance interests, because the Court upheld race-based admissions “by the narrowest of margins, over spirited dissents”²²⁰ and because *Grutter* itself contained a “self-destruct mechanism” in its 25-year sunset provision.²²¹

In the alternative, SFFA launched attacks at the Harvard and UNC affirmative action programs. First, SFFA argued that Harvard used its policy to actively discriminate against Asian applicants—a claim that, if persuasive, would render Harvard’s policy in violation of the Fourteenth Amendment *per se*.²²² It argued that, though Asian-Americans “are substantially stronger than white applicants on nearly every measure . . . [they] were admitted at the *same* rate as [non-legacy] white applicants.”²²³ SFFA argued that the “personal rating explains why,” highlighting that Asian applicants receive the worst scores across all racial groups in the category.²²⁴

SFFA also argued that the district court extended too much deference to Harvard.²²⁵ Though the court found that it would be “econometrically reasonable” for Harvard to implement an admissions program without a personal rating score, the district court still ruled in Harvard’s favor.²²⁶ SFFA characterized the district court’s rationale as follows: “[I]n its view, the causes of the penalty [in Asian American applicants’ personality scores] were unclear, the court could imagine non-racial explanations, and Harvard denied liability.”²²⁷ SFFA argued that this deference mirrored rational basis review instead of strict scrutiny.²²⁸

218. Brief for Petitioner at 62, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

219. *Id.* at 65 (emphasis in original) (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”)).

220. *Id.* at 67 (quoting *Payne v. Tennessee*, 501 U.S. 808, 823–30 (1991)).

221. *Id.* at 67–68 (quoting *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting)).

222. *Id.* at 71–72.

223. *Id.* at 72–73 (emphasis in original).

224. Brief for Petitioner at 73, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

225. *Id.* at 73–75.

226. *Id.* at 74.

227. *Id.* at 74 (citing Appendix to Petition for Certiorari at 194, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022) (No. 20-1199)).

228. *Id.*

SFFA also maintained that Harvard’s policy was not narrowly tailored.²²⁹ First, it argued that Harvard used race as more than a “mere plus” in its admissions.²³⁰ SFFA claimed that Harvard mechanically grants preferences to “applicants who check the box for ‘Black’ or ‘Hispanic,’ whether or not they write about their race or otherwise indicate that it’s important.”²³¹ And SFFA alleged that this preference is “enormous” in absolute terms, making race “determinative for at least 45% of all admitted African American and Hispanic applicants.”²³² Second, it claimed that Harvard could “eliminate[] its preferences for the children, donors, alumni, and Harvard faculty” (commonly known as “legacy students”) as a workable, race-neutral alternative.²³³ SFFA argued that Harvard’s failure to consider these specific alternatives rendered its program not narrowly tailored.²³⁴

SFFA only challenged UNC’s program as not narrowly tailored.²³⁵ It posited that UNC has “‘workable race-neutral alternatives’ that could achieve the educational benefits of diversity ‘about as well and at tolerable administrative expense.’”²³⁶ SFFA proffered alternatives like creating a quota for “high-scoring, socioeconomically disadvantaged applicants,”²³⁷ or retaining UNC’s holistic review but preferencing socioeconomic diversity higher and removing legacy preferences.²³⁸ SFFA criticized the district court for rejecting these alternatives in favor of UNC, arguing that “UNC bears the burden of showing that alternative approaches would somehow deprive its

229. *See id.* at 77–83 (discussing Harvard’s use of race as more than a “mere plus” and Harvard’s available race-neutral alternatives).

230. Brief for Petitioner at 78, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

231. *Id.* (citing Appendix to Petition for Certiorari at 116, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 195 (No. 20-1199); Joint Appendix at 568–71, 900–01, 1071–72, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 195 (No. 20-1199)).

232. *Id.* at 79 (internal quotation marks omitted) (quoting Appendix to Petition for Certiorari at 209–10, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 195 (No. 20-1199)).

233. *Id.* at 81.

234. *Id.*

235. *Id.* at 83. *But see id.* at 83 n.8 (highlighting that SFFA preserves the claim that UNC fails strict scrutiny because it does not use race as a mere “plus” for the Fourth Circuit to consider on remand).

236. Brief for Petitioner at 83, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707) (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013)).

237. *Id.* (citing Appendix to Petition for Certiorari at 134 n.43, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (No. 21-707); Joint Appendix at 574–79, 1156, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707)).

238. *Id.* at 84–85.

students of the *educational benefits* of diversity,” and it did not do so at trial.²³⁹ SFFA reasoned that “the evidence UNC needs almost certainly doesn’t exist,” because public universities in states where affirmative action has been banned by statute²⁴⁰ are “more racially diverse than ever.”²⁴¹

B. Harvard College and the University of North Carolina

Though Harvard²⁴² and UNC²⁴³ filed separate merits briefs after the Court de-consolidated the cases, the Universities lofted similar arguments in favor of *Grutter*. This Commentary streamlines the common arguments in favor of maintaining the Court’s affirmative action precedent before handling each of Harvard’s and UNC’s claims that their policies satisfy strict scrutiny.

1. *Grutter* Should Not be Overturned

Both Harvard and UNC characterized overturning *Grutter* as engendering enormous consequences, arguing that *Bakke*, *Fisher I*, and *Fisher II* would necessarily be overturned in tow.²⁴⁴ On this point, UNC emphasized that “[p]arties seeking to overturn precedent on historical grounds have the ‘burden’ to point to evidence that settles ‘the historical question with enough force’ to displace precedent.”²⁴⁵ In light

239. *Id.* at 84.

