21-707

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,

Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fourth Circuit

AMICI CURIAE BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1940 by Justice Thurgood Marshall, the NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to eliminate barriers that prevent Black Americans from realizing their basic civil and human rights. For more than eight decades, LDF has worked to dismantle racial segregation and ensure equal educational opportunity for all students, most prominently in the groundbreaking case, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

LDF also has represented Black students and applicants, as parties and *amici curiae*, in numerous cases before this Court regarding educational access and opportunity in higher education. *See, e.g.*, *Students for Fair Admission v. Harvard*, No. 20-1199; *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *United States v. Fordice*, 505 U.S. 717 (1992); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Okla., 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

The National Association for the Advancement of Colored People ("NAACP") was founded in 1909 and has more than 2,200 local chapters across the country, including in North Carolina. Its principal objectives are to ensure the political, educational, social, and economic equality of all citizens; to achieve equality of rights and eliminate racial prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state, and local laws securing civil rights; and to inform the public of continued adverse effects of racial discrimination while working toward its elimination. The NAACP has worked for over a century to address issues of racial discrimination and inequality in college admissions and in college life and has been at the forefront of every major advancement in ensuring integration at every level of the nation's public schools. *See, e.g.*, Brief for Respondent as Amicus Curiae, *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013) (arguing for UT Austin's continued use of race-conscious admissions); Arthur Morse, *When Negroes Entered a Texas School*, Harper's (Sept. 1, 1954), http://web.archive.org/web/20150406160442/ https://southtexasrabblerousers.files.wordpress.com/2014/04/dmc-harpers-1.pdf (securing the admission of seven Black students into Del Mar college prior to *Brown*); *Swanson v. Rector & Visitors of Univ. of Va.*, No. 30 (W.D. Va. Sept. 5, 1950), Box 42, MSS 81-7, Judicial Papers of Judge John Paul, Special Collections UVA Law Library (securing Gregory Swanson's admission to desegregate University of Virginia Law School).

SUMMARY OF ARGUMENT

Petitioner urges the Court to flout *stare decisis* and adopt a revisionist interpretation of its seminal decision, *Brown v. Board of Education*, 347 U.S. 483 (1954), that would categorically bar any consideration of students' racial identities in the higher educational system. However, Petitioner's arguments ignore the meaning of the *Brown* decision itself, the decades of case law implementing it, the lived experiences of the brave Americans challenging racial segregation, and the objective historical record surrounding the *Brown* decision. *Brown* did not espouse Petitioner's version of "colorblindness," which would require decisionmakers to willfully ignore ongoing racial inequality. To the contrary, *Brown* explained how the racial caste system established through chattel slavery demeans and subordinates Black people and thus promised to secure their equality in our educational system and as citizens of our democracy.

Overturning half a century of precedent by prohibiting race-conscious admissions policies in selective colleges and universities like the University of North Carolina at Chapel Hill ("UNC" or "the University") would contravene *Brown*'s core principles. Petitioner would transform *Brown* from an indictment against racial apartheid into a tool that supports racial exclusion, prevents further advancement in the Nation's progress towards racial integration, and deepens persistent inequalities in educational opportunities.

Petitioner's arguments are particularly repugnant in North Carolina, a state whose flagship public university refused to consider Black applicants only a

few generations ago. Today, the state continues to provide starkly unequal access to K-12 education based on race, creating severe disadvantages for talented Black applicants to obtain the type of credentials that would assure admission to UNC. Even with a tailored race-conscious admissions policy, Black people today are nearly a quarter of the state's total population but just 8 percent of UNC's undergraduates. Last year, Black men comprised only 2 percent of the incoming class, totaling 95 students in a first-year class of over 4,500. If adopted, Petitioner's reading of *Brown* would impel even greater underrepresentation of Black students at UNC, further cementing a dual system of education in which very few Black students would have an opportunity to attend the state's flagship taxpayer-funded university.

Brown was a defining moment for this Court, and for our country. In that unanimous decision, the Court finally recognized that the Reconstruction Amendments embody a core constitutional commitment to equal citizenship for Black Americans in our multi-racial democracy, and that public education plays a central role in securing that goal. Despite undeniable progress, *Brown*'s constitutional promise to Black Americans remains unfulfilled. UNC heeds the letter and the spirit of *Brown* in its limited consideration of race in admissions to foster the educational benefits of diversity, and to endeavor to ensure equal opportunity to access a UNC education. By contrast, Petitioner seeks to re-write *Brown* to facilitate the resegregation of UNC in direct contravention of *Brown*'s express goals. Petitioner's distorted understanding of one of the most, if not the most, important case in the constitutional canon demeans Black Americans, and it would demean this Court to embrace it.

ARGUMENT

I. Petitioner's Reliance on *Brown* to Impose Race-Ignorant Admissions Contradicts the Context, Purpose, and Meaning of That Transformative Decision.

