

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

**On Writs of Certiorari to the United States Court of Appeals
for the First Circuit and Certiorari before Judgment to the
United States Court of Appeals for the Fourth Circuit**

**BRIEF OF ASIAN AMERICANS ADVANCING JUSTICE
AND 37 ORGANIZATIONS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

This brief is submitted by members of Asian Americans Advancing Justice (“ADVANCING JUSTICE”), an affiliation that includes the following nonprofit, nonpartisan organizations:

- Advancing Justice–AAJC
- Advancing Justice–ALC
- Advancing Justice–Atlanta
- Advancing Justice–Chicago
- Advancing Justice–Southern California.

Through litigation, direct legal services, policy advocacy, community outreach and education, and organizing, Advancing Justice’s mission is to promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders (“AAPIs”) and other underserved communities. Members of Advancing Justice routinely file *amicus curiae* briefs, including in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (“*Fisher I*”), and *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016) (“*Fisher II*”).

Advancing Justice is joined on this brief by 37 civil rights groups, advocacy organizations, professionals, and student organizations (collectively, “*Amici*”). For a list and description of *Amici*, see Appendix A. *Amici*

¹ All parties have provided blanket consent to the filing of *amicus* briefs, including this one. No counsel for a party authored any part of this brief. No one other than *Amici Curiae*, their members, or their counsel financed the preparation or submission of this brief.

have long-standing histories of serving the interests of Asian Americans, Native Hawaiians, and Pacific Islanders.

The undersigned *Amici*—like the majority of AAPIs they serve—support the lawful and proper use of race-conscious programs designed to improve equal access for all. AAPIs and other communities of color have fought together against racial discrimination and for greater civil rights, protections, justice, and equality in this country. Together with other communities of color, AAPIs have obtained greater rights and opportunities as a result of historic civil rights struggles. *Amici* recognize that prohibiting race-conscious admissions programs risks undoing the progress that has been won, and submit this brief in support of Respondents in these matters.



SUMMARY OF ARGUMENT

Racism is a ubiquitous and pernicious force in the United States. Despite some progress, prejudice against AAPIs as “perpetual foreigners” is as persistent as ever.² Groups promoting white supremacy are increasingly active,³ while anti-Asian invective and violence proliferate.

Petitioner and its *Amici* blame race-conscious admissions programs for exacerbating discrimination against and denying AAPIs valuable opportunities at elite educational institutions. *See, e.g.*, Petitioner’s Brief (“Pet. Br.”) at 27. They are wrong; the opposite, in fact, is true. Race-conscious admissions programs have opened the doors to higher education for AAPIs, as they have for other communities of color.⁴ Because race continues to factor significantly in students’ experiences, universities must be able to consider race, among other qualities, to contextualize students’ accomplishments when making admissions decisions. Such practice is lawful under this Court’s precedent and advances the compelling goal of achieving diverse learning environments.

Considering an applicant’s race, among a multitude of factors, does not render admissions programs

² NEW AM. ECON., *Combatting the AAPI Perpetual Foreigner Stereotype*, <https://research.newamericaneconomy.org/report/aapi-perpetual-foreigner-stereotype/> (May 20, 2021).

³ *See, e.g.*, Cassie Miller & Rachel Carroll Rivas, *The Year in Hate & Extremism Report 2021*, S. POVERTY L. CTR. (2022), <https://www.splcenter.org/20220309/year-hate-extremism-report-2021>; Robin Young et al., *White Supremacy Poses Increasing Threats in*

discriminatory. Forbidding consideration of race, however, will hinder universities' ability to achieve the educational benefits of diversity and harm communities of color, including AAPIs. As Petitioner concedes, “[n]o one is under the illusion that we live in a post-racial society, or that racial discrimination is a thing of the past.” Pet. Br. at 49. Abandoning race-conscious admissions programs will undo the progress that has been hard fought and won, and impede progress where it still is needed. *Grutter v. Bollinger*, and the combined over-fifty years of Supreme Court precedent that affirm its reasoning, *see, e.g., Fisher II*, 579 U.S. 365; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), are and should remain good law. The decisions of the courts below should be affirmed.

This *amici curiae* brief is submitted to aid the Court by highlighting the beneficial and valid effects race-conscious admissions programs have, specifically for AAPIs.

the U.S.: “We are Dealing with a Massive Movement,” WBUR.org (Jul. 7, 2022), <https://www.wbur.org/hereandnow/2022/07/07/white-supremacy-patriot-front.>; Simon Clark, *How White Supremacy Returned to Mainstream Politics*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/article/white-supremacy-returned-mainstream-politics/> (Jul. 1, 2020).

⁴ *See, e.g.,* Sylvia Guan, *Gaps in the Debate about Asian Americans and Affirmative Action at Harvard*, AM. PROGRESS (Aug. 29, 2018), <https://www.americanprogress.org/article/gaps-debate-asian-americans-affirmative-action-harvard/>.



ARGUMENT

I. RACE-CONSCIOUS ADMISSIONS PROGRAMS INCREASE AAPIs' ACCESS TO HIGHER EDUCATION.

A. AAPIs Have Experienced a Persistent History of Racial Discrimination, Requiring Systemic Responses to Combat It.

Racism and xenophobia against AAPIs have persisted since early AAPI migrants arrived to the U.S. in the 1800s. Asian Americans initially provided cheap manual labor, working the Gold Rush and constructing infrastructure.⁵ Despite these contributions, AAPIs faced social and legal barriers to integration into American society, if they were permitted to immigrate at all.⁶ Federal, state, and local governments codified

⁵ HISTORY, *Asian American Milestones: Timeline*, <https://www.history.com/topics/immigration/asian-american-timeline> (Mar. 22, 2021).