240. Nine states have banned affirmative action: Idaho, Oklahoma, New Hampshire, Arizona, Nebraska, Michigan, Florida, Washington, and California. For detailed information on each state’s program, see IDAHO CODE § 67-5909A (2020); OKLA. CONST. art. II, § 36A (2012); N.H. REV. STAT. ANN. § 187-A:16-a (2012); ARIZ. CONST. art. II, § 36 (2010); NEB. CONST. art. I, § 30 (2008); MICH. CONST. art. I, § 26 (2006); Fla. Exec. Order No. 99-281 (Nov. 9, 1999); WASH. REV. CODE § 49.60.400 (1998); CAL. CONST. art. I, § 31 (1996).

241. Brief for Petitioner at 85, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707). This claim is dubious. For more information, see *infra*, note 357 and accompanying text.

242. Brief for Respondent, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022) (No. 20-1199) [hereinafter Harvard Brief].

243. Brief by University Respondents, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707) [hereinafter UNC Brief].

244. Harvard Brief, *supra* note 236, at 21–22; UNC Brief, *supra* note 237, at 27 (“SFFA asks this Court to abandon nearly five decades of precedent.”).

245. UNC Brief, *supra* note 237, at 28 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1974 (2019)).

of this burden, UNC argued that SFFA's historical evidence²⁴⁶ only created "uncertainty," which "counsels retention of the status quo."²⁴⁷

Pandering to the Court's originalist lean, the Universities provided arguments on the Fourteenth Amendment's "constitutional text and history."²⁴⁸ For example, Harvard compared an "early proposal" of the Fourteenth Amendment, which prohibited "discrimination . . . because of race, color, or previous condition of servitude,"²⁴⁹ with the "equal protection" language that the Framers settled on.²⁵⁰ Harvard reasoned that this deliberate choice demonstrates the "collective understanding of the 39th Congress" that the Fourteenth Amendment authorizes race-conscious programs.²⁵¹ Building on this collective understanding argument, UNC highlighted the establishment of the Freedmen's Bureau and the targeted benefits the 39th Congress extended to Black Americans post-Civil War.²⁵² It argued that "the same Congress that drafted the Fourteenth Amendment" believed that "race-conscious measures are consistent with equal protection when their 'very object' is 'to break down the discrimination between whites and blacks.'"²⁵³

The Universities argued that the Court's affirmative action decisions "uphold *Brown* in every way."²⁵⁴ UNC reminded the Court of the context that *Brown* was decided in, stating:

Berea College maintained a race-conscious admissions policy for decades, until Kentucky enacted legislation that forced its African-American students to transfer to another school . . . This Court, over Justice Harlan's dissent, upheld the Kentucky law in *Berea College v. Kentucky*.²⁵⁵

246. *Id.* at 29 ("To support its sweeping claim that the Clause's historical meaning forbids race-conscious government action, SFFA cites a *single floor statement* by a one-term Senator who was not even in Congress when the Fourteenth Amendment was debated and ratified . . . Statements like these, spoken against racial *segregation*, hardly prove that the Fourteenth Amendment was originally understood to bar race conscious measures that *bring together* students from diverse backgrounds.").

247. *Id.* at 28 (quoting Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1711 (2013)) (internal quotation marks omitted).

248. Harvard Brief, *supra* note 236, at 22.

249. *Id.* at 23 (quoting Benjamin Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 83 (1914)); accord UNC Brief, *supra* note 237, at 29–30 (quoting same).

250. Harvard Brief, *supra* note 236, at 23.

251. *Id.* at 26.

252. UNC Brief, *supra* note 237, at 31–32.

253. UNC Brief, *supra* note 237, at 32 (quoting CONG. GLOBE, 39th Cong., 1st. Sess. 2766 (1866)).

254. Harvard Brief, *supra* note 236, at 27; accord UNC Brief, *supra* note 237, at 33 (arguing same).

255. UNC Brief, *supra* note 237, at 33.

In *Brown*, the Court deemed Kentucky’s choice “to dismantle [the College’s] race-conscious admissions policy [] an unconstitutional application of ‘the separate but equal doctrine’ established by *Plessy*.”²⁵⁶ To this point, UNC argued that *Brown* prohibits the segregation of students based on color, but “[p]olicies that bring students *together* bear no such badge [of servitude].”²⁵⁷ Harvard agreed, adding that both *Brown* and the Court’s affirmative action doctrine ban the use of race as a determinative factor for admissions or school placement.²⁵⁸

2. Harvard’s Admission Policy

In support of its admissions policy, Harvard argued that its program complies with the Court’s precedents.²⁵⁹ First, Harvard reminded the Court of the factual record—namely, that the school did not intentionally discriminate against Asian-Americans.²⁶⁰

On narrow tailoring, Harvard argued that it does not engage in racial balancing.²⁶¹ Instead Harvard maintained its admissions considers race flexibly as “one factor among many,”²⁶² and pursues “all types of diversity, not just racial diversity.”²⁶³ In response to SFFA’s criticism of its “tipping,” Harvard reasserted the district court’s finding that “‘the magnitude of race-based tips is not disproportionate to the magnitude of other tips applicants may receive’ . . . for leadership, creativity, athleticism, maturity, and the capacity to contribute to socioeconomic or geographic diversity.”²⁶⁴

256. *Id.* at 33 (quoting *Plessy v. Ferguson*, 347 U.S. 483, 491 n.7 (1954) (emphasis in original)).

257. *Id.* at 35 (emphasis in original).

258. Harvard Brief, *supra* note 236, at 28.

259. *Id.* at 41.

260. *Id.* at 42.

