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Brief of Legal Scholars Defending Race-Conscious Admissions as Amici Curiae in Support of Respondents, SFFA v. Harvard (20-1199) and SFFA v. University of North Carolina at Chapel Hill (21-707)

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Nos. 20-1199 & 21-707

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The First And Fourth Circuits

BRIEF FOR LEGAL SCHOLARS DEFENDING RACE-CONSCIOUS ADMISSIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are law professors at Boston University School of Law and the University of New Mexico School of Law.[2] Based on their expertise in antidiscrimination law, constitutional law, and racism in the United States, amici believe their knowledge and collective experiences can inform this Court's consideration of the pending matter.

Jonathan Feingold is an associate professor of law. He earned his J.D. from the University of California, Los Angeles ("UCLA") School of Law with a Specialization in Critical Race Studies and received his B.A. from Vassar College. Before joining Boston University School of Law, Professor Feingold clerked for federal judges in the Second Circuit and Central District of California and served as a special assistant to UCLA's inaugural Vice Chancellor for equity, diversity and inclusion.

Professor Feingold has written multiple law review articles that analyze Petitioner's claims against Respondents. That work has interrogated institutional dynamics that disincentivize elite universities from marshaling the most compelling arguments for race-conscious admissions policies

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[1] Pursuant to this Court's Rule 37.3(a), all parties have provided blanket consent to the filing of amicus briefs. Pursuant to Rule 37.6, Amici affirm that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than amici, or their counsel, made a monetary contribution to its preparation or submission.

[2] The views expressed by amici in this brief are their own and should not be construed as views of Boston University School of Law or the University of New Mexico School of Law.

("RCAPs"[3]). Professor Feingold has detailed how Respondents, like prior university defendants, have failed to foreground available facts and theories that would buttress their own policies against normative and doctrinal attacks. Amici are concerned that absent additional briefing, this Court might adjudicate Petitioner's claims on a deficient record that understates the legal and moral case for RCAPs.

Vinay Harpalani is Professor of Law and the Lee and Leon Karelitz Chair in Evidence and Procedure at the University of New Mexico School of Law. He is a South Asian American male who was raised in New Castle County, Delaware, where he attended schools that implemented comprehensive school desegregation under federal court order. He earned his J.D. from New York University School of Law; his Ph.D. in Education from the University of Pennsylvania; and his bachelor's degrees from the University of Delaware.

Professor Harpalani has written several law review articles that analyze the doctrinal contours of RCAPs, such as diversity's importance within racial groups for strict scrutiny's compelling interest and narrow tailoring prongs. He has also written extensively on Asian Americans' positioning in educational debates, focusing on the role of racial stereotypes in framing those debates.

Against this backdrop, amici respectfully request that this Court:

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[3] For purposes of this brief, the terms "race-conscious admissions policies" and "RCAPs" are used interchangeably to refer to policies that permit decisionmakers to consider the racial identity of individual applicants.

(1) resist Petitioner's attempt to conflate two discrete claims it levies against Harvard: (a) an intentional discrimination (or "negative action") claim that alleges Harvard discriminates against Asian Americans to the benefit of white applicants; and (b) a generic affirmative action challenge. Petitioner blurs these claims to scapegoat and stigmatize affirmative action, which is not the source of negative action and benefits many Asian Americans.

(2) credit the multiple ways that Respondents' RCAPs mitigate unearned racial advantages that white applicants enjoy in Respondents' admissions processes. Respondents' RCAPs serve a critical antidiscrimination function that ensures a more "fair appraisal of each individual's academic promise" and therefore constitute "no 'preference' at all." *Regents of the University of California v. Bakke*, 438 U.S. 265, 306 n.43 (1978) (Powell, J.).

SUMMARY OF ARGUMENT

"No one is under the illusion that we live in a postracial society, or that racial discrimination is a thing of the past." Pet'r's Br. 49. Petitioner tells it all. Nearly 70 years after *Brown v. Board of Education*, 347 U.S. 483 (1954), students of color still face racial discrimination throughout their academic lives. And yet, Petitioner asks this Court to prohibit universities from accounting for this reality—a result that would constitutionalize racial advantages for white applicants.

The Court should reject this request.

All lower courts to adjudicate Petitioner's claims have reached the same conclusion: Respondents employ RCAPs consistent with the

Constitution and federal antidiscrimination law. This should not be a surprise. Petitioner has neither facts nor law on its side. But that is a feature of this litigation, not a bug. Petitioner wants to change the law, not to prevail under this Court's existing affirmative action jurisprudence.

Specifically, Petitioner asks this Court to declare that the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964 prohibit public and private universities, respectively, from ever considering an applicant's race. Petitioner would ban all RCAPs—even those that, as here, promote a more "meritocratic" and individualized process by countering racial advantages that flow to white applicants.

Amici respectfully request that this Court deny Petitioner's request, which would pervert the Fourteenth Amendment's original meaning, Title VI's core purpose, and *Brown*'s animating spirit and moral mandate.

Amici seek to highlight two broad issues.

