Nos. 20-1199 & 21-707

In The Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLL.,
Respondent.

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals of the First and Fourth Circuits

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, REASON FOUNDATION, CHINESE AMERICAN CITIZENS ALLIANCE – GREATER NEW YORK, YI FANG CHEN, COALITION FOR TJ, COMMITTEE FOR JUSTICE, WARD CONNERLY, AND ERFA PAC IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

3. The Constitution and Title VI ban race-based admissions unless they are "'necessary'" to achieve the educational benefits of diversity. *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 312 (2013). Can the University of North Carolina reject a race-neutral alternative because the composition of its student body would change, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student body diversity?

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INTEREST OF AMICI CURIAE

Founded in 1973, **Pacific Legal Foundation (PLF)** is a nonprofit legal foundation that defends the principles of liberty and limited government, including equality before the law.[1] For over 45 years, PLF has litigated in support of the rights of individuals to be free from racial discrimination. PLF is currently litigating, or has recently litigated, to vindicate the equal protection rights of children in New York, Virginia, Connecticut, and Maryland; small business owners in Colorado; and farmers in Florida, Illinois, and several other states. *See, e.g.*, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 21-296, ECF No. 144 (E.D. Va. Feb. 25, 2022) (granting plaintiff's motion for summary judgment in case challenging racial discrimination in K-12 admissions); *Collins v. Meyers*, No. 21-2713, ECF No. 14 (D. Col. Oct. 12, 2021) (granting TRO in case involving minority-owned business preference in COVID relief program); *Wynn v. Vilsack*, No. 21-514, ECF No. 41, 2021 WL 2580678 (M.D. Fla. June 23, 2021) (granting preliminary injunction against USDA's race-based farm loan forgiveness program). PLF has also participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365 (2016) (*Fisher*

[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

II); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The **Center for Equal Opportunity (CEO)** is a research and education organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code and devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies do not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. E pluribus unum: out of many, one. CEO supports colorblind policies and seeks to block the expansion of racial preferences in all areas. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved*, 551 U.S. 701; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Reason Foundation (Reason) is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason Magazine, as well as

commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets" and equality before the law, Reason selectively participates as amicus curiae in cases raising significant constitutional issues. Reason has participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades.

The **Chinese American Citizens Alliance - Greater New York (CACAGNY)** is a chapter of the Chinese American Citizens Alliance, the oldest Asian American advocacy group in the country. CACAGNY's mission is to empower Chinese Americans, as citizens of the United States of America, by advocating for Chinese-American interests based on the principles of fairness and equal opportunity, and guided by the ideals of patriotism, civility, dedication to family and culture, and the highest ethical and moral standards.

Yi Fang Chen is a mother of a fourth grader at P.S. 102 in Brooklyn. Ms. Chen was born in China and moved to the United States in 1996. Although she came to this country speaking little English, she eventually obtained a doctorate in statistics from Stanford University, and now works as a data scientist in Manhattan. PLF currently represents Ms. Chen and CACAGNY in a lawsuit challenging New York City's discriminatory changes to its admissions program for the city's specialized schools. *See Christa McAuliffe Intermediate School PTO, Inc., et al. v. De Blasio, et al.*, No. 18-11657 (S.D.N.Y. filed Dec. 13, 2018).

The **Coalition for TJ** is a group of parents, students, alumni, and community members of Thomas Jefferson High School for Science and

Technology, known as "TJ." The Coalition's approximately 5,000 supporters are primarily Asian American parents, who regularly attend and speak at school board meetings, organize rallies, engage legislators, and educate their community on the value of merit-based admissions for specialized schools like TJ. PLF currently represents the Coalition for TJ in its challenge to Fairfax County's discriminatory changes to its admissions policy for Thomas Jefferson High School for Science and Technology. *See Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 21-296 (E.D. Va. filed Mar. 10, 2021).

Founded in 2002, the **Committee for Justice (CFJ)** is a nonprofit, nonpartisan legal and policy organization dedicated to promoting the rule of law and preserving the Constitution's protection of individual liberty. Central to this mission is the imperative for the judiciary to engage in objective, textualist interpretation of our statutes and the Constitution, including the prohibitions on racial discrimination in the Equal Protection Clause and Title VI of the 1964 Civil Rights Act. CFJ advances its mission by supporting constitutionalist nominees to the federal judiciary, filing amicus curiae briefs in key cases, analyzing judicial decisions with respect to the rule of law, and educating government officials and the American people about the Constitution and the proper role of the courts.