⁶ See, e.g., Page Act, Pub. L. No. 43-141, 18 Stat. 477, Ch. 141 (1875) (defining Chinese women as immoral and effectively prohibiting their immigration); Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58, Ch. 126 (1882) (banning all Chinese immigration to the United States until its repeal in 1943); Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (1917) (banning immigration from South Asia, Southeast Asia, and the Middle East.); Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924) (effectively banning immigration from all Asian countries). These policies remained intact until the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), which lifted the ban on Asian immigration and Asian naturalization. See also generally Selena Dong, “Too Many Asians”: *The Challenge of Fighting Discrimination Against*

the denial of basic rights to AAPIs who remained in the U.S. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down San Francisco’s laundry permit law discriminating against Chinese business owners). Foreign-born Japanese residents, for example, were barred from owning property.⁷ And during World War II, the U.S. government forcibly incarcerated 120,000 residents of Japanese descent, the vast majority U.S. citizens—an action infamously blessed in *Korematsu v. United States*, 323 U.S. 214 (1944), a decision that was not overruled until 74 years later.⁸

De jure discrimination against AAPIs begat barriers that persist to this day. AAPIs—especially immigrant laborers—frequently fall victim to trafficking and exploitation, while the “bamboo ceiling” limits opportunities for white collar workers.⁹ Chinese American scientists and academics face prosecutions on espionage-related charges that often are overblown and unfounded,

Asian-Americans and Preserving Affirmative Action, 47 STAN. L. REV. 1027, 1039-40 (1995).

⁷ Dong, *supra* note 6, at 1039-40.

⁸ *Trump v. Hawaii*, 138 S.Ct. 2392, 2423, 585 U.S. ____ (2018).

⁹ Asian Pac. Am. Lab. All., AFL-CIO & Inst. for Asian Pac. Am. Leadership & Advancement, *Untapped Power: The Strength of Asian American, Native Hawaiian, and Pacific Islander Working People* 25-26 (2019); Margaret M. Chin, *Asian Americans, Bamboo Ceilings, and Affirmative Action*, 15 CONTEXTS 70, 70-73 (2016); *see also* John Delloro, et al., *Breaking Ground, Breaking Silence: Report from the First National Asian Pacific American Workers’ Rights Hearing* (Caroline Fan, et al., eds., 2006), <https://d3n8a8pro7vhmx.cloudfront.net/apala/pages/123/attachments/original/1421265427/breaking-ground.pdf?1421265427>.

yet destroy the target’s personal and professional reputations.¹⁰

Hate incidents against several Asian American sub-groups have recently spiked alarmingly. In 2020, reported hate crimes against Asian American communities soared 164% over 2019, and the trend continued into 2021 and beyond.¹¹ Arab, Middle Eastern, Muslim, and South Asian communities have endured violent assaults, like the murder of six worshippers at a Sikh Temple in Oak Creek, Wisconsin, and have been the targets of legal restrictions, like the 2017 “Muslim Travel Ban.”¹² The 2021 killing of six Asian American

¹⁰ See, e.g., Betsy Woodruff Swan, *Inside DOJ’s nationwide effort to take on China*, POLITICO, <https://www.politico.com/news/2020/04/07/justice-department-china-espionage-169653> (Apr. 7, 2020); Alicia Lai, *It’s Wrong to Target Asian-American Scientists for Espionage Prosecution*, SCI. AM., <https://www.scientificamerican.com/article/prosecuting-asian-american-scientists-for-espionage-is-a-shortsighted-strategy/> (Mar. 22, 2021).

¹¹ See Ctr. for Study of Hate and Extremism at Cal. State Univ., San Bernardino, *Report to the Nation: Anti-Asian Prejudice & Hate Crime*, <https://www.csusb.edu/sites/default/files/Report%20to%20the%20Nation%20-%20Anti-Asian%20Hate%202020%20Final%20Draft%20-%20As%20of%20Apr%2030%202021%206%20PM%20corrected.pdf> (Apr. 28, 2021). Additional nationwide data is not available yet, but rate of incidents made to stopaapihate.org, which had over 10,000 such incidents reported between March 2020 and December 2021, indicate that the trend continues. See <https://stopaapihate.org/wp-content/uploads/2022/03/22-SAH-NationalReport-3.1.22-v9.pdf> (last visited July 12, 2022).

¹² See Jerry Markon and Michael Laris, *At Sikh temple in Wisconsin, gunman kills 6; suspect is shot dead by police*, WASH. POST (Aug. 5, 2012), https://www.washingtonpost.com/national/7-killed-including-gunman-in-shooting-at-wisconsin-sikh-temple/2012/08/05/70692158-df2b-11e1-a19c-fcfa365396c8_story.html; ACLU Wash., *Timeline of the Muslim Ban*, <https://>

women at two Atlanta massage parlors underscores AAPIs' continued experience of violence.¹³ And, AAPIs are now scapegoated as the cause of COVID-19, maliciously referred to as “kung flu” or the “China virus.”¹⁴

Particularly relevant here, AAPIs also have experienced persistent discrimination in education. Until 1947, California law permitted segregation of “children of Mongolian or Chinese descent.”¹⁵ Following *Brown v. Board of Education*, 347 U.S. 483 (1954), states and local school districts resisted efforts to implement its mandate, see, e.g., *Guey Heung Lee v. Johnson*, 404 U.S. 1215, 1215 (1971), while housing discrimination against

www.aclu-wa.org/pages/timeline-muslim-ban (last visited July 12, 2022).

¹³ See Kate Brumback and Angie Wang, *Man Charged with Killing 8 People at Georgia Massage Parlors*, AP NEWS (Mar. 17, 2021), <https://apnews.com/article/georgia-massage-parlor-shootings-leave-8-dead-f3841a8e0215d3ab3d1f23d489b7af81>.