261. *Id.* at 46–48 (describing how data explaining the relationship between admitted students and applicants is the “opposite of what one would expect” with a quota, and that the “one-pagers” are used to ensure that “admitted students with certain characteristics, including but not limited to race, . . . were not inadvertently overlooked”).

262. *Id.* at 49 (internal quotation marks omitted) (quoting Appendix to Petition for Certiorari at 137, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199)).

263. *Id.* (internal quotation marks omitted) (quoting Appendix to Petition for Certiorari at 68, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199)).

264. Harvard Brief, *supra* note 236, at 51 (quoting Appendix to Petition for Certiorari at 255, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199)) (citing Appendix to Petition for Certiorari at 127, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199); Joint Appendix at 1558–60, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199)).

Additionally, Harvard argued that no race-neutral alternatives to its affirmative action program are “workable.”²⁶⁵ Echoing the findings of the district court and the First Circuit, Harvard reminded the Court that SFFA’s proposed alternatives, including eliminating legacy tips, and increasing socioeconomic tips²⁶⁶ would “require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.”²⁶⁷ For example, if Harvard were to only use socioeconomic tips to attain its diverse student body, “Harvard would have to give socioeconomic tips so large that they would essentially automatically [admit] any applicant . . . with an average probability of admission.”²⁶⁸ Harvard argued that it is not required to implement race-neutral alternatives with such dramatic outcomes to comply with the narrow tailoring required by *Grutter*.²⁶⁹

3. University of North Carolina’s Admission Policy

Unlike Harvard, UNC re-raised its argument that SFFA lacked standing when it filed suit.²⁷⁰ In short, UNC argued that SFFA failed to meet its burden establishing its Article III standing for two reasons: (1) SFFA did not prove that it “had the requisite stake in the outcome when the suit was filed;”²⁷¹ and (2) at the time it filed its complaints, SFFA was not a “genuine membership organization.”²⁷² UNC argued that SFFA was not a genuine membership organization because, at the time of its filing in 2014, SFFA’s “purported members neither controlled the organization nor played a meaningful role in its activities,”²⁷³ and had “no voting rights.”²⁷⁴ Additionally, “SFFA’s purported members provide[d] almost none of the organization’s funding” at the time of filing.²⁷⁵ Considering the scant control and

265. Harvard Brief, *supra* note 236, at 52–54.

266. *Id.* at 52–53 (discussing SFFA’s “Simulation D”).

267. *Id.* at 52 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003)).

268. *Id.* at 53 (internal quotation marks omitted) (quoting Joint Appendix at 3077–78, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199)).

269. *See id.* at 51–53.

270. UNC Brief, *supra* note 237, at 23–24.

271. *Id.* at 23 (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008)) (citing *Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (“[The plaintiff] bears the burden of establishing standing as of the time he brought th[e] lawsuit.”)).

272. *Id.* at 24.

273. *Id.* at 25.

274. *Id.* at 25 (quoting Joint Appendix at 302, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (No. 21-707)).

275. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Joint Appendix at 275–77, 286, 295–96, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-

impact that SFFA’s purported members had on the organization, UNC urged the Court to find that SFFA is a “founder-controlled litigation vehicle whose main purpose was to circumvent the Constitution’s bar against litigating generalized grievances.”²⁷⁶

Procedurally, UNC reminded the Court of its unique reviewing position. Because the Court granted certiorari prior to the Fourth Circuit’s hearing on the merits, the Court assumes the typical position of the Court of Appeals by examining the district court’s factual findings for clear error.²⁷⁷ Before presenting the evidence from trial, UNC restated the high bar for clear error: that the appellate court has the “definite and firm conviction that a mistake has been committed.”²⁷⁸

On the merits, SFFA conceded that UNC has a compelling interest in “assembling a diverse student body” and that “UNC’s admissions process is properly holistic.”²⁷⁹ Accordingly, UNC prompted that “the only question before the Court is whether UNC has given serious, good-faith consideration to workable race-neutral alternatives.”²⁸⁰

UNC maintained that the race-neutral alternatives SFFA proffered are unworkable.²⁸¹ SFFA’s models would either require UNC to abandon holistic, individualized review²⁸² or place so much weight on an applicant’s socioeconomic status “that this one factor would eclipse any other aspect of an application.”²⁸³ Because UNC’s academic mission hinges on its ability to perform holistic review, it argued that

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276. UNC Brief, *supra* note 237, at 25.

277. *Id.* at 47–48 (quoting *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 531 (2021)) (citing Fed. R. Civ. P. 52(a)(6)).

278. *Id.* at 48 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

279. *Id.* at 47 (citing Brief for Petitioner at 83–86, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707)).

280. *Id.*

281. *Id.* at 50–52. The district court also rejected SFFA’s race-neutral models as unworkable. *See id.* at 52 (“The district court was therefore right to reject this alternative as unworkable, because it would require UNC to fundamentally alter its academic mission.”) (citing Appendix to Petition for Certiorari at 134 n.43, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 386–87 (2016)).

282. *See* UNC Brief, *supra* note 237, at 52 (“By focusing on only three factors—test scores, GPA, and socioeconomic status—[the Modified-Hoxby Simulation] would bar UNC from engaging in holistic, individualized review.”).