First, Petitioner brings two discrete claims against Harvard: (1) an intentional discrimination (or "negative action") claim alleging anti-Asian bias that benefits white applicants and (2) a standard affirmative action challenge. It is critical that this Court disentangle the allegations that underlie, and the precedent that governs, these distinct claims.

Petitioner has blurred these claims to scapegoat and stigmatize affirmative action as a practice that pits Asian Americans against other students of color. Yet Petitioner belies its own narrative. According to Petitioner's own expert, anti-

Asian bias—to the extent it exists—benefits wealthy white applicants, not students of color.

Second, Respondents' RCAPs counter racial advantages that white applicants enjoy in purportedly "colorblind" components of the admissions process. Respondents' RCAPs, in turn, are best characterized as essential antidiscrimination that promote the "fair appraisal of each individual's academic promise" and constitute "no 'preference' at all." *Bakke*, 438 U.S. at 306 n.43 (1978). By countering unearned racial advantages that benefit white applicants, Respondents realize a more individualized and "meritocratic" process that helps to desegregate and diversify their campuses.

Respondents' RCAPs clearly satisfy strict scrutiny. But this backdrop also troubles the conclusion that strict scrutiny should apply to all "racial classifications." As this case highlights, this standard views with suspicion race-conscious practices that counter discrimination in the present—and thereby hinders universities from realizing *Brown*'s fundamental aspiration of an American where race no longer matters. In effect, this standard ignores the unavoidable reality that "to get beyond racism, we must first take account of race." *Id.* at 407 (Blackmun, J., concurring). Petitioner acknowledges that racism exists. But urges this Court to ignore that reality and cripple Respondents' ability to overcome it.

For the reasons set forth herein, this Court should affirm the judgments below.

ARGUMENT

I. PETITIONER'S NEGATIVE ACTION CLAIM SUPPORTS MORE AFFIRMATIVE ACTION, NOT LESS.

Petitioner's lawsuit against Harvard contains two distinct claims. *See* Harv.JA357-58. The first is an intentional discrimination claim. Harv.JA470-74. We term this Petitioner's *negative action* claim because the alleged anti-Asian bias benefits similarly situated *white* applicants.[4] The second claim is a standard affirmative action challenge targeting Harvard's RCAP. *See* Harv.JA474-77. To properly adjudicate this case, it is critical that this Court disentangle these two claims, which differ in four key respects.

First, the claims target distinct components of Harvard's admissions process. The negative action claim targets facially race-neutral considerations. The affirmative action challenge targets Harvard's open consideration of race.

Second, the alleged negative action against Asian Americans benefits *white* applicants. Harvard's RCAP, in contrast, primarily benefits students of color—including many Asian Americans.

Third, the claims are governed by distinct lines of precedent. The negative action claim—because it

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[4] Law Professor Jerry Kang coined the term *negative action* to describe admissions processes that grant preferential treatment to white applicants over similarly situated Asian American applicants. *See* Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 3 (1996). We adopt this terminology because it best reflects the allegations that underlie Petitioner's intentional discrimination claim.

challenges facially race-neutral conduct—is governed by *Washington v. Davis*, 426 U.S. 229 (1976) (and its progeny) and related Title VI precedent. The affirmative action challenge is governed by this Court's affirmative action jurisprudence embodied by *Bakke*, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016).

Fourth, the claims invite different remedies. Notably, the negative action claim, if proven, would call for remedies that ameliorate the anti-Asian biases that unfairly benefit white applicants. This includes *more* affirmative action, not less. The affirmative action claim, if successful, could entail the loss of Harvard's RCAP—a result that would: (a) fail to remedy anti-Asian Bias, (b) harm applicants of color (including Asian Americans), (c) amplify the racial advantages white applicants already enjoy; and (d) thereby render Harvard's admissions process *less* "meritocratic."

A. Petitioner claims that "colorblind" components of Harvard's admissions process harm Asian Americans to the benefit of white applicants.

Petitioner claims that Harvard discriminates against Asian Americans in favor of white applicants. Critically, Petitioner concedes that this claim does not implicate Harvard's RCAP. *See* Pet'r's Br. 72-74. To the contrary, Petitioner attributes negative action to multiple facially race-neutral components of Harvard's admissions process.

This includes "Legacy+" preferences, which Harvard extends to (a) children of alumni, (b) recruited athletes, (c) dean's list members, and (d) children of faculty and staff. *See infra* Section

II.B.1. Petitioner highlights, for example, that an Office of Civil Rights investigation attributed disparate "admissions rates between whites and Asian Americans … [to] Harvard's legacy and athlete preferences, which largely benefited white applicants." Pet'r's Br. at 27.