¹⁴ Jennifer Lee, *Asian Americans, Affirmative Action & the Rise in Anti-Asian Hate*, DAEDALUS (Spring 2021), <https://www.amacad.org/publication/asian-americans-affirmative-action-rise-anti-asian-hate>.

¹⁵ See Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 198 n.115 (1998). The *de jure* segregation of Chinese American children was upheld in *Wong Him v. Callahan*, 119 F. 381 (N.D. Cal. 1902) and remained in effect until 1947. During this time, AAPIs mounted a number of challenges to such school segregation, that, albeit unsuccessful, lay the groundwork for *Brown v. Board of Education*. See, e.g., *Wong Him v. Callahan*, 119 F. 381, 381-82 (C.C.N.D. Cal. 1902); *Gong Lum v. Rice*, 275 U.S. 78 (1927).

AAPIs¹⁶ entrenched disparate access to educational opportunities.

Historical discrimination against AAPIs manifests today in disparate access to higher education among AAPI subgroups. The relative prevalence of poverty among Southeast Asian Americans, for example, impairs their ability to invest resources in their children’s academic success to the same extent as wealthier communities.¹⁷ Many in the Native Hawaiian and Pacific Islander (“NHPI”) and Southeast Asian communities lack access to college preparatory resources,¹⁸ which

¹⁶ Jung Hyun Choi & Daniel Pang, *More Asian Americans Are Becoming Homeowners, but They Still Face Barriers in the Housing Market*, URBAN WIRE (Jun. 17, 2021), <https://www.urban.org/urban-wire/more-asian-americans-are-becoming-homeowners-they-still-face-barriers-housing-market>; Vincent Reina & Claudia Aiken, *Fair Housing: Asian and Latino/a Experiences, Perceptions, and Strategies*, 7 THE RUSSELL SAGE FOUND. J. OF THE SOC. SCIS. 201 (2021); U.S. Dep’t of Hous. and Urban Dev., *Housing Discrimination Against Racial and Ethnic Minorities 2012 Executive Summary* (2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf.

¹⁷ Vikash Reddy, Ph.D., Douglas H. Lee & Michele Siqueiros, *The State of Higher Education for Asian American, Native Hawaiian, and Pacific Islander Californians* 8, 26, 57 (May 2022), <https://collegecampaign.org/wp-content/uploads/2022/05/5.30-FINAL-SHE-AANHPI-WEB.pdf> (in California, 33% of Hmong children, 25% of Laotian children, and 22% of Cambodian children live in poverty; more than three-fifths of Hmong (80%), Cambodian (62%), and Laotian (60%) freshmen receive need-based financial aid); Grissom et al., *Money over Merit? Socioeconomic Gaps in Receipt of Gifted Services*, 89 HARV. ED. REV. 337, 337-41, 361 (2019).

¹⁸ Reddy, et al., *supra* note 17 (fewer than half of NHPI students complete college preparatory coursework); *id.* at 86; Robert T. Teranishi et al., *The College-Choice Process for Asian Pacific*

results in lower than average college completion rates.¹⁹ Vietnamese, Burmese, Thai, Chinese, Korean, and Mongolian American communities have higher rates of limited English proficiency,²⁰ and high percentages of Southeast Asian and NHPI students are first-generation students,²¹ both of which predict lower educational attainment.²²

A 2022 study in California—home to the nation’s largest AAPI community—revealed significant dis-

Americans: Ethnicity and SocioEconomic Class in Context, 27 REV. OF HIGHER ED. 527, 537 (2004).

¹⁹ Reddy et al., *supra* note 17, at 23-24, 39 (only 13% Guamanian, 11% Laotian, 11% NHPI, and 7% Samoan students complete community college within four to six years; 22% of Cambodians, 20% of Laotians, and 18% of Hmong Californians do not have a high school diploma or equivalent; only 40% of Vietnamese, 28% of Native Hawaiian, 26% of Guamanian or Chamorro, 26% of Bhutanese, 25% Hmong, 23% Cambodian, 19% Fijian, 19% Laotian, 19% Samoan, 14% Tongan, and 11% Marshallese adults 25 or older have a Bachelor’s degree or higher).

²⁰ *Id.* at 61.

²¹ *Id.* at 62-63 (65% of Tongan, 61% of Samoan, 64% of Filipino, 60% of Hmong, 47% of Guamanian/Chamorro, 41% of Laotian, and 40% of Fijian students in the UC system are first-generation students).

²² Se. Asia Res. Action Ctr., *Increase Access to Higher Education 1* (Feb. 2013), <https://www.searac.org/wp-content/uploads/2018/04/Increase-Access-to-Higher-Education-Why-Are-Southeast-Asian-Americans-Not-Going-to-College.pdf>; Reddy et al., *supra* note 17, at 38.

parities in admission rates to the University of California system among various AAPI subgroups.²³ In that system, for example, Filipino, Thai, NHPI, and Laotian students experience lower-than-average admission rates,²⁴ and, relative to their overall population, Filipinos, Native Hawaiians, Samoans, Guamanians/Chamorros, and Fijians are underrepresented.

Race-conscious admissions programs, sanctioned by this Court for over fifty years, ameliorate these disparities.²⁵ When *Bakke* was decided, about 198,000 AAPIs were enrolled in college.²⁶ After universities implemented affirmative action programs targeting AAPIs during the 1960s and '70s,²⁷ college enrollment

²³ Reddy et al., *supra* note 17, at 50 (detailing significant variation in educational attainment among Asian American and NHPI subgroups).

²⁴ *Id.* at 50.