283. *Id.* (citing Joint Appendix at 597, 866–87, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707)) (“SFFA’s models place so much weight on socioeconomic status—in some cases making it the equivalent of scoring an extra 400 points or more on the SAT—that this one factor would eclipse any other aspect of an application.”).

the district court was proper to conclude that SFFA’s race-neutral alternatives were unworkable.²⁸⁴

Finally, UNC emphasized that it currently utilizes several race-neutral strategies, including “establishing and expanding partnerships with high schools and community colleges [and] increasing financial aid to make college more affordable.”²⁸⁵ UNC reminded the Court of its consistent efforts to reevaluate socioeconomic factors and a percentage plan at regular increments.²⁸⁶ Though it concluded that race-neutral plans were presently unworkable,²⁸⁷ UNC supported this conclusion with evidence from its trial expert that demonstrated no race-neutral alternative would achieve “a racially diverse, academically qualified class about as well as UNC’s current holistic admissions process.”²⁸⁸ Despite the success of race-neutral alternatives in other states, UNC argued that the “unique demographics and history” of North Carolina make implementing race-neutral alternatives less feasible than in states with fewer vestiges of slavery and other racial discrimination.²⁸⁹ UNC closed by urging the Court not to “short-circuit [its] ongoing process” to move away from affirmative action incrementally.²⁹⁰

VI. ORAL ARGUMENTS

On October 31, 2022, the Court heard oral arguments from the parties, the Student-Intervenors from UNC, and U.S. Solicitor General Elizabeth Prelogar, arguing on behalf of the Biden administration in support of the Universities. Because Title VI’s protections are coextensive with the standard imposed by the Equal Protection Clause of the Fourteenth Amendment,²⁹¹ this Commentary summarizes the key questions from the arguments with specific references to the record where appropriate.

The Court questioned SFFA about what a “race-neutral alternative” looks like in practice. For example, Justice Kavanaugh

284. *Id.* at 53–54.

285. *Id.* at 54 (citing *id.* at 15–17).

286. *Id.* at 55–56.

287. *Id.* at 56.

288. UNC Brief, *supra* note 237, at 57 (citing Appendix to Petition for Certiorari at 182, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707)).

289. *Id.* at 58.

290. *Id.* at 59.

291. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (“Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”).

pressed the term’s definition, asking, “What if a college says ‘we’re going to give a plus to descendants of slaves?’” and “Could you give a plus to applicants whose parents were immigrants to this country?”²⁹² Patrick Strawbridge, on behalf of SFFA,²⁹³ responded that a slave-descendant plus would amount to an impermissible “proxy for race,” while advantaging students whose parents were immigrants “regardless of their racial descent . . . is probably closer to being okay.”²⁹⁴

Indeed, SFFA conceded at oral argument that its real concern was with “race in a box-checking way,” not universities considering an applicant’s race in an “experiential way.”²⁹⁵ The record suggests that this distinction would allow universities to consider the traits required to respond to discrimination or racism (for example, strength and resilience) if the applicant discussed the experience in her admissions essay.²⁹⁶ But, SFFA would not allow universities to “consider[] race and race by itself.”²⁹⁷ Cameron Norris, for SFFA, echoed this understanding.²⁹⁸ But as General Prelogar highlighted, a consideration of race by itself would almost certainly amount to a “mechanical application” of a race “plus factor” in offense of *Gratz*.²⁹⁹ Accordingly, she argued that the current doctrine already forbids universities from preferencing any single person “automatically or inflexibly” because of race.³⁰⁰ To this end, Justice Kagan opined that SFFA’s distinction between box-checking and experience “slic[es] the baloney awfully thin.”³⁰¹

Justice Thomas pressed the Universities and the Student-Intervenors about why strict scrutiny in the affirmative action context gives deference “to the discriminator.”³⁰² He asked why Universities would receive this deference in a Fourteenth Amendment context but

292. Transcript of Oral Argument at 45, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707) [hereinafter UNC Oral Argument].

293. *Id.* at 2.

294. *Id.* at 45.

295. *Id.* at 27.

296. *Id.* at 23–24.

297. *Id.* at 24.

298. Transcript of Oral Argument at 9, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022) (No. 20-1199) [hereinafter Harvard Oral Argument].

299. *Id.* at 108.

300. *Id.*

301. UNC Oral Argument, *supra* note 292, at 34; accord Harvard Oral Argument, *supra* note 298, at 9.

302. UNC Oral Argument, *supra* note 292, at 75 (question to UNC); *id.* at 120 (question to Student-Intervenors).

not in a “Title VII case or a Title VI case,” where the burden to explain discriminatory behavior is entirely shifted to the alleged discriminator.³⁰³ On behalf of UNC, Solicitor General Ryan Park³⁰⁴ argued that the deference afforded by *Grutter* is “quite limited,” and only extends to the university’s “educational objectives and not the legal question of whether those objectives constitute a compelling interest.”³⁰⁵ For the Student-Intervenors, David Hinojosa³⁰⁶ agreed that the deference still required the Court to analyze whether the “university’s articulated interest was clearly identifiable, measurable, and precise.”³⁰⁷ In short, affirmative action supporters posited that the “deference” referenced in *Grutter* only requires that a reviewing court believe universities if they claim that a diverse student population will benefit their students’ education.³⁰⁸ This “deference,” however, is meaningless if the university seeking to implement affirmative action does not substantiate its claimed benefits of diversity with concrete and measurable qualities.

Grutter’s sunset provision was another frequent point of discussion. Strawbridge, for SFFA, argued that the provision is a “hard-and-fast requirement,”³⁰⁹ while Solicitor General Park claimed that the “25-year [deadline is not] some sort of strict aspiration” and that “on its face it was [not] structured as such.”³¹⁰ Justice Kavanaugh pushed back on the Solicitor General’s characterization, reminding the Court that “Justice Thomas in his separate opinion referred to it as a holding[, and] Justice Kennedy referred to it as a pronouncement.”³¹¹ In response, Solicitor General Park argued that “every institution in every state will differ,” so while UNC needs to presently consider race due to North Carolina’s history of segregation, the need is diminishing and has fully diminished in other states.³¹² Norris, for SFFA, claimed that the Court need not give *Grutter* longer than the 25-year pronouncement.³¹³ Waxman, for Harvard, claimed that “Harvard takes to heart Justice O’Connor’s opinion that ‘in the context of higher education, the durational

303. UNC Oral Argument, *supra* note 292, at 75.

304. *Id.* at 2.