Petitioner also contends that Asian Americans are subject to racial stereotyping and unequal treatment vis-à-vis white applicants in Harvard's "personal" rating. *See id.* at 2, 28 ("[Harvard] penalizes [Asian American applicants] for supposedly lacking as much leadership, confidence, likability, or kindness as white applicants."); *see also id*. at 25-27. The personal rating summarizes an applicant's personal qualities based on an "applicant's essays, their responses to short-answer questions, teachers' and guidance counselors' qualitative observations about applicants, alumni interviewers' comments, and much other information." Harv.Dist.Ct.Dkt. 418 at 43. Admission officers further assign the personal rating based on their assessment of a variety of other factors, including the applicant's "humor, sensitivity, grit, leadership, integrity, helpfulness, courage, kindness and many other qualities." *Students for Fair Admission, Inc., v. President and Fellows of Harvard Coll.*, 346 F. Supp. 3d 174, 183 (D. Mass. 2018).

It is plausible that pervasive and pernicious stereotypes about Asian Americans and other groups of color infiltrate subjective assessments like Harvard's personal rating. *See infra* Section II.B.2.a; *see also* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. Rev. 233, 267-73 (2022). But for purposes of Petitioner's negative action claim, the key insights

are that: (1) Petitioner alleges that *"colorblind"* components of Harvard's admissions process harm Asian Americans (2) to the benefit of *white* applicants. Even the district court noted that "the disparity between white and Asian American applicants' personal ratings has not been fully and satisfactorily explained[,]" perhaps due to biases in teacher and counselor recommendations or to Harvard's admissions reviewers' implicit biases. *Students for Fair Admission, Inc., v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 171 (D. Mass. 2019) [hereinafter *SFFA v. Harvard I*].

The foregoing confirms that Harvard's RCAP is *not* responsible for negative action against Asian Americans. Petitioner actually concedes this point. Beyond locating anti-Asian bias in "colorblind" components of the admissions process, Petitioner emphasizes the myriad ways that negative action benefits white applicants.

In Petitioner's own words: "Incontrovertible evidence shows that Harvard's admissions policy has a disproportionately *negative impact on Asian Americans vis-a-vis* similarly situated *white applicants* that cannot be explained on non-discriminatory grounds." Harv. Dist.Ct.Dkt. 413 at 1 (emphasis added) [hereinafter "Plaintiff's MSJ"]; *see also, e.g.*, Pet'r's Br. 30 ("Harvard admits Asian Americans at similar or lower rates than whites, even though Asian Americans receive higher academic scores, higher extracurricular scores, and higher alumni-interview scores."); Plaintiff's MSJ at 10 ("Looking at the number of Asian Americans denied admission because of the bias against them underscores the magnitude of the penalty. If they had

been treated like white applicants, an average of approximately 44 more Asian Americans per year would have been admitted to Harvard over the six-year period the experts analyzed.").

To summarize, the alleged negative action harms Asian Americans to the benefit of less qualified *white* applicants. In stark contrast, Harvard's RCAP levels the playing field by countering racial advantages that benefit white applicants to the detriment of more qualified students of color—including Asian Americans. *See infra* Part II.B.

B. Petitioner's two claims are governed by distinct lines of precedent and require distinct evidentiary showings.

The First Circuit suggested that "SFFA's intentional discrimination claim does not fit neatly into the strict scrutiny framework." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 195 n.34 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) [hereinafter *SFFA v. Harvard II*]. The First Circuit should have been more direct. Under this Court's well-established antidiscrimination caselaw, strict scrutiny is inapplicable to Petitioner's negative action claim. This is because, as noted above, the alleged negative action derives from facially race-neutral conduct. Accordingly, this claim is governed by precedent that governs any other discrimination claim challenging facially race-neutral conduct with a racially disparate impact.

As a matter of constitutional law, this triggers the trilogy of *Washington v. Davis*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), and *Personnel Adm'r of Mass. v. Feeney*, 442

U.S. 256 (1979). Under this line of caselaw, a plaintiff's prima facie case requires proof of discriminatory intent. *See Arlington Heights*, 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). This Court has adopted similar standards to govern Title VI claims, which also require proof of discriminatory intent when a party challenges facially race-neutral conduct.[5] *See Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) ("What we said in *Alexander v. Choate* … is true today: 'Title VI itself directly reach[es] only instances of intentional discrimination.'").

Petitioner recognizes that the foregoing standard governs its negative action claim. This is evident from Petitioner's briefing, which argues that discriminatory intent could be inferred through the "cumulative" evidence before the court—evidence that includes statistical analysis, "highly subjective" facially race-neutral components of Harvard's admissions process, and off-hand remarks that track Asian stereotypes. *See* Pet'r's Br. 72-73.

Nonetheless, Petitioner contends that strict scrutiny should apply to its negative action claim. *See id*. at 71-72. According to Petitioner, Harvard should bear the initial burden because (a) Harvard's admissions process also contains a race-conscious component and (b) Petitioner challenges both

[5] Title VI's implementing regulations contain a distinct disparate impact provision that independently supports Harvard's RCAP. *See* 34 C.F.R. § 100.3(b)(2) (2000); Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. Rev. Discourse 592 (2017).

Harvard's RCAP and facially race-neutral conduct in the same action.