Ward Connerly is a former University of California Regent. He is also the founder and the chairman of the American Civil Rights Institute ("Yes on Prop 209" campaign, won in 1996), the president of Californians for Equal Rights ("No on Prop 16" campaign, won in 2020), and the founder and the

president of Equal Rights for All PAC. Mr. Connerly, in his individual capacity and through the American Civil Rights Foundation, has litigated many cases enforcing Proposition 209 (Article I, Section 31, of the California Constitution), which bars discrimination and preferences in government contracting, employment, and education on the basis of race, ethnicity, or sex. *See, e.g.*, *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001); *American Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (2009); *American Civil Rights Found. v. Los Angeles Unified Sch. Dist.*, 169 Cal. App. 4th 436 (2008).

Equal Rights for All PAC (ERFA) is a political action committee that believes that equal rights and the supremacy of personal liberties are at the heart of America's founding. To this end, ERFA seeks to identify, nurture, and contribute to political leaders who support equal rights for all citizens. ERFA PAC's leadership includes individuals who are strongly committed to the principle of equality before the law, such as Xiaohua (Tony) Guan, Simone Brown, Amy Yuan, Debbie Ferrari, Gaurang Desai, Aida "Tessie" Crosby, and Ronald L. Fong.

INTRODUCTION AND SUMMARY OF ARGUMENT

America was built on a principle. "All men are created equal"—each endowed with "unalienable Rights" such as "Life, Liberty, and the pursuit of Happiness." Decl. of Independence. The Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act safeguard this important principle. They ensure not equality of outcomes, but equality of liberty. As Senator Jacob

Howard from Michigan, in a speech introducing the Fourteenth Amendment to the United States Senate in 1866 put it, the Amendment "establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard). Equal protection of the laws is an *individual* right. It stands in stark contrast to equality of outcomes among *groups*—which has no basis in the Constitution. As the late Justice Scalia proclaimed, "individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race." *Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring). "That concept is alien to the Constitution's focus upon the individual and its rejection of dispositions based on race." *Id.* (cleaned up). "In the eyes of government, we are just one race here. It is American." *Id.* In other words, we are all individuals who share a universal bond. By virtue of our humanity, we are entitled to pursue happiness free from arbitrary or onerous government encumbrances.

This case involves a cornerstone of opportunity: Education. Harvard University is regarded by many as the best university in the world. The school has produced several U.S. presidents, several corporate CEOs, and countless judges—including current and former justices of the Supreme Court of the United States. Moreover, Harvard touts among its alumni nearly two hundred billionaires, dozens of Nobel laureates, and over three hundred Rhodes Scholars.

The University of North Carolina is among the best public universities in the world. Well-known Tar Heels include a president (James Polk), dozens of business leaders, and several professional athletes including, of course, Michael Jordan.

Both Harvard and UNC use racial preferences in admissions. Harvard admissions officers use summaries containing demographic information throughout the admissions process. Harvard Pet. App. 24. These "one-pagers" contain racial statistics and are "periodically shared with the full admissions committee" in part "to ensure that there is not a dramatic drop-off in applicants with certain characteristics—including race—from year to year." *Id.* Similarly, every applicant to UNC must complete a common application, UNC Pet. App. 167, which allows the applicant to identify as a member of a racial or ethnic group, such as white, black, Hispanic, or Asian. UNC's admissions policy favors members of underrepresented minority groups, which is defined as any group "whose percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina." UNC Pet. App. 15 n.7. For more than three decades, UNC has considered "students identifying themselves as African American or [B]lack; American Indian or Alaska Native; or Hispanic, Latino, or Latina" as underrepresented minorities. *Id.*; *see also* UNC Pet. App. 4 n.2 (referring to students who self-identify as members of those groups as "students of color").