A. *Brown* Did Not Espouse Petitioner's View of "Colorblindness," Which Willfully Ignores Ongoing Racial Inequality.

Petitioner argues that *Brown v. Board of Education*, 347 U.S. 483 (1954), endorsed a particular theory of equal protection that they call "colorblind." Pet'r's Br. 69; *see id.* at 1, 5, 47, 51. Petitioner's conception of a "colorblind" Fourteenth Amendment would require universities to willfully ignore the persistent racial inequality in our society that creates an uneven playing field in the admissions process. This country's racial caste system was deeply entrenched during centuries of enslavement and legalized racial apartheid, and the work of eradicating the vestiges of such severe racial subjugation remains far from complete. In their persistent modern form, racial inequalities continue to limit opportunities and educational outcomes for Black children regardless of their talent or potential. Yet Petitioner's hollow vision of "colorblindness" would prohibit limited race-conscious approaches to university admissions, even when necessary to achieve the educational benefits of racial diversity amid persisting racial inequalities in K-12 education. *See* Pet'r's Br. 1, 4–6.

Petitioner's argument rests on a fundamental misunderstanding of *Brown*, which is a canonical case precisely because, among other principles, it recognized the significance of race in educational

settings. The equality principle articulated in *Brown* is founded on an explicit acknowledgment that racial segregation relegates Black people to second-class citizenship. In *Brown*, the Court finally dispensed with the fiction that, after centuries of chattel slavery and state-sanctioned racial subordination, racial segregation could coincide with any principle approximating equality.

The Court in *Brown* sought to restore the Equal Protection Clause's original history and purpose—to provide Black people meaningful, equal participation in education and society. Indeed, *Brown* proclaimed that the Fourteenth Amendment's "great purpose" is to "raise the colored race from [a] condition of inferiority . . . into perfect equality of civil rights with all other persons."[2] *Ex Parte Virginia*, 100 U.S. 339, 344–45 (1879) (cited in *Brown*, 347 U.S. at 490 n.5). And *Brown* further highlighted the Court's past recognition that the Equal Protection Clause was enacted to protect Black people from being saddled with "inferiority in civil society," from experiencing discrimination that "lessen[s] the security of their enjoyment of the rights which others enjoy," and from enduring other efforts "towards reducing them to the condition of a subject race." *Brown*, 347 U.S. at 490 n.5 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880)).

Brown applied these core principles of the Equal Protection Clause in recognizing the constitutional necessity of racially integrated education. The *Brown*

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[2] This brief references historical racial terms that are not the preferred usage in the present day. Such language appears only where it was retained in a direct quote from the original source.

Court voiced an incontrovertible truth: racially segregated education harms and subordinates Black people and denies them equal status as full citizens. By unequivocally declaring that "[s]eparate educational facilities are inherently unequal," *Brown* acknowledged that racially segregated schools "deprive the children of the minority group of equal educational opportunities." *Brown*, 347 U.S. at 493, 495. As *Brown* explained: "Segregation of white and colored children in public schools has a detrimental effect on colored children" by creating barriers to opportunity and marking them as inferior. *Id.* at 494 & n.10; *see also Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (in companion case to *Brown*, holding that "maintaining racially segregated public schools" in the District of Columbia is constitutionally untenable because segregation "imposes" a "burden" on Black children). *Brown* was emphatic about the need to consider the legacy, and persistence, of anti-Black discrimination in applying equal protection principles to public education: "Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." *Brown*, 347 U.S. at 493.

Brown not only acknowledged that segregation is a shameful emblem of our racist history, but also recognized that accepting racial subordination and racial caste in our schools harms American democracy itself. That is why the Court explained in a key passage that integrated education "is the very foundation of good citizenship." *Brown*, 347 U.S. at 493. The decision thus turned on an honest and sober assessment of public education's "full development" and "present place in American life throughout the Nation." *Id.* at 492–93. After acknowledging how

formal education of Black people was once "almost nonexistent" and "forbidden by law in some states," *id.* at 490, the Court made an enduring promise to secure their equality in education—and our democracy—that for centuries had been denied.

B. *Brown* and Its Progeny Underscore the Need for Tailored Race-Conscious Interventions to Ensure Equal Educational Opportunity in Higher Education.

The plaintiffs and lawyers who litigated *Brown* intended, from the very beginning, to do far more than merely eliminate formal racial classifications. What they sought instead was to thoroughly uproot the subordination of Black Americans, as it found expression in a segregated education system. The architects of the *Brown* litigation at LDF characterized their goal as vindicating the "intended effect of the Fourteenth Amendment—which was to give Negroes full citizenship rights." Internal Memorandum from NAACP LDF 11–12 (Manuscript Div., Library of Congress photo. reprt. n.d.) (Nov. 26, 1952). And the Court fully understood the historical import of *Brown* and anticipated the legacy it would create and the breadth of its impact. *See*, S. Sidney Ulmer, *Earl Warren and the* Brown *Decision*, 33 J. of Politics No. 3, 689, 698–99 (1971) (crediting Justice Warren with the "major accomplishment" of securing a unanimous decision in a case with such charged subject matter and providing an account of the Court's deliberations regarding the *Brown* decision).