²⁵ *Id.* at 13. Notably, the disparities among AAPI communities does not seem to concern Petitioner. Although it claims to vindicate the rights of Asian Americans generally, Petitioner is predisposed to advocate for only select portions of the AAPI community. For example, Petitioner's challenge to Yale University's race-conscious admissions program, which remains pending in the district court, alleges discrimination against Asian Americans—but only those who do not identify as Cambodian, Hmong, Laotian, or Vietnamese. See Compl., *Students for Fair Admissions, Inc. v. Yale Univ.*, No. 3:21-cv-00241 (D. Conn. Feb. 25, 2021), Dkt. No. 1.

²⁶ Nat'l Comm'n on Asian Am. and Pac. Islander Research in Ed., *The Relevance of Asian Americans & Pacific Islanders in the College Completion Agenda* 7 (2011), http://care.gseis.ucla.edu/wp-content/uploads/2015/08/2011_CARE_Report.pdf.

²⁷ Sharon S. Lee, *The De-Minoritization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California*, 15 ASIAN AM. L.J. 129, 132-33 n.16, 136 (2008);

ballooned, growing to over 800,000 AAPIs by 2000, and 1.1 million by 2008—a six-fold increase in a few decades, far outstripping AAPI population growth at this time.²⁸

Most AAPIs recognize the compelling benefits they enjoy from race-conscious admissions programs: a majority of AAPIs consistently have supported race-based affirmative action.²⁹ In 1996, 61% of AAPIs rejected Proposition 209, which banned affirmative action programs in California. A decade later, AAPIs overwhelmingly rejected a similar ballot measure in Michigan.³⁰ A 2020 survey concluded that 70% of Asian

William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29, 30 (2000).

²⁸ Nat'l Ctr. for Ed. Statistics, *Status and Trends in the Education of Racial and Ethnic Minorities*, https://nces.ed.gov/pubs2010/2010015/indicator6_24.asp (last visited Jul. 26, 2022). Consistent with this trend, the District Court found that Harvard has admitted a growing number of Asian American students over time—from 3.4% of admitted students in 1980 to 20.6% in 2019—a statistic that the Court of Appeals found persuasive. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 188 (1st Cir. 2020); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F.Supp.3d 126, 177 (D. Mass. 2019).

²⁹ Robert T. Teranishi, *The Attitudes of Asian Americans Toward Affirmative Action*, NAT'L COMM'N ON ASIAN AM. & PAC. ISLANDER RESEARCH IN ED. (2015), http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-affirmative_action_polling-v2.pdf.

³⁰ *Asian Americans for Affirmative Action*, THE NATION (2007), <http://www.thenation.com/article/asian-americans-affirmative-action>.

American voters support affirmative action.³¹ This study, and others like it, indicate strong support for affirmative action among AAPIs, even when controlling for national origin, gender, age, and nativity.³² The misguided characterization of the AAPI community by Petitioner and its *amici* as a monolith opposed to race-conscious admissions is simply incorrect.

B. Purportedly Race-Neutral Admissions Alternatives Are Insufficient to Capture Applicants’ Lived Experiences Shaped by Their Race.

The response to progress for AAPIs in higher education should not and cannot be to abandon these policies: retrenchment will set communities of color back. Petitioner’s claimed “race-neutral” alternatives to race-conscious admissions programs reinforce the ongoing effects of discrimination and disparate access. Many of the most touted non-racial considerations fail to account for the unique ways in which race continues to shape experiences and limit access to educational opportunities.

Socio-economic status. Students of color disproportionately come from low-income families but, while income affects educational outcomes, socioeconomic status does not adequately explain racial disparities in admissions. Improving educational access for low-income students, although important, cannot substitute

³¹ Jennifer Lee, Janelle Wong & Karthick Ramakrishnan, *Asian Americans Support for Affirmative Action Increased Since 2016*, AAPI DATA: DATA BITS (Feb. 4, 2021), <http://aapidata.com/blog/affirmative-action-increase/>.

³² *Id.*

for race-conscious policies—a fact proven by several studies.³³

Standardized tests. Standardized test scores *magnify* underlying racial disparities in access to quality education, and are questionable indicators of merit. *See generally, e.g.,* Brief of 823 Social Scientists as *Amici Curiae* in Support of Respondents, *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) (No. 14-981). Students of color are less likely to enroll in expensive prep courses that inflate scores for wealthier students, are more likely to be taught by less-skilled teachers, attend schools in distressed neighborhoods where they are socially isolated, and are unfairly assigned to lower academic tracks in elementary and high school.³⁴ The result is that Black, Latinx, Native American, and certain AAPI ethnic groups score lower on standardized tests than white students,³⁵ a gap that continues to

³³ William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J. COLL. & U.L. 53, 117 (2013).

³⁴ *See, e.g.,* Julie J. Park & Ann H. Becks, *Who Benefits from SAT Prep?: An Examination of High School Context and Race/Ethnicity*, 39 REV. HIGHER ED. 1, 20 (2015); Jay Rosner, *Disparate Outcomes by Design: University Admissions Tests*, 12 BERKELEY LA RAZA L.J. 377, 383-84 (2001); Demetra Kalogrides & Susanna Loeb, *Different Teachers, Different Peers: The Magnitude of Student Sorting Within Schools*, 42 EDUCATIONAL RESEARCHER 304 (2013); William C. Kidder & Patricia Gándara, *Two Decades After the Affirmative Action Ban: Evaluating the University of California's Race-Neutral Efforts* 4-5 (Oct. 2015), https://www.ets.org/Media/Research/pdf/kidder_paper.pdf; Jeannie Oakes, *2016 AERA Presidential Address: Public Scholarship: Education Research for a Diverse Democracy*, 47 EDUCATIONAL RESEARCHER 91-104 (2018).