Such a rule would produce perverse incentivizes. Any time a litigant wants to challenge facially race-neutral conduct that would ordinarily trigger *Washington v. Davis* (or related Title VI precedent), the claim would jump to a separate doctrinal track if the defendant also employs, and the plaintiff also challenges, some race-conscious practice. Pursuant to this theory, Harvard's Legacy+ preferences are also subject to strict scrutiny—notwithstanding that they are facially race-neutral. But were Harvard to eliminate its RCAP, that same claim challenging Legacy+ preferences would jump back to the *Washington v. Davis* track.

The foregoing is perhaps most revealing because it exposes Petitioner's true motives. Were Petitioner invested in remedying negative action against Asian Americans, Legacy+ preferences would be its primary target. As described below, *see infra* Section II.B.1, Legacy+ preferences function as substantial race/class bonuses for underqualified wealthy white applicants. This preferential treatment occurs at the direct expense of innocent and accomplished students of color—including many Asian Americans. But Petitioner shows little interest in challenging this naked departure from merit.

To the contrary, the doctrinal gymnastics Petitioner invites appear designed to serve two related purposes: (a) leverage a narrative of anti-Asian bias to undercut the legal and moral case for RCAPs—even though affirmative action is not the source of negative action (and, in fact, could remedy it), and (b) usher in a new era of antidiscrimination

law that views with skepticism any policy change that diminishes the expected over-representation white students enjoy in most elite institutions. *See* Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate over Standardized Entrance Exams*, 73 S.C. L. Rev. 759, 786-87 (2022).

C. Petitioner requests relief that would not redress negative action, would harm Asian Americans, and would amplify racial advantages for white applicants.

Many civil rights advocates would welcome a ruling that breathes life into this Court's disparate impact jurisprudence. But if the Court does so here, it should ensure the remedy redresses the harm. That is, a proper remedy for negative action should target the source of alleged anti-Asian discrimination. This could entail at least two standard civil rights remedies: (1) eliminate or alter[6] "colorblind" considerations that unfairly benefit wealthy white applicants to the detriment of innocent Asian Americans; and/or (2) buttress Harvard's existing RCAP to better mitigate racial preferences that benefit wealthy white applicants.

Both remedies would promote the equality rights of Asian American applicants. *See* Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action*

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[6] Alterations could include: (a) reducing the weight given to a particular consideration, (b) adopting new facially neutral considerations less vulnerable to bias; or (c) targeted racial cloaking that hides an applicant's racial identity in specific moments of the review process. *See* Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Privilege*, 107 Calif. L. Rev. 707, 732 (2019).

Myths Mask White Privilege, 107 Calif. L. Rev. 707, 728-31 (2019). Petitioner seeks neither. To the contrary, Petitioner requests only that this Court prohibit all consideration of race in the admissions process. *See* Harv.JA490-91; *see also* Pet'r's Br. 69 (opining that "[m]ost universities can keep their admissions systems exactly as they are—with holistic, individualized review that considers all legitimate factors—only they cannot use race itself as a factor." (brackets and quotation marks omitted)).

Such a ruling would cast aside decades of this Court's well-reasoned precedent and invert *Brown*'s animating spirit and legal mandate. And notably, this remedy would leave untouched the source of negative action. Why? Because it does not target the "colorblind" components of Harvard's admissions process that harm Asian Americans to the benefit of less qualified white applicants. In fact, eliminating affirmative action would doubly harm Asian Americans. Not only would such a ruling fail to address allegations of negative action, but it would remove the piece of Harvard's admissions process best suited to counter preferential treatment for white applicants.

D. Petitioner blurs its claims to stigmatize affirmative action.

Petitioner brings two distinct claims. Yet throughout this litigation, Petitioner has blurred the facts that underlie, and the doctrine that governs, those claims. Given Petitioner's open interest in eliminating affirmative action, the purpose appears clear.

Petitioner's negative action claim is not designed to remedy anti-Asian bias or reduce racial

advantages that white applicants continue to enjoy. Rather, Petitioner marshals allegations of anti-Asian bias (alongside Harvard's history of antisemitism) to stigmatize affirmative action before this Court and the court of public opinion.

The requested remedies underscore that this case was never about realizing *Brown*'s promise. To the contrary, Petitioner aims to prohibit all public and private universities from considering applicant race—even when RCAPs offer a modest tool to reduce racial preferences for white applicants, promote the present and personal equality interests of students of color (including Asian American applicants), and diversify and desegregate historically white institutions. Petitioner's requested remedy embodies a perverse tribute to *Brown*.

II. RCAPS ARE NECESSARY TO COUNTER RACIAL ADVANTAGES WHITE APPLICANTS ENJOY IN HARVARD AND UNC'S ADMISSIONS PROCESSES.

Petitioner asks this Court to overturn its own well-reasoned conclusion that diversity constitutes a compelling interest sufficient to justify narrowly tailored RCAPs. This Court should reject this invitation. But this Court need not even reach this issue—because Harvard and UNC's RCAPs are lawful for a reason independent of their impact on student body diversity.