305. *Id.* at 75.

306. *Id.*

307. *Id.* at 122.

308. *Id.* at 75; *accord id.* at 120–122.

309. UNC Oral Argument, *supra* note 292, at 57.

310. *Id.* at 85.

311. *Id.* at 86.

312. *Id.*

313. Harvard Oral Argument, *supra* note 298, at 40.

requirement can be met by periodic reviews to determine whether racial preferences are still necessary.”³¹⁴ General Prelogar agreed with this understanding, characterizing *Grutter* as not instituting “a 25-year clock that would be inflexible.”³¹⁵ Rather, she argued, “it was an expectation about . . . what changes we would see in society.”³¹⁶

VII. ANALYSIS

In the unlikely event that the Court maintains *Grutter*, it should find that Harvard and UNC’s admissions policies satisfy strict scrutiny.

Looking to Harvard’s policy first, Harvard espoused a “reasoned, principled explanation” for its conclusion that “a diverse student body would serve its educational goals” in the Khurana Report.³¹⁷ The Report identifies four specific rationales that stem from a racially diverse student body that Harvard’s students and faculty desire: “(1) training future leaders in the public and private sectors as Harvard’s mission statement requires; (2) equipping its graduates and itself to adapt to an increasingly pluralistic society; (3) better educating its students through diversity; and (4) producing new knowledge stemming from diverse outlooks.”³¹⁸ Harvard’s frequent data collection and communication with its students and faculty suggest that the school will move away from affirmative action when its beneficiaries deem it unnecessary. This evidence, coupled with the judicial deference afforded to Harvard by *Grutter*, is sufficient to satisfy a compelling interest—especially in light of the less detailed findings that constituted a compelling interest in *Fisher II*.³¹⁹

Next, Harvard’s policy is narrowly tailored. Both the district court and the First Circuit found that Harvard does not engage in racial balancing as the “share of admitted Asian Americans co-varies almost perfectly with the share of Asian American applicants.”³²⁰ Nor does Harvard automatically reward “plus” points to candidates of a certain race—rather, its holistic review method creates a mechanism where

314. *Id.* at 85.

315. *Id.* at 116.

316. *Id.*

317. *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 173–74 (1st Cir. 2020).

318. *Id.* For the full report, see Harvard Univ., Report of the Committee to Study Race-Neutral Alternatives (Apr. 2018), https://projects.iq.harvard.edu/files/diverse-education/files/report_of_the_committee_to_study_race-neutral_alternatives_final.pdf.

319. *Id.* at 187.

320. *Id.* at 188.

race is just one factor among many considered by the admissions team.³²¹ Even if a student receives a “tip” based on her racial or ethnic background, this tip is not determinative of admission and has the same weight as a non-racial “tip,” such as one for academic achievement or socioeconomic diversity.³²²

Finally, Harvard does not maintain its affirmative action program in light of “workable” race-neutral alternatives. The district court found that “[i]f Harvard were to increase its tip based on socioeconomic status, it would make sacrifices on almost every dimension important to its admissions process, including one designed to measure a student’s academic excellence.”³²³ Such a change to Harvard’s student body would offend the principles espoused in *Fisher II*, derived from *Grutter*.³²⁴ Even if Harvard were to eliminate its legacy advantage, “African American representation in Harvard’s admitted class would decrease by about 32%.”³²⁵ Such a drastic change in population would engender feelings of loneliness and isolation in Harvard’s Black students, which would contravene the University’s compelling interest.³²⁶

Though the factual findings relied upon above are procedurally undisputed before the Court, at oral argument several Justices seemed persuaded that Harvard discriminated against Asian-Americans.³²⁷ Additionally, the Court extensively questioned Harvard on its race-neutral alternative programs.³²⁸ Assuming *arguendo* that the Court

321. *Id.* at 190.

322. *Id.* (internal quotation marks omitted) (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 199 (D. Mass. 2019)).

323. *Id.* at 194.

324. *See Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (“[A] university [need not] choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups.”) (citing *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

325. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 194 (1st Cir. 2020).

326. *Id.* at 194–95.

327. *See, e.g.*, Harvard Oral Argument, *supra* note 298 at 54 (Justice Alito asking, “The personal score that’s given to Asian applicants to Harvard, . . . why are they given a lower score than any other group?”); UNC Oral Argument, *supra* note 292, at 29 (Chief Justice Roberts stating, “. . . the one thing his essay is going to show is that he’s Asian American, and those are the people who are being discriminated against.”).

328. *See, e.g.*, Harvard Oral Argument, *supra* note 298, at 43 (Justice Thomas stating that SFFA presented Harvard with “a race-neutral approach that would yield different but excellent results.”), 88–90 (Justice Kavanaugh discussing “adequate race-neutral alternatives” and “durational limits” of affirmative action), 94 (Justice Barrett asking whether Harvard is “getting closer to a termination point” of affirmative action programs).

departs from the factual record, it could find Harvard’s program in violation of the Fourteenth Amendment if it held that Harvard intentionally discriminated against Asian-Americans by implementing racial balancing.³²⁹

From a practical standpoint, UNC is arguably better situated to survive strict scrutiny, chiefly because SFFA does not claim UNC intentionally discriminates against any group of students. Additionally, UNC’s current use of race-neutral programs demonstrates its commitment to moving away from affirmative action as swiftly as possible.