If any one person definitively understood the meaning and purpose of the *Brown* litigation, it was Thurgood Marshall, LDF's founding Director-Counsel.

Before serving on this Court, Justice Thurgood Marshall led the litigation campaign to overturn *Plessy v. Ferguson* and achieve full and equal citizenship rights for Black Americans. Justice Marshall's own public comments on the Fourteenth Amendment and *Brown* confirm that the *Brown* litigants sought much more than rote ignorance of race. For example, at the height of LDF's campaign to overturn *Plessy*, he rejected the hollow, race-ignorant conception of equal protection that Petitioners are now urging. He explained that "[t]he obligation to furnish equal protection of the laws does not establish an abstract uniformity applicable alike to all persons without regard to circumstances or conditions." Thurgood Marshall, *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws*, 275 Annals Am. Acad. Pol. & Soc. Sci. 101, 102 (1951).

Later, when applying the lessons of *Brown* and its progeny to higher education in *Regents of the University of California v. Bakke*, Justice Marshall "applaud[ed] the judgment of the Court that a university may consider race in its admissions process." 438 U.S. 265, 400 (1978) (opinion of Marshall, J.). He reasoned that the inclusion of Black people in "the mainstream of American life should be a state interest of the highest order." *Id.* at 396. And he warned that "[t]o fail to do so is to ensure that America will forever remain a divided society." *Id.* With a deep understanding of the discrimination against Black people throughout this Nation's history, Justice Marshall explained that "[i]f we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors." *Id.* at 401–

02. Accordingly, he declared it "inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures." *Id.* at 398.

The same lesson follows from what occurred in the wake of *Brown*. Unraveling hundreds of years of racial subordination and segregation would be impossible if the goal of the *Brown* plaintiffs were to compel school officials to ignore racial inequality by simply ignoring race. Indeed, the *Brown* plaintiffs struggling under racial apartheid never had the luxury of pretending that students' racial identities and the effects of deep-seated racial inequality could simply be ignored. The need to engage honestly with race, and with the complex realities inherent in dismantling entrenched racial subordination, is why realizing the promise of *Brown* has always called for a thoughtful and honest assessment of how racial inequality manifests in everyday life. That is why it took extensive supplemental briefing and an additional year of deliberation for the Court to even begin grappling with the "complexities" of realizing "a system of public education freed of racial discrimination." *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) ("*Brown II*"); *see also Brown*, 347 U.S. at 495. Those "complexities" arose because the *Brown* decision and the constitutional principles it recognized did not exist in a vacuum. The *Brown* plaintiffs were not seeking, and the Court did not offer, a constitutional mandate that would require school districts to feign ignorance of race and the ways in which it continues to shape and constrain opportunity.

The complexities inherent in meaningful integration are precisely why the *defenders* of segregation championed a willfully ignorant form of purported

"colorblindness" in the aftermath of *Brown*. When interpreting the decision, some resistant district courts initially held that the Constitution "does not require integration. It merely forbids discrimination." *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955). Southern school districts seized on this reasoning to allow segregation to continue unabated behind the abstract rubric of professed equal treatment. One approach was to adopt so-called "freedom of choice" plans, by which school districts technically permitted Black students to attend all-white schools, but fully expected them to remain wherever the discriminatory status quo had previously placed them. *See, e.g.*, *Green v. Cnty. Sch. Bd. of New Kent Cnty.,* 391 U.S. 430, 432–35 (1968); *Raney v. Bd. of Ed. of Gould Sch. Dist.*, 391 U.S. 443, 445–46 (1968). This Court, citing *Brown*, emphatically rejected this gambit to maintain segregation, holding that "'[f]reedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects." *Green*, 391 U.S. at 440 (quoting *Bowman v. Cnty. Sch. Bd. Of Charles City Cnty.*, 382 F.2d 326, 333 (4th Cir. 1967) (concurring opinion)). Thus, *Brown* mandated that the racial caste system in public education be dismantled "root and branch." *Id.* at 437–38.[3]

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[3] *See also Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971) (holding that the Equal Protection Clause requires the "eliminat[ion] from the public schools all vestiges of state-imposed segregation"); *Keyes v. Sch. Dist. No. 1,* 413 U.S. 189 (1973) (noting that the first step to implement *Brown* is redressing any factors that may have contributed "in creating a natural environment for the growth of further segregation").