By considering race, Respondents counter unearned racial advantages that benefit (predominately wealthy) white applicants. Respondents' RCAPs, in turn, constitute modest antidiscrimination measures that reduce race's impact on admissions, promote a more objective

process, and protect students' of color right to compete on their individual "merit," irrespective of their race. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (Thomas, J.) (identifying a constitutional injury when "the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group."). And in so doing, RCAPs enable historically white institutions to desegregate and diversify their campuses.

It is hard to imagine a more compelling admissions design. Moreover, once one credits RCAPs' antidiscrimination function, it does more than reinforce their constitutional mooring and moral authority. This insight also exposes an enduring contradiction inherent in this Court's affirmative action jurisprudence: its conclusion that strict scrutiny should apply to all "racial classifications," even those that—as here—counter racial advantages for white applicants, promote individual "meritocracy," and diversify and desegregate historically white institutions.

A. Justice Powell acknowledged that RCAPs could promote "meritocracy" and constitute "no 'preference' at all."

In *Bakke*, five Justices rejected a series of justifications U.C. Davis had offered to defend its RCAP. *See* 438 U.S. at 315. In his controlling opinion, Justice Powell endorsed student body diversity as a compelling interest. *Id*. But diversity was not the only compelling interest Justice Powell identified. In an oft-overlooked footnote, Justice Powell offered the following observation:

> Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: *fair appraisal of each individual's academic promise* in light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were *considered* only to the extent of *curing established inaccuracies* in predicting academic performance, it might be argued that there is *no "preference" at all*.

Id. at 306 n.43 (emphasis added).

Justice Powell buried this insight because U.C. Davis never justified its RCAP on this basis. *See* Jonathan P. Feingold, *Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action*, 58 Harv. C.R.-C.L. L. Rev. (forthcoming 2022). As then, Harvard and UNC have not defended their RCAPs as antidiscrimination that reduces white racial advantages—even with half-a-century of empirical scholarship that confirms Justice Powell's intuition. *See infra* Section II.B. Respondents' oversight compromises the case for their own policies. It also obscures how white students continue to benefit from common measures of "merit" that systematically understate the existing academic talent and potential of students of color.

B. "Colorblind" components of Respondents' admissions processes reward and reproduce white racial advantages.

Justice Powell did not characterize RCAPs in such terms, but he surfaced the antidiscrimination function RCAPs often perform. His insight also troubles the ease with which Petitioners and this Court characterize RCAPs as "racial preferences." This preference framing misdescribes affirmative action and trades on pernicious anti-Black stereotypes. *See* Cheryl I. Harris, *Fisher's Foibles: From Race and Class to Class not Race*, UCLA L. Rev. Discourse (2017). It also obscures the substantial racial advantages Respondents confer to (often wealthy) white applicants via "colorblind" considerations—*even with* affirmative action in place. RCAPs remain necessary to mitigate those white racial preferences. As Justice Powell envisioned, this modest intervention promotes the "fair appraisal of each individual's academic promise" and constitutes "no 'preference' at all."

1. Legacy+ Preferences confer "race/class preferences" to wealthy white applicants.

Harvard awards Legacy+ preferences to applicants who fall into four categories: children of alumni ("legacies"), recruited athletes, dean's list members, and children of staff or faculty. *See* Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. Lab. & Econ. 133, 134 (2021) (analyzing applicant data from students who would have graduated in 2014-2019). Legacy+ preferences are race-neutral in form; they do not expressly

differentiate between applicants based on race. But in practice, Legacy+ preferences comprise a substantial race and class preference for wealthy white applicants. *See id.* at 135 n.5 ("[W]hites … make up the vast majority of ALDC applicants and admits.").

Overall, white applicants comprise 40% of non-Legacy+ applicants but nearly 70% of Legacy+ applicants.[7] *Id.* at 148, tbl.4. This includes recruited athletes, 75% of whom are white and tend to be wealthy. *Id.*; *see also id.* at 142 ("Recruited athletes at Harvard tend to be [economically] advantaged and disproportionately white in part because of the varsity sports Harvard offers, including fencing, sailing, and skiing.").

Beyond their over-representation among applicants, white Legacy+ students are also over-represented on Harvard's campus. Over a recent six-year period, nearly 2,200 (out of 4,993 total) of Harvard's white admits were Legacy+. *Id.* at 148, tbl.4. This total exceeded all of Harvard's Black (1,392) and Latinx (1,283) admits, and nearly equaled Harvard's Asian American (2,443) admits. *Id.*; *see also id.* at 153 (observing that 43% of Harvard's white admits are Legacy+ but only 16% of Harvard's Black, Latinx, and Asian American admits are Legacy+).

One might assume that white Legacy+ admits are substantially overrepresented because they possess superior academic credentials. That is incorrect. According to Petitioner's expert, "roughly three-quarters of white [Legacy+] admits would have been rejected absent their [Legacy+] status." *Id.* at 133.

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[7] The 70% figure refers to recruited athletes, legacies, and dean's list applicants. *See id.* at 135.