First, UNC’s proffered compelling interest is uncontested by SFFA.³³⁰ The district court found that UNC articulated “substantial, credible, and largely uncontested evidence” that it seeks to enroll a diverse student body for the following purposes: “(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; and (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”³³¹ These specific goals are overseen by task forces convened by the University, which contain “faculty, students, and staff.”³³² These individuals, who experience UNC firsthand, reported to the University that “[t]he absence of critical mass . . . impedes the educational process, places undue pressure on underrepresented students, and limits the degree to which all students can experience the educational benefits of a diverse learning environment.”³³³

Additionally, UNC’s affirmative action policy is already limited by the race-neutral efforts it employs. Though the University determined that it still needed to be race-conscious in its holistic review of

329. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978) (describing how an affirmative action program with a racial “quota” violates the Fourteenth Amendment).

330. See Brief for Petitioner at 83, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707) (arguing that UNC’s admissions policy fails strict scrutiny because it does not embrace “workable race-neutral alternatives” and therefore fails narrow tailoring). Accord UNC Brief, *supra* note 237, at 22 (“SFFA does not contest that UNC proved its compelling interest in fostering student-body diversity or that it engages in proper holistic review, with race playing an appropriately limited role. SFFA claims only that UNC has refused to implement available race-neutral alternatives.”).

331. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 656 (M.D.N.C. 2021).

332. *Id.* at 655.

333. *Id.* at 608 (quoting Exhibit 39 to Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment at 4, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580 (No. 1:14-CV-00954)).

applicants, “UNC has engaged in ongoing, serious, and good faith consideration of workable race neutral alternatives over a several year period.”³³⁴ UNC does not implement quotas, automatically reward “plus” points, or ignore workable, race-neutral alternatives. Accordingly, its process is narrowly tailored.

Even though the record supports Harvard’s and UNC’s programs’ constitutionality, mechanical application of the Court’s precedent is only helpful to the extent that the Court does not overrule *Grutter*. In oral arguments, Justice Thomas appeared sympathetic to SFFA’s argument that *Brown* should obliterate all race-conscious distinctions.³³⁵ Additionally, the ninety-six amicus briefs filed may sway the Court to consider extraneous evidence or public policy rationales.³³⁶

The lowest-hanging fruit that would justify overruling *Grutter* is Justice O’Connor’s sunset provision. Indeed, if Justice Thomas is correct that the pronouncement makes the consideration of race “illegal” in 2028, the Court has little reason to maintain affirmative action until then. At first blush, Justice Thomas’s interpretation is compelling: It seems absurd that Justice O’Connor would instruct that the use of race in admissions “*must* be limited” and that “[e]nshrining a permanent justification” for affirmative action would be unconstitutional *per se* while hinting that affirmative action may be used as long as universities deem it necessary.³³⁷

If the Court accepts Justice O’Connor’s provision as binding, however, it will condone a time-sensitive rule responsive to social demand. Such an acknowledgement would run counter to the Court’s duty to say what the law *is*,³³⁸ not what the law should be. Indeed, the “proper understanding” in American law is that when the Court issues a ruling, its holding “was *always* the law . . . and that nothing has changed other than what our awareness of the law is.”³³⁹ Accordingly, if the Court treats Justice O’Connor’s provision as binding, it would

334. *Id.* at 662 (citing *id.* at 634-648).

335. Harvard Oral Argument, *supra* note 298, at 5–7 (prompting counsel for SFFA to “spend a few minutes . . . on the originalism argument.”).

336. For an in-depth discussion of the amici, see Ellena Erksine, Angie Gou, & Elisabeth Snyder, *A guide to the amicus briefs in the affirmative-action cases*, SCOTUSBLOG (Oct. 29, 2022, 6:44 PM), <https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases/>.

337. Evan Caminker & V.D. Amar, *Constitutional Sunsetting?: Justice O’Connor’s Closing Comments on Grutter*, 30 HASTINGS CONST. L.Q. 542 (2003) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003)).

338. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

339. Caminker & Amar, *supra* note 337, at 552.

embrace a new strand of *Lochner*-izing³⁴⁰ by allowing the Court to proscribe temporal, extraconstitutional rules. For this reason, the Court will likely avoid a full endorsement of the sunset provision.³⁴¹

In the event that the Court overrules *Grutter*, it should wade through complicated questions about race-consciousness to give universities and student-applicants guidance. First, the Court should clarify what constitutes a feasible race-neutral alternative. Though the Court considered the question in oral argument, it remains unclear whether a university could consider an applicant’s race if disclosed within a personal statement. If SFFA’s argument carries the day, the consideration of race could be banned outright. But Justice Jackson hinted that censorship of this magnitude creates a *new* Fourteenth Amendment claim—that barring only minority students from discussing their race and ethnicity would violate Equal Protection.³⁴² So too could this censorship impede on minority students’ First Amendment rights if universities erected content-based restrictions against discussing race within their application processes.³⁴³ A race-neutral admissions program might encourage applicants “to refrain from constitutionally protected speech or expression”³⁴⁴ by chilling their propensity to share information that would incidentally identify their race.³⁴⁵

340. See generally RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 82 (1996) (calling *Lochner* the “whipping boy” of constitutional law and opining that one goal of modern constitutional law is to squarely reject *Lochner*-era opinions).

341. Though the Court is unlikely to endorse the sunset provision as binding, the Court will probably argue that the oddity of the provision supports overruling *Grutter*. For example, the Court might endorse Justice Kavanaugh’s opinion in *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part) that *stare decisis* should be ignored when “the quality of the precedent’s reasoning” is poor. For a discussion of SFFA’s similar argument, see *supra*, p. 19.