³⁵ The Coll. Board, *2021 SAT Suite of Assessments Annual Report*, <https://reports.collegeboard.org/media/2022-04/2021-total->

widen.³⁶ Additionally, standardized test scores are an unreliable indicator of merit.³⁷ A growing number of institutions of higher education are abandoning consideration of metrics like standardized test scores

group-sat-suite-of-assessments-annual-report%20%281%29.pdf (last visited July 12, 2022).

³⁶ Saul Geiser, *The Growing Correlation Between Race and SAT Scores: New Findings from California*, Ctr. for Studies in Higher Ed., U.C. Berkeley, at 5-6 (2015), available at http://www.cshe.berkeley.edu/sites/default/files/shared/publications/docs/ROPS_CSHE_10.15.Geiser.RaceSAT.10.26.2015.pdf. Although AAPI students in the aggregate report higher standardized test scores, these results are skewed by the small handful of AAPI sub-groups who are more likely to enroll in commercial test preparation courses. See *2021 SAT Suite of Assessments Annual Report*, supra note 35; Soo-yong Byun & Hyunjoon Park, *The Academic Success of East Asian American Youth: The Role of Shadow Education*, 20 SOCIO. OF ED. 1 (July 29, 2011); Robert Teranishi et al., *iCount: A Data Quality Movement for Asian Americans and Pacific Islanders in Higher Education* 18 (2013), https://aapip.org/wp-content/uploads/2014/05/2013_icount_report.pdf.

³⁷ See, e.g., Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOCIO. REV. 487, 506 (2007) (discussing the low predictive validity of test scores); Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1269 (2011); William G. Bowen et al., *Crossing the Finish Line: Completing College at America's Public Universities* 113-15 (2009); Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395, 468-79, 485-90 (2000); Saul Geiser, *Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of California* at 9 (Research & Occasional Paper Series CSHE.15.17 Dec. 2017), https://cshe.berkeley.edu/sites/default/files/publications/2.rops.cshe.15.2017.geiser.testsrace-blind_admissions.12.18.2017.pdf.

for this very reason.³⁸ Given this, universities must be able to consider a variety of admissions criteria, including race.

*GPA*s. Students of color are more likely than white students to attend under-resourced and understaffed K-12 schools, which results in a lower quality of education and lower *GPA*s.³⁹ Race, therefore, is necessary to contextualize an applicant's *GPA* when assessing academic merit. *Fisher I* acknowledged as much when the Court held that Texas's facially neutral "Top Ten Percent Plan" was not, in fact, race-neutral. The Court explained: "Percentage plans [admitting students only on the basis of the highest *GPA*s at each high school] are adopted with racially segregated neighborhoods and schools front and center stage." 570 U.S. at 386. In so ruling, the Court acknowledged that *GPA*s, in general, are insufficient substitutes for race-conscious factors.

Rather than "leveling the playing field," sole reliance on metrics like socio-economic status, test scores, and *GPA*s will only entrench the effects of discrimination that continue to burden AAPIs and all communities of color. Holistic, race-conscious admissions programs give universities an essential tool to account for this discrimination and contextualize applications appropriately.

³⁸ Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 794-95 (2015).

³⁹ B. Tatum, *WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE* 7-8 (3d ed. 2017).

II. RACIAL DIVERSITY IMPROVES THE EXPERIENCES OF AAPIO—AND STUDENTS GENERALLY—AT COLLEGES AND UNIVERSITIES.

A. Universities Maintain a Compelling Interest in Fostering Racial Diversity as an Element of Overall Educational Diversity, Which Benefits AAPIO and Others.

All students, including AAPIO students, benefit from increased racial and ethnic diversity and an improved racial climate fostered by race-conscious policies. Those benefits include “promot[ing] cross-racial understanding,” “break[ing] down racial stereotypes,” “enabl[ing] students to better understand persons of different races,” “promot[ing] learning outcomes,” and “better prepar[ing] students for an increasingly diverse workforce and society.” *Grutter*, 539 U.S. at 330 (internal citations omitted). “These benefits are not theoretical but real[.]” *Id.* And, without them, students suffer.

Studies show that colleges and universities with higher levels of racial diversity have fewer incidents of racial hostility.⁴⁰ AAPIO students experience direct racial hostility in the forms of bullying, slurs, and profiling, as well as indirect intimidation resulting from the proliferation of racist acts directed towards other students of color.⁴¹ That marginalization undermines

⁴⁰ See, e.g., Rebecca L. Stotzer & Emily Hossellman, *Hate Crimes on Campus: Racial/Ethnic Diversity and Campus Safety*, 27 J. INTERPERSONAL VIOLENCE 644 (2012).

⁴¹ Samuel D. Museus & Julie J. Park, *The Continuing Significance of Racism in the Lives of Asian American College Students*, J. COLL. STUDENT DEV. 551, 553, 557-58 Vol. 56, No. 6 (Sept. 2015);

the robust discussions and critical thinking that are central to the university experience. Race-conscious admissions policies designed to increase racial diversity can and do reduce some of the negative experiences that students of color encounter, and improve the educational experiences of all students who benefit from hearing unfamiliar viewpoints.⁴²

This conclusion is corroborated by the students whose testimony in the proceedings below extolled the virtues of racial diversity. Sally Chen, who identifies as Chinese American, testified that exposure to racial diversity enriched her educational experience, noting that the lack of diversity at her high school had been “detrimental” to her learning experience. 10/23/18 Tr. 197:4-5, 208:13-209:13, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 1:14-cv-14176-ADB [the “Harvard Trial”], Dkt. No. 640. Thang Diep, who identifies as Vietnamese American, observed that interactions with racially diverse students on campus allowed him to gain “[n]ew perspectives on how to look at different issues.” *Id.* at 153:2-10. And, Madison Trice, who identifies as African American, testified that the racial diversity on

see also Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F.Supp.3d 580, 594 (M.D.N.C. 2021).