This Court should put an end to the race-based component of the universities' admissions policies for three reasons. *First*, racial balancing is pernicious. It

makes no difference whether such balancing comes in the form of a candid acknowledgement on the part of the universities that they are engaging in such practices or are instead implemented under the guise of pursuing diversity. Either way, the practice is antithetical to the principle of equality before the law. *Second*, as many of the amici have experienced first-hand, the pernicious practice of racial balancing has spread to K-12 education, where it is now depriving children of spots at some of the best public schools in the nation solely because of their race. *Third*, the constitutional path toward advancing opportunity for all is not creating racial entitlements, but tearing down obstacles to opportunity, such as unnecessary and burdensome occupational licensing laws, the public-school monopoly, and unlawful housing regulations. Thus, this Court should enhance equality and opportunity for all Americans by strongly protecting all of their civil rights, including the right to equality before the law, the right to earn a living, and the right to property. The judgments below should be reversed.

ARGUMENT

I. Racial Balancing Is Inconsistent with the Principle of Equality Before the Law

The admissions policies upheld by the courts below engage in illegal racial balancing. Under the guise of furthering an amorphous interest in the educational benefits of diversity, the universities provide preferences based on an individual's purported membership in a racial group. The one-pagers at Harvard contain racial statistics and are employed by the admissions committee to ensure that the racial composition of Harvard University remains similar

from year to year. Harvard Pet. App. 135–37. It is a similar story at the University of North Carolina. The admissions policy there gives a boost to members of underrepresented minority groups, which is calculated by comparing the racial demographics of the undergraduate student body with the racial demographics of the general population of North Carolina. UNC App. 15 n.7.

These efforts are contrary to the principle of equal protection in multiple respects. *First*, although the Equal Protection Clause protects equality of treatment and enjoyment of one's civil rights, these efforts focus on equality of outcomes. This ignores the fundamental principle of the Equal Protection Clause —which requires government to treat individuals based on their personal qualities instead of their membership in a crudely defined racial group. *See Miller v. Johnson*, 515 U.S. 900, 912 (1995) (citation omitted) ("Race-based assignments embody stereotypes that treat individuals as the product of their race."). Efforts to balance the student population at universities like Harvard to produce a racial or ethnic outcome have a long and deplorable pedigree. Roughly a century ago, Harvard maintained a "holistic" admissions process designed to limit the number of Jewish students enrolled at the university. An admissions subcommittee collected information about a student's name, place of birth, as well as information about the student's parents. The subcommittee would then give applicants ratings such as J1, J2, or J3—connoting whether the evidence pointed "conclusively to the fact that the student was Jewish," a "preponderance of evidence" suggested that the student was Jewish, or "the evidence suggested the possibility that the student was Jewish." Jerome

Karabel, The Chosen: The Hidden History of Admissions at Harvard, Yale, and Princeton 96 (2005).

Even today, stories of high school students who aspire to attend schools like Harvard underscore that the school's obsession with the racial composition of its class continues to produce noxious results.[2] College guidebooks like the *Princeton Review* advise Asian American applicants to "be careful about what [they] say and don't say in [their] application[s]." Princeton Review, Cracking College Admissions 174 (2d ed. 2004). Asian American students who aspire to attend Harvard are encouraged to take steps to "avoid being an Asian Joe Bloggs." *Id.* at 175. Asian American applicants must "distance [themselves] as much as possible from" stereotypes. *Id.* at 176. The guide implores Asian American students to disavow any aspiration of being a doctor or an engineer, and to "get involved in activities other than math club, chess club, and computer club." *Id.* at 175.

The principle of equality before the law embodies the promise that race will not stand between individuals and their dreams. Yet Asian American students who want to attend Harvard are incentivized to forgo a career in medicine, math, and sciences—all because there happen to be "too many Asians" in those programs. This leads to devastating consequences. As one Chinese American student at Yale recounted, "I quit piano, viewing the instrument as a totem of my race's overeager striving in America. I opted to spend

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[2] Amici use "students" and "applicants" interchangeably given that applicants to universities are high school students, applicants to specialized high schools are middle school students, and so on.

much of my time writing plays and film reviews—pursuits I genuinely did find rewarding but which I also chose so I wouldn't be pigeonholed." Althea Nagai, *Too Many Asian Americans: Affirmative Discrimination in Elite College Admissions*, Center for Equal Opportunity, May 22, 2018.[3]