C. This Court's Failure in *Plessy* Was Ignoring—and Thus Perpetuating—Our Nation's Racial Caste System.

The Court's great sin in *Plessy v. Ferguson*, 163 U.S. 537 (1896), was not that it was insufficiently "colorblind," as Petitioner repeatedly suggests. *See* Pet'r's Br. 4–5, 47, 51. To the contrary, its sin was the Court's acceptance of America's racial caste system and the harms that segregation inflicts on Black people. In *Plessy*, this Court denied a truth that was, in actuality, undeniable: that racial segregation "stamps the colored race with a badge of inferiority." 163 U.S. at 551. By calling this fact a "fallacy," the *Plessy* Court inexplicably surmised that any harm to Black people from racial subordination and racial exclusion occurred "solely because the colored race chooses to put that construction upon it." *Id.* The egregious error in the Court's reasoning, therefore, was not a lack of the type of "colorblindness" advanced by Petitioner, but rather a failure to acknowledge the realities and consequences of persistent anti-Black racism in our society.[4] It was *Plessy*, not *Brown*, that

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[4] Petitioner's repeated invocations of Justice Harlan's dissent in *Plessy* are unavailing and omit critical context. Pet'r's Br. 1, 5, 47, 51. Justice Harlan argued for a "colorblind" constitution that sanctioned entrenched white supremacy:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.

championed willful ignorance of race and the pernicious ways that it operated to limit equality and opportunity. *See Bakke*, 438 U.S. at 392 (opinion of Marshall, J.) (explaining that *Plessy*'s failure was "[i]gnoring totally the realities of the positions of the two races").

Petitioner therefore distorts history by likening *Plessy* to *Grutter v. Bollinger*, 539 U.S. 306 (2003), and by insisting that overturning *Grutter* would somehow honor *Brown*. *See* Pet'r's Br. 47. In actuality, *Grutter* is the antithesis of *Plessy*. Like *Brown*—and unlike *Plessy*—*Grutter* rested upon a discerning acknowledgement of the reality that "race unfortunately . . . matters" in American life. *Id.* at 333. *Grutter* reaffirmed that higher education "must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogenous society may participate in the educational institutions that provide the training and education necessary to succeed in America." 539 U.S.,

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Plessy, 163 U.S. at 559 (Harlan, J., dissenting). He repeatedly referred to white people as the "dominant" and "superior" race. *Id.* at 559–60, 562–63. And he pointedly did not dispute "the suggestion that social equality cannot exist between the white and black races in this country." *Id.* at 561. Notably, Justice Harlan's dissent evidenced particularly virulent racism towards Asian people. *See id.* at 561 ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."). It was through this distorted lens that he criticized the majority for allowing states to regulate "*solely* upon the basis of race." *Id.* at 553, 559 (emphasis added).

at 332–33. The Court's other decisions affirming the constitutionality of the limited use of race in university admissions likewise build upon this core teaching of *Brown*. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Opinion of Powell, J.); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 381, 388 (2016). *Grutter* and the other precedents that Petitioner would have this Court cast aside thus heeded, echoed, and reaffirmed *Brown*'s recognition that genuinely integrated education is "'the very foundation of good citizenship.'" 539 U.S. at 331 (quoting *Brown*, 347 U.S. at 493).

II. A Reversal of This Court's Longstanding Precedent on Race-Conscious Admissions Would Cause Immeasurable Harm to Public Education and the Legitimacy of this Court.

Some level of race-consciousness to ensure equal access to higher education remains critical to realizing the promise of *Brown*. A central premise of *Brown* was the fundamental role of public education in the development of full citizenship. *See Brown*, 347 U.S. at 493. Likewise, *Grutter*—and *Bakke* before it—recognized the need for diverse learning environments that are reflective of the multi-racial democracy in which we live. *Grutter* explained that universities, as a gateway to leadership in our society, must "be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 332. Although *Grutter*'s rationale for race-conscious admissions was not to remedy societal discrimination, *see id.* at 323, that decision recognized that race-conscious admissions remain necessary because "race unfortunately still matters" in accessing educational opportunities like

admission to selective colleges and universities. *Id.* at 333.

As it did in *Brown*, in *Grutter* this Court acknowledged the vital importance of the educational benefits of diversity and the need for racial integration to reap those educational benefits. *See Grutter*, 539 U.S. at 327–33. And *Grutter* embraced *Brown*'s imperative that students of all races have equal access to educational opportunities to help shape our country's future. Heeding Justice Powell's reasoning in *Bakke*, the *Grutter* Court affirmed that "'the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation.'" *Id.* at 324 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)). Likewise, as recently as 2016, this Court in *Fisher* recognized and applied *Grutter*'s guiding principle that universities must be free to pursue racial diversity because doing so prepares all students to function in "an increasingly diverse workforce and society." *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 381 (2016) (quoting *Grutter*, 539 U.S. at 330). It also reaffirmed the "enduring" importance to "our Nation's education system" of universities' ongoing "pursuit of diversity" through constitutionally permissible means. *Id.* at 388.

For over four decades, the Court has repeatedly recognized the principle that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. Yet, Petitioner now asks the Court to ignore the racial and ethnic diversity that have been so foundational to our Nation's success and vibrancy. The Court must reject Petitioner's efforts and stand by the same convictions that emanated from *Bakke*, *Grutter*, and *Fisher* to

ensure that our future leaders of tomorrow have the full benefits of the rich diversity we have today.