⁴² *See, e.g.*, Julie J. Park, *Asian Americans and the Benefits of Campus Diversity: What the Research Says*, NAT’L COMM’N ON ASIAN AM. & PAC. ISLANDER RESEARCH IN ED. (2015), http://care.gseis.ucla.edu/wp-content/uploads/2015/08/CARE-asian_am_diversity_D4.pdf; Shaun R. Harper & Sylvia Hurtado, *Nine Themes in Campus Racial Climates and Implications for Institutional Transformation* 12-14, NEW DIRECTIONS FOR SOCIAL SERVICES, NO. 120, WINTER (2007), <http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=sharper>.

campus introduced her to new causes to become involved in and helped her learn about the impact she could have. *Id.* at 191:1-12.⁴³ As this testimony demonstrates, the benefits that flow from racial diversity were critical to these students’ positive experiences at college.

These benefits are perhaps even more meaningful for AAPIs once out of school—a fact that has influenced this Court’s jurisprudence recognizing the importance of racial diversity in education. *See Grutter*, 539 U.S. at 330-33. Research demonstrates that exposure to diverse communities minimizes prejudice and animosity toward other racial groups, and forcefully suggests that diverse educational settings can help alleviate anti-Asian hate and violence.⁴⁴ Similarly, combatting stereotypes that stifle AAPI advancement and promotion—

⁴³ *See also, e.g.*, 10/29/18 Tr. at 107:8-24, 109:21-25 (Ho), Harvard Trial, Dkt. No. 648 (“As an individual student, we learn from other people, and we learn from listening to their stories, listening to their perspectives. And if their perspectives and stories aren’t present on campus or aren’t as present on campus, who are we supposed to learn from?”); *id.* at 31:1-33:8 (M. Chen); *id.* at 87:15-90:3, 91:5-92:18 (Ho); *id.* at 140:19-143:3, 145:21-146:6, 147:7-148:3 (Diep); *id.* at 196:22-198:13, 199:20-203:21, 211:18-212:19 (S. Chen); Harvard Trial, Dkt. No. 440 (7/30/18 Memorandum in support of Motion for Summary Judgment), Ex. 1.1 at ¶¶ 4-8 (Decl. of A.A.); Ex. 1.2 at ¶ 4 (Decl. of A.Z.); Ex. 1.3 at ¶¶ 3, 5 (Decl. of D.L.); Ex. 1.4 at ¶ 3 (Decl. of J.L.); Ex. 1.6 at ¶¶ 3, 5 (Decl. of S.C.); Ex. 1.8 at ¶¶ 3-5, 7 (Decl. of T.D.); Ex. 1.9 at ¶ 3 (Decl. of Y.Z.).

⁴⁴ *See, e.g.*, Vinay Harpanani, “*Safe Spaces*” and the Educational Benefits of Diversity, 13 DUKE J. OF CONST. L. & PUB. POL’Y 118, 160-62 (2017); Julie Park, *Who Are You Studying With? The Role of Diverse Friendships in STEM and Corresponding Inequality*, RESEARCH IN HIGHER ED. 2 (2021). Alarming, incidents of hate and violence toward Asian Americans have surged, presenting

the so-called “bamboo ceiling”—improves AAPIs’ career prospects far more effectively than placing the onus of achievement on individual AAPIs in the face of bias from others.⁴⁵ And, AAPIs will be better served by leaders who have learned from and alongside diverse peers, learned to communicate with diverse constituencies, and become aware of systemic barriers and bias faced by AAPIs and other communities of color.⁴⁶

B. Consideration of Race, Distinct from Other Factors, Is Necessary to Achieve the Benefits of Racial Diversity.

Because “diversity takes many forms,” *Fisher I*, 579 U.S. at 380, racial and ethnic diversity are critical for achieving the benefits of diversity sought by institutions of higher learning.

even a more compelling need for exposure to diverse communities. *Hate Crimes Against Asian Americans Are on the Rise*, TIME (Feb. 18, 2021), <https://time.com/5938482/asian-american-attacks/>; *SF Police Data Shows 567% Increase In Reports of Hate Crimes Against Asian Americans*, THE GUARDIAN (Jan. 26, 2022), <https://www.theguardian.com/us-news/2022/jan/26/san-francisco-increase-hate-crime-anti-asian-aapi>.

⁴⁵ Harpanani, *supra* note 40; Park, *supra* note 40.

⁴⁶ One need only consider recent comments from the highest levels of government maliciously connecting the spread of COVID-19 to Asian American communities. *See, e.g.*, David Nakamura, *With ‘Kung Flu,’ Trump Sparks Backlash Over Racist Language—and A Rallying Cry for Supporters*, THE WASH. POST (June 24, 2020), https://www.washingtonpost.com/politics/with-kung-flu-trump-sparks-backlash-over-racist-language-and-a-rallying-cry-for-supporters/2020/06/24/485d151e-b620-11ea-aca5-ebb63d27e1ff_story.html.

The stark legacy of structural racism in this nation means that color-blindness “cannot be a universal constitutional principle.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part). Understanding how each applicant can enrich the educational environment requires consideration of the applicant’s race and ethnicity as one factor among many, which “gives a fuller picture of the student’s background. . . and thus their merits of admission.”⁴⁷ Conversely, ignoring race “undercuts the significance of the different applicants’ achievements by failing to take into account the race-related obstacles that they overcame.”⁴⁸

The educational benefits that flow from a diverse student body remain as compelling of an interest as they did in *Bakke*, for both educational institutions and society at large, and consideration of race cannot be excised from policies aimed at achieving that interest. Increased racial diversity improves the educational experience for students of color and white students alike.⁴⁹ Petitioner and its *amici* themselves do not argue against the overall benefits of student diversity. They, however, fail to justify their contention that consideration of race is not elemental to achieving those benefits.