In raw terms, this means that Harvard admitted 1,634 white (and predominately wealthy) students with academic credentials *inferior* to the typical applicant. *Id.* at 148, tbl.4. If this number feels large, it should. In relative terms, 33% of Harvard's white admits and 16% of *all* admitted students accessed Harvard because of their inherited race/class privilege, not academic merit. To add insult to injury, this number exceeds *all* Black and Latinx admits from the same period—even when Harvard employs an RCAP that counters some white racial advantage. *Id*.

According to Petitioner's expert, this race/class bonus is "particularly striking" for white recruited athletes:

> At most, 28% of white athlete admits receive a 2 or higher on the academic rating. In contrast, 89% of white typical admits receive a 2 or higher on the academic rating. In many cases—and in contrast to LDC admits—recruited athlete *admits* are substantially weaker than typical *applicants*. *Id.* at 141 (emphasis in original).

In practice if not name, Harvard's Legacy+ preferences reward less qualified white applicants for their inherited race and class privilege. Put differently, "[t]he majority of [whites] are admitted to [Harvard] because of discrimination, and because of this policy all are tarred as undeserving." *Grutter*, 539 U.S. at 373 (Thomas, J., concurring). Petitioner's expert even acknowledges that these students enjoy a double bonus. *See* Arcidiacono et al., *supra*, at 141 ("The patterns described above suggest that

[Harvard's] LDC applicants … are doubly advantaged.…").

First, Legacy+ applicants are rewarded for enjoying a status (e.g., child of alumni) unrelated to any standard conception of academic "merit."

Second, well before they apply, that status confers multiple advantages. Most Legacy+ applicants are white and wealthy—thereby enjoying unique access to the social, economic, and political resources necessary to refine the application components Harvard most values.

But characterizing Legacy+ preferences as a double bonus understates the race/class advantage it confers. This is more accurately described as a *triple* bonus. Harvard admits Legacy+ applicants *even when* their academic profile is weaker than their less advantaged peers. *Id.* at 142 ("[T]he average [Legacy+] admit is weaker than the typical admit."). Thus, Harvard rewards wealthy white applicants who do less with more. *Id.* at 144 ("[W]hite LDC applicants in the bottom decile of academic preparation were admitted at a higher rate (6.35%) than the average across all typical applicants (5.46%)." This race/class preference violates the equality interests of students of color and poor whites—all of whom achieve far more with less. *See* Jonathan P. Feingold, *'All (Poor) Lives Matter': How Class-Not-Race Logic Reinscribes Race and Class Privilege*, U. Chi. L. Rev. Online 47 (2020).

Were Petitioner intent on remedying alleged anti-Asian bias, eliminating racial advantages, or promoting "meritocracy," Harvard's Legacy+ preferences would offer the obvious point of legal and political attack, *not* RCAPs. The race/class

preferences embodied within Legacy+ preferences constitute a naked disregard for "meritocracy" that harms far more deserving, accomplished, and perseverant students of color—including many Asian Americans. *See* Arcidiacono et al., *supra*, at 151 ("We suspect that if we were able to run these counterfactuals, the share of white admits would drop by significantly more than 6%, and the share of Asian American admits would rise by more than 9%.").

But this litigation was never intended to remedy negative action or mitigate racial advantages that white applicants now enjoy. *See* Br. of Amicus Curiae Walter Dellinger in Supp. of Def.-Appellee on the Issue of Standing at 10-11, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) (quoting Edward Blum) ("I needed plaintiffs; I needed Asian plaintiffs … so I started … HarvardNotFair.org."). To the contrary, Petitioner aims to undermine the legal and moral case for affirmative action—even as RCAPs comprise a modest tool to mitigate the white racial advantages that harm innocent Asian Americans and other students of color. Were Petitioner and this Court concerned about racial equality in admissions, the remedy would be clear: more affirmative action, not less.

Critically, even if Harvard and UNC eliminate all Legacy+ preferences, RCAPs would remain essential to counter unearned racial advantages that flow to white applicants. As outlined below, other "colorblind" components of Respondents' admissions processes understate the existing academic talent and potential of students of color. RCAPs, in turn, offer a

modest tool to counter the preferential treatment white applicants would otherwise enjoy—and thereby promote a more individualized, equitable, and "meritocratic" admissions process.

2. RCAPs counter racial advantages that white applicants enjoy in "colorblind" components of Harvard and UNC's admissions processes.

When Justice Powell recognized that RCAPs could ensure a more "meritocratic" process, he was not envisioning the need to counter naked deviations from "merit" like Legacy+ preferences. Rather, he intuited that RCAPs might be necessary to correct for standard metrics—e.g., standardized tests—that fail to capture the true academic talent and potential of students of color. To borrow his words, Justice Powell realized that RCAPs might serve a critical *anti*discrimination function by correcting faulty measures that denied students of color a "fair appraisal of . . . [their] academic promise." *Bakke*, 438 U.S. at 306 n.43

This insight is now buttressed by decades of empirical scholarship. *See* Jonathan P. Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 Utah L. Rev. 59 (2019). Nonetheless, it remains peripheral to this Court's affirmative action jurisprudence. One reason is that universities have not defended RCAPs as essential antidiscrimination that promotes "meritocracy" by reducing race's impact on admissions. As a result, this Court has not engaged one of the most compelling legal and normative justifications for RCAPs and affirmative action writ large. *See* Feingold, *supra*, *Ambivalent Advocates*.