342. UNC Oral Argument, *supra* note 292, at 64 (“[W]hat I’m worried about is that the rule that you’re advocating, that in the context of a holistic review process, a university can take into account and value all of the other background and personal characteristics of other applicants, but they can’t value race . . . that that seems to me to have the potential of causing more of an equal protection problem than it’s actually solving.”).

343. See *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980) (“The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to *prohibition of . . . discussion of an entire topic.*”) (emphasis added).

344. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

345. See Brief of American Council on Education et. al. as Amici Curiae Supporting Respondents at 30–31, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199) (discussing potential First Amendment implications of suggested race-neutral alternatives, including students’ dilemmas when their extracurriculars, such as “leadership in an AME church choir, work for a Black-owned business, or receipt of a scholarship

If universities may consider an applicant's race presented in a narrative fashion, diverse applicants may be incentivized to write personal statements about their race instead of other personal characteristics. Encouraging students to retell traumatic experiences of prejudice or isolation³⁴⁶ for fear that their race or ethnicity would remain unknown otherwise encourages students to typecast themselves. Such a race-neutral program creates a perverse incentive similar to those disclaimed as not "workable" in *Fisher II*.³⁴⁷

To this end, the Court should also resolve who has standing to vindicate future claims of discrimination in admissions. Though UNC maintained its standing objection throughout the litigation, the Court seemed disinterested in the inquiry during oral arguments. UNC's argument that SFFA is not a genuine membership organization is fully supported by the record—especially at the time of SFFA's filings in 2014, when SFFA's members had no voting power and did not pay dues.

Besides SFFA's questionable organizational standing, the SFFA litigation raises questions about three important aspects of the Court's standing doctrine. First, as recently as 2015, the Court reaffirmed an older precedent articulating that a complainant lacks standing where he raises only a "generally available grievance" such that relief would "no more directly and tangibly benefit[] him than it does the public at large."³⁴⁸ Second and relatedly, a plaintiff must demonstrate that he has been "concretely harmed."³⁴⁹ that his injury is "real, and not abstract."³⁵⁰ Recently, the Court narrowed its concrete injury inquiry to require a "close historical or common-law analogue for [the] asserted

or internship designed to increase minority representation in particular industries or fields of study" indicate race).

346. During oral argument, SFFA conceded that students might be able to describe the pertinent traits developed through their experience of racism in admissions essays. UNC Oral Argument, *supra* note 292, at 23–24.

347. In *Gratz* and *Fisher II*, the Court clarified that race-neutral programs that create "perverse incentives" are not "workable" in the context of the narrow tailoring inquiry. *Gratz v. Bollinger*, 539 U.S. 244, 304, n. 10 (Ginsburg, J., dissenting) (2003); *accord Fisher v. University of Texas*, 579 U.S. 388, 387 (2016) (*Fisher II*) (discussing same). The perverse incentives discussed included "encourag[ing] parents to keep their children in low-performing segregated schools, and discourag[ing] students from taking challenging classes that might lower their grade-point averages." *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting).

348. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992); *see also generally Spokeo, Inc. v. Robins*, 578 U.S. 330 (2015), *as revised* (May 24, 2016).

349. *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2205 (2021).

350. *Spokeo*, 578 U.S. at 340.

injury.”³⁵¹ Third, a favorable ruling must actually redress the injury complained about.³⁵²

Here, if the Court deems affirmative action to be unconstitutional, it is doubtful at best that *SFFA’s members* will be positively impacted. Though SFFA purports to represent a class of students rejected from Harvard and UNC, the common law analogue for the students’ claimed injury remains unclear.³⁵³ Even if this injury is sufficiently established, it seems that the injury is not redressable: SFFA does not seek to have the students’ applications re-examined under a race-neutral framework. Rather, it seems that SFFA merely seeks to vindicate the “generally available grievance” that affirmative action is not a “proper application of the Constitution and [Title VI].”³⁵⁴ If SFFA has standing to sue on behalf of its disconnected “members,” the Court’s rule against general-grievance complaints seems rudderless,³⁵⁵ and its rigid treatment of the concrete injury and redressability requirements as of late is perplexing. To this end, the Court instructed just last year that its treatment of standing “is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.”³⁵⁶

Assuming that the Court rejects affirmative action—thus endorsing that SFFA has standing—it seems that any rejected applicant would have standing to challenge a university’s admissions program in the future if the university employs *any* race-conscious programs. This concern is especially problematic if the Court allows universities to consider race in a narrative, experiential fashion. Such a rule would seemingly create vexatious litigation that would drain university *and state* resources—the same resources that SFFA suggests universities should spend to institute more race-neutral outreach programs.

Indeed, universities in states without affirmative action struggle to use race-neutral alternatives to achieve meaningful student-body

351. *TransUnion*, 141 S.Ct. at 2204.

352. *See Lujan*, 504 U.S. at 560.

353. It is viable that the Court may recognize the plaintiffs’ injury as their unequal treatment adverse to the Fourteenth Amendment and Title IX’s guarantees. *See TransUnion*, 141 S.Ct. at 2204–05 (noting that “traditional harms may also include harms specified by the Constitution itself,” and noting that “Congress’s views may be ‘instructive’” in determining whether an injury is concrete (quoting *Spokeo*, 578 U.S. at 341)).

354. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

355. Even Justice Thomas recognizes that generalized-grievance complaints, “in the context of public rights . . . require more than just a legal violation.” *See TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 221920 (2021) (Thomas, J., dissenting).