⁴⁷ Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 291-93 (2015).

⁴⁸ *Id.*

⁴⁹ See, e.g., *supra* note 42.

III. ELIMINATING CONSIDERATION OF RACE IN ADMISSIONS PROGRAMS WILL HARM AAPIs AND OTHER COMMUNITIES OF COLOR.

Narrowly tailored race-conscious admissions policies that comply with the strictures of *Grutter*, like those at Harvard and UNC, do not discriminate against AAPIs, while prohibiting consideration of race harms them. This was demonstrated by the extensive evidence accumulated by Respondents in the cases below, a robust record that Petitioner simply was unable to counter. Eliminating the consideration of race deprives AAPI students of the opportunity to convey their unique experiences. Moreover, these policies do not benefit AAPI students and limit universities' ability to counteract potential implicit bias against all students of color.

A. Race-Conscious Admissions Programs Allow AAPI Students to Authentically Convey Their Ethno-Racial Identities to Contextualize Their Achievements and Adversities.

“Removing considerations of race and ethnicity from Harvard’s admissions process entirely would deprive applicants, including Asian American applicants, of their right to advocate the value of their unique background, heritage, and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F.Supp.3d 126, 195 (D. Mass. 2019). This holding is amply supported by the record, and specifically by testimony from the student-*amici*,

who repeatedly stated that sharing their racial identities on their applications was necessary to convey their stories, achievements, and strengths fully and authentically.

The record is replete with examples evincing the central position race occupies in the formative experiences of successful AAPI applicants.⁵⁰ Petitioner never refuted this evidence. Based on this testimony, the District Court in *Harvard* noted that “race can profoundly influence applicants’ sense of self and outward perspective” and concluded that eliminating consideration of race would “significantly disadvantage” at least some Asian Americans.⁵¹ Without consideration of race, applicants for whom race is a critical aspect of their history will be deprived of the opportunity to truthfully express their experiences, achievements, goals, and beliefs. This is particularly true for certain

⁵⁰ See also, e.g., Harvard Trial, Dkt. No. 440 (7/30/18 Memorandum in support of Motion for Summary Judgment), Ex. 1.1 at ¶¶ 4-8 (Decl. of A.A.); Ex. 1.2 at ¶ 4 (Decl. of A.Z.); Ex. 1.3 at ¶¶ 3, 5 (Decl. of D.L.); Ex. 1.4 at ¶ 3 (Decl. of J.L.); Ex. 1.6 at ¶¶ 3, 5 (Decl. of S.C.); Ex. 1.8 at ¶¶ 3-5, 7 (Decl. of T.D.); Ex. 1.9 at ¶ 3 (Decl. of Y.Z.).

⁵¹ *SFFA v. Harvard*, 397 F.Supp.3d at 126; see *Grutter*, 529 U.S. at 338 (“By virtue of our Nation’s struggle with racial inequality, [minority] students are both likely to have experiences of particular importance to the [school’s] mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, UCLA J. OF SCHOLARLY PERSPS. 5(01), 6-7 (2009) (“Colorblind admission regimes create an incentive for applicants to suppress their racial identity and to adopt the position that race does not matter in their lives,” an “incentive structure [that] is likely to be particularly costly to applicants for whom race is a central part of their social experience and sense of identity”).

AAPI sub-groups who continue to be underrepresented in university admissions, as discussed above.

B. Petitioner’s Allegedly Race-Neutral Alternative Does Not Benefit AAPI Students.

In *Harvard*, Petitioner introduced its proposal for a race-neutral program, referred to as “Simulation D.” See 10/22/18 Tr. at 43:9-46:23, Harvard Trial, Dkt. No. 638. Simulation D eliminates consideration of race; gives tips to applicants with economic and geographic indicators of disadvantage; and eliminates tips for recruited athletes, legacy students, students on the Dean’s/Director’s list, and children of faculty and staff (historically, the recipients of such “tips”). See *SFFA v. Harvard*, 980 F.3d at 193. The District Court concluded that Simulation D would not result in a cognizable improvement in racial diversity and would decrease it with respect to Black applicants, whose representation would fall by nearly one third. *SFFA v. Harvard*, 397 F.Supp.3d at 182 (citing 10/22/18 Tr. at 127:16-23, Harvard Trial, Dkt. No. 638). The First Circuit agreed, holding that “Harvard’s consideration of race is not impermissibly extensive, but considering race is meaningful to Harvard’s admissions process because it prevents diversity from plummeting.” *SFFA v. Harvard*, 980 F.3d at 194.

The impact of adopting “Simulation D” would be devastating to communities of color, including AAPIs. Although AAPI admission increased slightly under Simulation D, the effect is illusory: “the dramatic decline in [overall] diversity under Simulation D could adversely affect the educational experience at Harvard and increase feelings of isolation and alienation among Harvard’s students.” *Id.* The First Circuit went on to

cite evidence of this very outcome at the University of Texas, when it attempted to adopt race-neutral alternatives in its admissions program, as presented in *Fisher II*, 579 U.S. at 386-87 (citing “evidence that minority students admitted [under a race-neutral regime] experienced feelings of loneliness and isolation”).