At bottom, when universities privilege faulty measures of student achievement, white students enjoy an unearned racial advantage that denies students of color an individualized, "meritocratic," and race-neutral review. *See* Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. Davis L. Rev. 1117 (2019). Two common measures of "merit" are particularly prone to understate the true academic abilities of students of color.

First, subjective assessments like interviews and letters of recommendation can subject applicants from negatively stereotyped racial groups to disparate treatment. *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of* Affirmative Action, 94 Calif. L. Rev. 1063, 1089 (2006) ("What we thought to be fair assessments of 'merit' can turn out to be mismeasurements—not because of explicit animus but because of hidden mental processes … ").

Second, standardized tests and grades tend to understate the existing academic abilities of Black and Latinx students. *See* Jonathan P. Feingold, *Equal Protection Design Defects,* 91 Temple L. Rev. 513 (2019).

a. Due to implicit biases, subjective assessments can systematically understate the existing "merit" of students of color.

Implicit biases refer to stereotypes or attitudes people hold about social categories (e.g., race, gender, age) but cannot identify through earnest self-introspection. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1126 (2012).

Decades of research confirm that implicit biases are pervasive; tend to favor majority groups over minority groups; are often more severe than explicit biases; and affect behavior and decision-making across domains. *See id*. At least one state supreme court has taken judicial notice of implicit biases' prevalence and impact. *See State v. Gregory*, 427 P.3d 621, 635 (Wash. 2018) ("Given the evidence before this court and our judicial notice of implicit and overt racial bias against black defendants in this state, we are confident that the association between race and the death penalty is *not* attributed to random chance.").

Racial stereotypes render all students of color vulnerable to implicit biases before, during, and after admissions. During admissions, implicit biases are most likely to compromise the reliability of subjective assessments that grant evaluators wide discretion. *See* Kang et al., *supra*, *Implicit Bias in the Courtroom* at 1142 ("[T]he conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability.") This includes alumni interviews and guidance counselor recommendations, among other assessments like Harvard's "personal" rating.

On this point, the district court found it "possible … that part of the statistical disparity resulted from admissions officers' implicit biases that disadvantaged Asian American applicants in the personal rating relative to white applicants…." *See SFFA v. Harvard I*, 397 F. Supp. 3d at 171; *see also* Plaintiff's MSJ at 10 ("If Asian-American applicants were treated like white applicants, their chances of receiving a 2 or better on the personal rating would

increase by 21%."). The district court could not identify the source of alleged anti-Asian bias with absolute certainty. Even so, its statement reinforces a key insight: negative action against Asian Americans—whether traceable to implicit biases (that affect subjective assessments), explicit preferences (that underlie Legacy+ preferences), or elsewhere—derives from *"colorblind"* considerations that benefit *white* applicants.

Were there any doubt that the alleged anti-Asian bias benefits white applicants, Petitioner makes clear that "even taking 'Harvard's scoring of applicants at face value, Harvard imposes a *penalty against Asian Americans as compared to whites'* that 'has a significant effect on an Asian-American applicant's probability of admission.'" Plaintiff's MSJ at 10; *see also id*. ("An Asian-American male applicant with a 25% chance of admission would see his chance increase to 31.7% if he were white—even including the biased personal rating.").

For decades, stakeholders have raised concerns that racial stereotypes harm students of color—including Asian American university applicants. *See* Vinay Harpalani, *Asian Americans, Racial Stereotypes, supra,* 102 B.U. L. Rev. at 267-73. In 1990, for example, OCR found that UCLA had discriminated against several Asian American applicants and ordered them to be admitted. *Id.* at 272. Although this history does not implicate Respondents, it resonates with the concern that subjective assessments like Harvard's "personal" rating, guidance counselor recommendations, and alumni interviews are susceptible to implicit biases. These measures are prone to systematically

understate the qualifications and accomplishments of not only Asian Americans, but also Black, Latinx, and Native American applicants.

Absent intervention, unmindful reliance on such measures inflates the relative "merit" of similarly situated white applicants. RCAPs offer one modest countermeasure that mitigates this unearned white racial advantage. If anything, Petitioner's evidence suggests that Harvard's RCAP is insufficient. A proper remedy would entail a recalibrated RCAP better tailored to mitigate implicit biases that harm Asian Americans and other students of color.

b. Due to stereotype threat, standardized tests and grades tend to understate the existing "merit" of Black and Latinx students.

Standardized tests and grades often understate the actual academic abilities of students from groups stereotyped as intellectually inferior. *See* Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students,* 20 Psych. Sci. 1132 (2009).