A. Black North Carolinians Fought Hard to Obtain Progress Towards Racial Integration at UNC, a Public Institution that Long Embraced a Race-Based Hierarchy.

Brown and its promise of equal educational opportunities for students of all races have particular significance in schools of higher learning like UNC, which imposed *de jure* racial segregation during most of its history.[5] Chartered in 1789, UNC is the Nation's oldest public university. However, it was not until 1951—over 160 years after its founding—that UNC admitted its first Black students, and then only in response to a federal court order. *See McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951).

Prior to that 1951 order, UNC kept its doors shut to Black Americans on the basis of their race. For example, in response to this Court's decision in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), which held that Black students must have substantially equal legal education facilities as white students or else be integrated into the state's white law school, North Carolina established what is now the

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[5] *See, e.g.*, Electronic folder No. 298: Negro Admissions 1950-1952, School of Law of the University of North Carolina, Collection Number 40046: Chapel Hill Records,1923–2005, https://finding-aids.lib.unc.edu/40046/ (hereinafter "UNC Law Chapel Hill Records") (including digitized scans of letters, internal memoranda, and correspondence detailing the University's rejection of several applicants for admission to the law school because of their race).

historically Black North Carolina Central University School of Law ("NC Central") to continue excluding Black students from UNC.[6] That same year, UNC's Graduate School also denied admission to pathbreaking civil rights attorney Pauli Murray solely because she was Black.[7] Murray's rejection letter informed her that "members of your race are not admitted to the University."[8]

In 1951, UNC was finally forced by the Fourth Circuit to admit Black students from NC Central to UNC School of Law. The court held that, due to unequal resources, integration was necessary because "the Negro [s]chool is clearly inferior to the white." *McKissick*, 187 F.2d at 950. In so holding, the court identified "material inequalities between the schools," including disparities in course offerings, law review

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[6] Mary Wright, *Mission Accomplished: The Unfinished Relationship between Black Law Schools and Their Historical Constituencies*, 39 N. C. Cent. L. Rev. 1, 4–5 (2016).

[7] UNC denied Murray's applications for admission twice—in 1938 and 1951. *See* UNC Law Chapel Hill Records, *supra* note 5 (including correspondence between Murray and a representative of the law school regarding Murray's second application for admission to UNC).

[8] Letter from Dean W.W. Pierson to Pauli Murray (Dec. 14, 1938), https://nationalhumanitiescenter.org/pds/maai3/protest/text1/paulimurray.pdf ("Under the laws of North Carolina, and under the resolutions of the Board of Trustees of the University of North Carolina, members of your race are not admitted to the University.").

opportunities, and faculty experience. *Id*. at 953.[9] Yet, despite this ruling and the subsequent decision by this Court in *Brown* in 1954, UNC continued to deny Black students admission to its undergraduate program.[10]

It was not until 1955, in a federal court ruling later affirmed by this Court, that UNC finally eliminated its *de jure* segregation policy.[11] *See Frasier v. Bd. of Trustees of the Univ. of North Carolina*, 134 F. Supp. 589 (M.D.N.C. 1955), *aff'd*, 350 U.S. 979 (1956). Even then, Black enrollment remained negligible into the 1960s. The University enrolled only four Black first-year students in 1960 and just eighteen in 1963.[12] And the state of North Carolina continued to resist desegregation of its higher education system for decades after *Brown*. In 1977, a federal judge concluded that North Carolina "ha[d] not achieved

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[9] Harvey Beech, James Lassiter, J. Kenneth Lee, Floyd McKissick, and James Robert Walker were the first Black students enrolled in UNC School of Law and faced fierce discrimination from the University including a segregated, dormitory, denial of access to the campus swimming pool, and denial of access to the student section at campus football games. *See* Oral History Interview with Harvey E. Beech (Sept. 25, 1996), https://docsouth.unc.edu/sohp/J-0075/menu.html.

[10] *See* UNC, *Paving the Way*, https://www.unc.edu/story/black-history-month-2020 (last visited July 20, 2022) (noting the first three Black undergraduates were admitted in 1955).

[11] The student plaintiffs in this successful legal challenge were represented by F.B. McKissick, the named plaintiff in *McKissick v. Carmichael*, who had been admitted to UNC Law School by court order. 187 F.2d 949 (1951).

[12] UNC, *First Black Undergraduate Students*, https://museum.unc.edu/exhibits/show/integration/leroy-frasier--john-lewis-bran (last visited July 20, 2022).

desegregation" of public higher education and had not "submitted acceptable and adequate desegregation plans" to the federal government. *Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977). Federal enforcement proceedings against North Carolina for failure to comply with those desegregation obligations persisted into the 1980s—making North Carolina a late holdout, even relative to other recalcitrant Southern states.[13] When it came to desegregating public universities, a former cabinet secretary responsible for enforcing Title VI "described North Carolina to be the most 'intractable state of all.'" *Adams v. Bell*, 711 F.2d 161, 178 n.36 (D.C. Cir. 1983) (en banc) (Skelly Wright, J., dissenting) (quoting Joseph A. Califano, Jr., Governing America 247 (1981)).