Even if Simulation D might lead to increased enrollment of some students of color, it would sacrifice considerations essential to many others, including AAPIs. As discussed above, relying on socioeconomic status and other allegedly race-neutral metrics cannot account for the unique ways that race shapes students’ experiences and fails to establish a more racially diverse student body, disincentivizes personal expression of important identities, and ignores observed racial disparities. *See Fisher II*, 579 U.S. at 386-87. On the other hand, holistic, race-conscious policies can be narrowly tailored to achieve educational benefits from racial diversity on campus by comprehensively evaluating applicants on an individualized manner, rather than by considering or ignoring race mechanically or only for certain groups of people. *Id.* at 381-82.

Petitioner and its *amici* also claim that eliminating race-conscious admissions programs will increase admissions of AAPIs, *see* Pet. Br. at 81, an unreasonable and untenable prediction considered and rejected below, *see, e.g., SFFA v. Harvard*, 980 F.3d at 195. Again, data from institutions that have abandoned race-conscious admissions programs suggest otherwise. For example, in California, where Proposition 209 ended race-conscious admissions programs at state colleges and universities in 1996, the rate of Asian American admissions to the UC system did not increase but remained roughly

stagnant, to the detriment of the underrepresented AAPI communities.⁵²

C. Depriving Universities of the Ability to Consider Race Will Not Counteract Any Perceived Implicit Bias Against AAPIs, and Will Only Leave Universities with Fewer Tools to Address It.

Although it found no evidence of discrimination against AAPIs, the District Court in *Harvard* addressed the “slight numerical disparity” in the personal ratings between white applicants and AAPIs, with white applicants faring slightly better on this metric. *See SFFA v. Harvard*, 397 F.Supp.3d at 194. The court found that “the disparity is small and reflects neither intentional discrimination against Asian American applicants nor a process that was insufficiently tailored to avoid the potential for unintended discrimination.” *Id.* The court also mentioned the possibility of “very slight implicit bias” as one potential cause of the disparity, *id.* at 175, but concluded that “to the extent that the disparities are the result of race, they are unintentional,” *id.* at 202.

Importantly, the District Court also held that even assuming the existence of implicit bias against AAPIs in the admissions process—which as the First Circuit reiterated is “unsupported by any direct evidence,” *SFFA v. Harvard*, 980 F.3d at 203—it “would not be

⁵² Jennifer Lee, *Op-Ed: Why California needs affirmative action more than ever*, L.A. TIMES (June 26, 2020), <https://www.latimes.com/opinion/story/2020-06-26/affirmative-action-california-asians>.

cured by a judicial dictate that Harvard abandon considerations of race in its admission process,” *SFFA v. Harvard*, 397 F.Supp.3d at 202.

Instead, depriving universities of the ability to consider race only ties their hands from addressing potential implicit bias and taking steps to eradicate it. As those who study implicit racial bias make clear, the way to root it out is to be more, rather than less, intentional about addressing it. *See, e.g., Salami v. Von Maur, Inc.*, 838 N.W.2d 680 n.1 (Iowa Ct. App. 2013) (“A ‘colorblind’ ideology or approach to organizations is likely to produce ‘increased reliance on stereotyping and increased racial bias’ in decision-making [and i]f you don’t do anything to address contemporary forms of bias, racial bias is likely to ‘creep in’ to organization and will affect how people affiliate and evaluate one another.”). And, indeed, this is exactly what both Harvard and UNC do: consider race as a “plus” factor. *See, e.g., SFFA v. Harvard*, 397 F.Supp.3d at 146; *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d 580, 659 (M.D.N.C. 2021).

Recognizing the inexorable role that race plays in society and on university campuses compels the consideration of applicants’ ethno-racial identities, for which socioeconomic status and other criteria cannot be substituted.⁵³

⁵³ *See, e.g.*, 11/1/18 Tr. at 206:3-16 (Faust), Harvard Trial, Dkt. No. 654; *id.* at 33:25-34:7 (Khurana).



CONCLUSION

Amici respectfully submit that, in respect of AAPIs' acceptance to and success at educational institutions of higher learning, the use of race-conscious admissions programs is both critical and lawful. Real life experience—that is, the facts—tells us so, and must inform the Court's determination of the validity and propriety of the thoughtful admissions programs under challenge.

For those reasons, *Amici* respectfully pray that the decisions below be affirmed.

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August 1, 2022

APPENDIX A
LIST OF AMICI CURIAE

1. ACE Talk
2. Asian American Community Services
3. Asian American Federation of Florida
– South Region
4. Asian American Futures
5. Asian American Studies Program,
University of Maryland
6. Asian Americans United
7. Asian Community and Cultural Center
8. Asian Law Alliance
9. Asian Pacific American Labor Alliance, AFL-CIO
10. Asian Pacific Community in Action
11. Asian/American Political Alliance at Brown
12. Baltimore Asian Resistance in Solidarity
13. Baltimore Asian Resistance in Solidarity (BARS)
14. Center for the Pacific Asian Family (CPAF)
15. Colorado Asian Pacific United
16. Florida Asian Services
17. Georgetown Asian American Student Association
18. Georgetown Asian Pacific Islander Leadership
Forum
19. HANA Center
20. Japanese American Citizens League

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21. Lao Community Center of WI 19
22. Michael Leong
23. Midwest Asian Pacific Islander Desi Students Union
24. MinKwon Center for Community Action
25. Missouri Asian American Youth Foundation
26. NANAY INC
27. National Tongan American Society
28. National Tongan American Society
29. New Jersey Alliance for Immigrant Justice
30. North Carolina Asian Americans Together (NCAAT)
31. OCA – Asian Pacific American Advocates
32. OCA South Florida Chapter
33. Rising Voices
34. South Asian Network
35. Thomas Jefferson Alumni for Racial Justice
36. VAYLA New Orleans
37. Xīn Shēng | 心声 Project