A significant portion of this measurement error derives from *stereotype threat*, one of the most studied psychological phenomena of the past three decades. Stereotype threat refers to the psychological threat that arises when students fear poor performance on an academic task could confirm negative stereotypes about their group. *See* Claude M. Steele, *Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do* (Norton, 2010). When stereotype threat arises, it creates a cognitive "tax" that interferes with academic

performance. *Id.* As a result, a portion of perceived racial "achievement gaps" are illusory, a reflection of psychological harms *not* actual differences in preparation, ability, or potential.

Stereotype threat is most likely to affect the highest achieving Black and Latinx students. *See id.* (observing that stereotype threat has the largest effect on a group's vanguard). Multiple meta-analyses have concluded that grades and test scores can understate the existing ability of affected students by an average of .18 standard deviations. *See* Walton & Spencer, *supra*, *Latent Ability*. This translates to roughly 63 points on the SAT. *See* Br. of Experimental Psychs. as Amici Curiae in Supp. of Resp't at 18-19, *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6774020 [hereinafter "Experimental Psychologists' Br."]

In *Fisher*, leading stereotype threat scholars identified "three important implications" from the research. *See id.* at 5-6.

First, because stereotype threat depresses the true academic abilities of Black and Latinx students, "[a] genuine merit-based admission policy . . . cannot rely on th[o]se numbers alone." Admissions policies that account for stereotype threat—e.g., by considering applicant race—are "not a *departure* from merit-based admissions" but rather offer "*more accurate* merit-based admissions." *Id.* at 5.

Second, stereotype threat depresses the grades of negatively stereotyped students in college. *Id.* Accordingly, when universities do not mitigate stereotype threat (in admissions or thereafter), the institution compromises the present and personal equality rights of individual students of color. *See*

Jonathan P. Feingold, *Hidden in Plain Sight, supra,* 2019 Utah L. Rev. 59. One way to reduce stereotype threat—and thereby promote equality on campus—is to admit racially diverse student bodies. *Id*. at 106-114.

Third, when stereotype threat is reduced, students from negatively stereotyped groups "show dramatic improvements in performance." Experimental Psychologists' Br. at 6.

To summarize, when universities privilege grades and standardized test scores, they are privileging metrics that under-state the true academic talent and potential of students of color. This creates an undeserved racial bonus for white applicants. RCAPs, in turn, offer one mechanism to mitigate this site of white racial advantage. This is not a story about affirmative action redressing some past harm or remedying "societal discrimination" exogenous to the university. To the contrary, by considering race, Respondents can correct for metrics that artificially inflate the relative "merit" of white applicants. The result is a more accurate and "meritocratic" process that yields greater student body diversity—all of which protects the present and personal equality interests of students of color during admissions and thereafter.

The foregoing reflects the scenario Justice Powell envisioned in *Bakke*. Respondents RCAPs ensure a more "fair appraisal of each individual's academic promise" because they "cur[e] established inaccuracies in predicting academic performance." *Bakke*, 438 U.S. at 306 n.43. Respondents RCAPs constitute "no 'preference' at all." *Id*.

C. Justice Powell's insight suggests that strict scrutiny is inappropriate when RCAPs reduce white racial advantages.

The record confirms that Respondents' RCAPs, because they serve an essential antidiscrimination function, satisfy strict scrutiny. But once one recognizes how RCAPs ensure a more racially neutral, individualized and "meritocratic" admissions process, it calls into question this Court's conclusion that strict scrutiny is appropriate for all "racial classifications." This standard constitutionalizes an equivalence between the race-conscious practices that entrenched American apartheid (e.g., Jim Crow) and race-conscious efforts to undo that ignoble legacy (e.g., affirmative action). The irony should be obvious.

Consequently, this Court should hold that strict scrutiny is inappropriate for RCAPs designed to diversify and desegregate historically white institutions by countering racial advantages for white applicants. Such a standard would realign this Court's affirmative action jurisprudence with *Brown*'s animating spirit and legal mandate.

To this end, all parties agree that race and racism remain central organizing forces in America. *See* Pet'r's Br. 49 ("No one is under the illusion that we live in a postracial society, or that racial discrimination is a thing of the past."). This Court, likewise, has long acknowledged that while "race should not matter; the reality is that too often it does." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring).

Nonetheless, this Court continues to subject all RCAPs to strict scrutiny. On the one hand, the Court recognizes racism's indelible impact on society. On the other hand, the Court views with skepticism race-conscious endeavors to mitigate that reality. This dissonance has always been palpable. If race matters outside of admissions, race matters inside of admissions—whether we like it or not. And unless universities account for race and racism, they will privilege students who enjoy the most inherited racial advantage. Against this backdrop, "the application of strict scrutiny to affirmative action [becomes] normatively and doctrinally suspect." *See* Carbado, *supra*, *Footnote 43* at 1123.

Only by considering race can Respondents move us closer to a society in which race no longer matters. Respondents' RCAPs offer a modest corrective to existing racial advantages for white applicants. They accordingly ensure a more "fair appraisal" of each applicant's existing academic "merit." And in the process, they desegregate and diversify historically white universities.

CONCLUSION

For the reasons set forth above, the judgments below should be affirmed.

Respectfully submitted,

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