B. Overruling *Grutter* Would Undermine Ongoing Racial Integration in Public Educational Institutions Like UNC and Reinforce Racial Caste Systems.

In more recent times, UNC has made some incremental progress toward diversifying its campus. However, the increase in diversity resulting from UNC's race-conscious process continues to be modest as racial inequality persists. Black students constituting 8 percent of UNC's undergraduates is certainly an improvement from *de jure* segregation,

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[13] *See Uzzell v. Friday*, 592 F. Supp. 1502, 1513 (M.D.N.C. 1984) (summarizing this history); *State v. Dep't of Health, Educ., & Welfare*, 480 F. Supp. 929, 932 (E.D.N.C. 1979) (noting that "[a]ll the states preliminarily found in noncompliance [with desegregation obligations in higher education] have now had resubmitted proposals approved except North Carolina").

but hardly sufficient given that Black people comprise 22 percent of North Carolina's total state population.[14] Over the years, the University has especially struggled with enrolling and retaining Black men. From 2009 until at least 2017, UNC enrolled, at most, 125 Black men in an incoming first-year class of over 4,000 students—thus making Black men approximately 2.8 percent of the incoming class as compared to about 11 percent of the state's population.[15] In 2021, there were only 95 Black men enrolled in a first-year class of over

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[14] Data compiled by the U.S. Department of Education National Center for Education Statistics (NCES) and the U.S. Census Bureau. *See* Nat'l Ctr. for Educ. Statistics, *Integrated Postsecondary Education Data System*, https://nces.ed.gov/collegenavigator/?id=199120#enrolmt (last visited July 15, 2022); U.S. Census Bureau, *QuickFacts: North Carolina*, https://www.census.gov/quickfacts/NC (last visited July 15, 2022). Latino and Native American students are similarly underrepresented on UNC's campus. Latino students represent 8.5 percent of the student body, while they are 10.2 percent of the state population, and Native American students comprise 0.385 percent of UNC's student body, as compared to 1.6 percent of the state population. *Id.*

[15] *See* Colleen Moir, *Black male enrollment at UNC hasn't risen above 125 in a new class since 2009*, Daily Tar Heel (Feb. 27, 2017), https://www.dailytarheel.com/article/2017/02/black-male-enrollment-hasnt-risen-above-125; 2017 Class Profile, https://admissions.unc.edu/wp-content/uploads/sites/1130/2020/11/2017-Class-Profile.pdf (percentage calculated using incoming class total (4,355)); U.S. Census Bureau, *QuickFacts: North Carolina*, *supra* note 14 (North Carolina Black male population calculated by multiplying the Black population by the "all female" percentage).

4,500 students, representing just 2 percent of the class.[16]

As the District Court noted in the decision under review, even though UNC's current efforts to foster a diverse student body "demonstrate a marked contrast to the discriminatory and obstructionist policies that defined the University's approach to race for the vast majority of its existence," UNC students of color are still "confronted with racial epithets, as well as feeling isolated, ostracized, stereotyped and viewed as tokens in a number of University spaces." *SFFA v. UNC*, 567 F. Supp. 3d 580, 666–67 (M.D.N.C. 2021). The court further commented that underrepresented students of color, including Black, Latino, Hawaiian/Pacific Islander, and Native students, continue to be "admitted at lower rates than their white and Asian American counterparts, and those with the highest grades and SAT scores are denied twice as often as their white and Asian American peers." *Id*. at 667.

This underrepresentation would be further exacerbated should this Court categorically ban race-conscious admissions. In 2007, 2009, and 2012, UNC's admissions office repeatedly analyzed how various race-neutral efforts would impact the composition of its admitted classes and consistently found that no race-neutral alternative would produce a student body as diverse as its race-conscious process. UNC Br. In Opp'n 10. Moreover, in 2013, the University's Working Group on Race-Neutral Alternatives found that

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[16] *See* Ruth Samuel, *UNC-Chapel Hill has a problem retaining Black male students*, MediaHub (May 5, 2021), http://mediahub.unc.edu/unc-chapel-hill-has-a-problem-retaining-black-male-students.

removing all consideration of race in its admissions policies would result in either a decline in racial diversity, a decline in academic quality, or both. *Id*. The University's Committee on Race-Neutral Strategies met 16 times between 2016 and 2018 to consider race-neutral alternatives and concluded that none were workable because each would compromise the University's educational goals. *Id.*; *see also* Pet. App. 116–17. Instead, the committee recommended continued use of the university's lawful race-conscious admissions strategy. UNC Br. In Opp'n 10.