356. *TransUnion*, 141 S.Ct. at 2204.

diversity, both practically and financially. For example, Michigan voters banned the use of affirmative action in 2006, leaving the University of Michigan system to rely on race-neutral alternatives.³⁵⁷ Since replacing the individualized system it used in *Grutter*, “admission and enrollment of underrepresented minority students have fallen precipitously” at the University of Michigan at Ann Arbor.³⁵⁸ This decline is not for lack of trying: since 2008, the University has sponsored a “Center for Educational Outreach,”³⁵⁹ which communicates with Michigan’s “underserved schools and schools with significant enrollment of underrepresented minorities” to encourage interest in the University.³⁶⁰ Despite these recruiting efforts and the University’s race-neutral admissions policies, including socioeconomic advantages,³⁶¹ the University’s Black and Native student populations have gravely declined.³⁶² The current race-neutral alternatives are not only ineffective, but they are significantly more expensive. The University of California system, which has not considered race in its admissions policies since 2004, has spent more than a half-billion dollars to increase its minority recruitment efforts in the wake of its inability to consider race in admissions.³⁶³

CONCLUSION

Universities should reflect the diverse populations they prepare students to serve. Since *Bakke* and through *Fisher II*, the Court endorsed the importance of instilling cultural competence through education. Diverse classrooms create as a microcosm of the United States. They provide a unique—and in many cities, otherwise unattainable—forum for students to learn from peers with different cultures, religions, and American experiences. And conversations with diverse viewpoints introduce students to the cultural considerations they must weigh when they leave the classroom and face the challenges

357. Brief for the Univ. of Mich. as Amicus Curiae in Support of Respondents at 3, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (No. 20-1199).

358. *Id.* at 12.

359. *Id.* at 13–14 (citing UNIV. OF MICH., CTR. FOR EDUC. OUTREACH, *About CEO*, <https://ceo.umich.edu/about/> (last visited Jan. 13, 2022)).

360. *Id.* at 14–15 (describing the Center’s specific outreach programs).

361. *Id.* at 16–17 (describing the University’s race-neutral admissions policies).

362. *Id.* at 22 (detailing how the Black student population dropped from roughly 7 percent to 4 percent and that Native American student population is below 1 percent).

363. Stephanie Saul, *Affirmative Action Was Banned at Two Top Universities. They Say They Need It.*, N.Y. TIMES (Oct. 31, 2022), <https://www.nytimes.com/2022/08/26/us/affirmative-action-admissions-supreme-court.html>.

of a modern world. This cultural competence will enable our future leaders to consider distributional impacts while lobbying for new laws, pursuing new medical research, or creating a new renewable energy source. This interest remains and is inadequately served by race-neutral alternatives that equate socioeconomic challenge with the experience of being a racial or ethnic minority in the United States.

Under the Court’s current doctrine, universities must jump through hoop after hoop with exacting precision to use affirmative action. SFFA’s contentions that universities discriminate against white and Asian students and are filling racial quotas are wholly unfounded by the evidence in both *Harvard* and *UNC*. But even if Harvard’s or UNC’s policies are factually discriminatory in the manner suggested by SFFA, they would be *per se* violative of the Court’s current precedent and would not require upending decades of settled law. As Justice Thomas lauds, there is no use throwing the baby out with the bath water.³⁶⁴ Even accepting that *Grutter*’s constitutional infirmity is the narrow deference it affords to universities in the compelling interest inquiry, the Court could overrule the *Grutter* deference without a noticeable effect on the strict scrutiny analysis. The evidence proffered in response to *Fisher II*’s requirement that universities substantiate their specific diversity interests proves all that the *Grutter* deference assumes.

In sum, the Court has little reason to abandon the status quo of affirmative action. Striking down decades of affirmative action precedent would displace university funds to ineffective outreach programs, diluting university and state resources at the peril of students, and moreover opening universities to hordes of new liability.

364. See, e.g., Justice Clarence Thomas, Address at the 164th Commencement Exercises of Hillsdale College (May 14, 2016), in *Freedom and Obligation—2016 Commencement Address*, 45 HILLSDALE COLL. IMPRIMIS (2016), <https://imprimis.hillsdale.edu/freedom-obligation-2016-commencement-address/> (“In the arrogance of my early adult life, I challenged my grandfather and doubted America’s ideals. . . . ‘Son,’ he said, ‘don’t throw the baby out with the bath water.’ That is, don’t discard what is precious along with what is tainted.”). Justice Thomas strongly criticizes *stare decisis*, remarking that “[the Court] use[s] *stare decisis* as a mantra when we don’t want to think.” Ariane de Vogue, *Thomas Says Government Institutions Shouldn’t be ‘Bullied’ Following Leak of Draft Opinion on Abortion*, CNN POLITICS (May 7, 2022, 9:21 AM), <https://www.cnn.com/2022/05/06/politics/clarence-thomas-stare-decisis-roe-v-wade-leak/index.html>. Justice Thomas’ position, however, runs counter to even some of the most ardently conservative members of the court in recent memory. E.g. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (Rehnquist, J.) (“*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”).

Unfortunately, the Court's embrace of "new textualism"³⁶⁵ positions it to accept SFFA's argument that *Grutter* is "grievously wrong" because it has "no support in the Fourteenth Amendment's 'historical meaning.'"³⁶⁶ It seems Justice Thomas's view of the Constitution will finally prevail.³⁶⁷

365. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L.REV. 621, 623–24 (1990) (describing the phenomenon of rejecting legislative history in statutory interpretation).

366. Brief for Petitioner at 50, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707) (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020)).

367. *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 315 (2013) (Thomas, J., concurring) ("The Constitution abhors classifications based on race because every time the government places citizens on racial registers . . . it demeans us all.").