UNC's race-conscious admissions policy is especially necessary because, in North Carolina's primary and secondary schools, Black students are systemically denied fair opportunity to amass the very credentials UNC values in its admissions determinations. Due to "racialized tracking," or the disproportionate exclusion of students of color from challenging courses, Black and Latino students are underrepresented in advanced, honors, and gifted courses throughout the state.[17] In 2020, roughly 24 percent of students in North Carolina's public schools identified as Black and 19 percent as Latino.[18] Yet, in advanced or intellectually gifted courses, including honors, Advanced Placement, or International Baccalaureate, only less than 5 percent of students identified as Black

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[17] *See generally* Karolyn Tyson, Integration Interrupted: Tracking, Black Students, & Acting White after *Brown* (2011).

[18] North Carolina Dep't of Pub. Instruction, *DPI AIG Child Count, Statewide Overview* (Apr. 2019–2020), https://www.dpi.nc.gov/media/10011/download?attachment (percentage calculated using "Total Students Enrolled Statewide" by race and "Total NC Students Enrolled Statewide").

and approximately 5.8 percent as Latino.[19] Furthermore, a 2019 report found that Black, Latino, and Native American students in North Carolina experienced diminished educational access and outcomes compared to their white peers.[20] In addition to lower proportional enrollment in advanced classes, students of color in North Carolina have, on average, fewer opportunities to take honors courses, less access to experienced teachers, under-selection for academically and intellectually gifted programs, and increased out-of-school suspensions, among other race-based disparities.[21] This systemic inequality in educational access persists even when controlling for other variables, like socioeconomic status.[22] In short, in North Carolina K-12 education, race matters.

Petitioner's request that UNC be required to eliminate its race-conscious admissions process under the misnomer of "colorblindness," *see* Pet'r's Br. 69, would mandate ignorance of a student's race against the backdrop of stark racial inequalities in educational

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[19] *Id*.

[20] Nicholas P. Triplett & James E. Ford, *E(race)ing Inequities: The State of Racial Equity in North Carolina Public Schools*, Ctr. for Racial Equity in Educ. (2019), https://www.ednc.org/wp-content/uploads/2019/08/EducationNC_Eraceing-Inequities.pdf.

[21] *Id*.

[22] *Id*. at 31 (finding that Black students in North Carolina faced the largest disparity in access to honors courses, such that "Black students were 23 percent less likely than White students to take an honors course after controlling for other factors," and that "[a]pproximately 20,000 more Black students would have taken at least one honors course if they participated in honors courses at rates similar to White students").

opportunities. Such ignorance would also ensure that the racial stratification of North Carolina's K-12 schools carries over into a racial caste system in higher education and beyond.

Thus, in asking this Court to overrule *Grutter*, Petitioner seeks to reverse even the limited progress made towards racial integration and racial equality at UNC over the past six decades, and to reinforce the racial caste system attendant to a segregated educational system. The loss of race-conscious admissions would make it even more difficult, if not impossible, for UNC to counteract the chronic under-identification of talented and qualified students of color throughout the state, and it would entrench de facto segregation of the state's student population. *Id*. Moreover, a decrease in student diversity would foreclose important educational and professional opportunities for many people of color in the state, as UNC's academic programs are a pathway to prestigious honors, awards, and leadership positions throughout the state. For example, UNC's alumni include two Nobel Laureates, fifty-four Rhodes Scholars, and thirty-two of the state's governors, including its current governor.[23]

Similar measures prohibiting race-consciousness in admissions processes have already been adopted in other university systems and resulted in dramatic drops in Black student enrollment. In 1996,

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[23] *See* UNC, *By The Numbers*, https://www.unc.edu/about/by-the-numbers (last visited July 20, 2022); *see also* Carson Fish, *North Carolina Governors Who Went to UNC*, UNC University Libraries: Blog (Jan. 6, 2017), https://blogs.lib.unc.edu/uarms/2017/01/06/north-carolina-governors-at-unc.

California's Proposition 209 prohibited public universities from considering race as one of several factors for admission in its holistic review process.[24] Public universities in California saw immediate declines in Black student enrollment after the adoption of this measure. At UC Berkeley, Black student enrollment among incoming first-year students dropped by more than one-half from approximately 7 percent to 3 percent and has remained around that figure.[25] In the fall of 2019, just 2.8 percent of UC Berkeley's enrolled first-year students identified as Black.[26] Moreover, Proposition 209 caused a cumulative decline in the number of high-

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[24] Zachary Bleemer, *The Impact of Proposition 209 and access-oriented UC admissions policies on underrepresented UC applications, enrollment, and long-run student outcomes*, Inst. Res. & Acad. Planning, Univ. of Cal. Office of the President (2020), https://www.ucop.edu/institutional-research-academic-planning/_files/uc-affirmative-action.pdf.

[25] Brandon Yung, *Black students at UC Berkeley spearheaded statewide initiative to restore affirmative action*, Berkeleyside (July 9, 2020), https://www.berkeleyside.org/2020/07/09/black-students-uc-berkeley-diversity-proposition-209-proposition-16-affirmative-action-california; Inst. Res. & Acad. Planning, Univ. of Cal. Office of the President, *Freshman fall admissions summary*, https://www.universityofcalifornia.edu/infocenter/freshman-admissions-summary (last visited July 20, 2020) (to access relevant data, select "Freshman Enrollees," then select "ethnicity" and "African American").

[26] Yung, *supra* note 25.

earning, early-career Black and Latino Californians that persists more than twenty years later.[27]

Likewise, in 2006, Michigan's Proposition 2 banned consideration of race, color, sex, or religion in the state's public college admissions. Three years after its passage, Black student enrollment at the University of Michigan dropped by almost 10 percent.[28] Since 2010, Black student enrollment has remained around just 1,200, representing less than 4 percent of the overall campus population eclipsing 31,000 students.[29]

In light of UNC's history of racist exclusion even in the face of court orders, the inability to prevent resegregation of that public institution would be a tragic development for all of North Carolina, but especially for Black North Carolinians—some of whom personally experienced the constant degradation of *de jure* segregation, and others of whom continue to face the systemic deprivation of access to educational resources in the state's primary and secondary schools. *See supra* Section II.A. It would also carry profound symbolic weight in light of UNC's special status as the first public institution of higher learning in the United

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[27] *See, e.g.*, Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, Ctr. for Studies in Higher Educ., Univ. of Cal. Berkeley (2020), https://cshe.berkeley.edu/sites/default/files/publications/rops.cshe.10.2020.bleemer.prop209.8.20.2020_2.pdf.

[28] Adam Harris, *What Happens When a College's Affirmative-Action Policy is Found Illegal*, Atlantic (Oct. 26, 2018), https://www.theatlantic.com/education/archive/2018/10/when-college-cant-use-race-admissions/574126/.

[29] *Id.*; Univ. of Mich., *Facts and Figures* (2021), https://umich.edu/facts-figures (last updated May 2022).

States and the flagship of the University of North Carolina system.[30] A total bar on race-conscious admissions in higher education not only would negatively impact the number of underrepresented students of color in selective academic institutions, but also would significantly reduce the number of underrepresented students of color who graduate from professional and graduate educational programs and ultimately obtain leadership roles and employment in influential positions.[31] Such an outcome is impossible to square with the Court's promise of equal educational opportunity and full citizenship in *Brown*.

C. Overruling *Grutter* and Perpetuating an Entrenched Racial Caste System in Higher Education Would Undermine the Legitimacy of This Court.

This Court must reject Petitioner's invitation to use *Brown* as cover to subvert progress made in integrating public institutions, especially considering the significant negative impact such a decision would have on schools like UNC. *Brown* is widely regarded as one of the Court's crowning achievements that demonstrated the best of our constitutional principles and the rule of law. "In both legal consciousness and the popular imagination, *Brown v. Board of Education* exemplifies constitutional justice; a constitutional

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[30] *See infra* Section I.E.i (discussing the history of the University of North Carolina and the long struggle of Black students to gain admission to UNC).

[31] *See* Joni Hersch, *Affirmative Action and the Leadership Pipeline*, 96 Tulane L. Rev. 1, 5–7 (2021).

theory is widely thought to be disqualified from acceptance if it could not justify the result in *Brown*." Richard H. Fallon, Jr., Implementing the Constitution 56 (2018). Accordingly, *Brown* has remained "a primary source of sustained public confidence in the Court" for over half a century. Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 Harv. L. Rev. 1, 8 (2012). And *Brown*'s powerful legacy is inextricably tied to this Court's acknowledgment of the realities of race and race discrimination in the United States.

UNC's own checkered journey toward integrated education is intertwined with *Brown's* legacy: UNC did not voluntarily integrate its student body, but instead was forced to acknowledge the dignity and equality of Black people through the power of the federal courts, most significantly this Court's *Brown* decision. Given the long history of racial segregation at UNC, this Court risks its own legitimacy and the legitimacy of the rule of law if it knowingly undermines canonical precedent to foreclose educational and professional opportunities to students of color who have been unable, for too long, to seek admission to higher education on a level playing field. The growing resegregation of a prominent public institution like UNC would be anathema to this Court's recognition in *Brown* that our Constitution requires educational opportunities for students of all races so that our future leaders represent the full breadth of available talent. Petitioner invites this Court to rewrite history and the law. A faithful interpretation of *Brown* and the principle of *stare decisis* demand that this Court reject that invitation, and we respectfully urge the Court to do so.

CONCLUSION

For the foregoing reasons, *Amici Curiae* NAACP Legal Defense and Educational Fund, Inc. and the National Association for the Advancement of Colored People respectfully support affirmation of the decision below.

Respectfully submitted,

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