Second, the group-based equality sought by many universities today rests on arbitrary racial classifications. The term "Hispanic," for instance, does not describe a common background, designate a common language, or even describe gross physical appearance. *See* Peter Wood, Diversity: The Invention of a Concept at 25 (2003). And "Asians" make up roughly 60 percent of the world's population and encompass people of Chinese, Indian, Filipino, and many more backgrounds. David E. Bernstein, *The Modern American Law of Race*, 94 S. Cal. L. Rev. 171, 182–83 (2021). A *New York Times* article from nearly a decade ago provides a memorable illustration. *See* Erika Allen, *A Couple Who See Race Clearly*, N.Y. Times, Aug. 23, 2013.[4] The article profiles a couple who did not realize that they were of different races until their first date. Laura assumed Christopher was black, and Christopher assumed Laura was white. They were both wrong. Christopher is Italian; Laura is African American. Speaking of their three kids, who all look very different, Laura says, "They all identify as biracial. We taught them that they did not have to choose. You are what you are and if someone wants to

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[3] http://www.ceousa.org/attachments/article/1209/AN.Too%20Many%20AsianAms.Final.pdf.

[4] http://www.nytimes.com/2013/08/23/booming/starting-out-us-against-the-world-but-still-together.html?pagewanted=all&_r=0.

make it a problem it is theirs." Justice Kennedy has voiced similar sentiments in other cases involving racial preferences. Racial labels, whether state-mandated or state-sponsored, are "inconsistent with the dignity of individuals in our society." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). That is because racial labels require their creator to "first define what it means to be of a race." *Id.* In that process, they impinge on the right of every individual to "find his own identity," and "define her own persona, without state intervention that classifies on the basis of his race or the color of her skin." *Id.*

II. Racial Balancing Under the Guise of Diversity Has Infected K-12 Education, Where It Denies Students Opportunities Because of Their Race

Although *Grutter* was originally intended as a limited exception to the antidiscrimination principle, the decision increasingly threatens to swallow the Fourteenth Amendment's rule of affording all individuals equal justice under law. The story of how racial balancing in K-12 schools has slipped the leash of this Court's precedents illustrates how difficult it is to constrain racial discrimination once courts open Pandora's Box even a crack.

Grutter's (erroneous) holding reflected considerations unique to higher education. The *Grutter* majority endorsed racial preferences in the context of higher education in "keeping with [the Court's] tradition of giving a degree of deference to a university's academic decisions" and "the expansive freedoms of speech and thought associated with the university environment." *Grutter*, 539 U.S. at 329. In *Parents Involved*, this Court asserted "key limitations

on [*Grutter*'s] holding," including the "unique context of higher education." *Parents Involved*, 551 U.S. at 725.

Notwithstanding those limitations, school districts across the country have used race in K-12 admissions, notably in replacing admissions procedures at selective middle and high schools when administrators determine there are "too many" or "too few" students of certain races. Amici include parents and their advocates who have direct experience with these cases, which involve admissions policies at Thomas Jefferson High School in Alexandria, Virginia; magnet middle schools in Montgomery County, Maryland; world-class magnet schools in Hartford, Connecticut; and the renowned specialized high schools of New York City. Some common themes run throughout these cases. The admissions policies at issue in these cases were driven by an interest in increasing racial diversity at the schools. But they were implemented at the expense of other, highly-deserving applicants—all because they are members of a disfavored racial group. What is more, the revised admissions programs at these schools do nothing to improve outcomes for all students, but instead promote a "race to the bottom" by eliminating metrics that measure academic achievement.

A. Thomas Jefferson High School in Virginia

Thomas Jefferson High School ("TJ") in Alexandria, Virginia—a public magnet high school specializing in advanced instruction in science, technology, and mathematics—has been ranked the nation's number one public high school by *U.S. News and World Report*. The school is ethnically diverse,

with over thirty nationalities represented and many students who are recent immigrants or children of recent immigrants.

TJ's admissions process is highly competitive. Until 2020, a famously demanding set of standardized tests were an important component of the TJ application process. Members of the Coalition for TJ, an organization of primarily Asian American parents with a mission to advocate for diversity and excellence at TJ, often recount stories of families gathering together in the evenings to go over questions, making test prep a family affair. While TJ's sometimes highly competitive environment is not necessarily the right fit for every student, many of its graduates value how much it has pushed them to accomplishments beyond their dreams. As entrepreneur Howard Lerman observed, TJ "gave [him] the opportunity to" start multiple companies, "back dozens more, [and] create thousands of jobs."[5]

Yet in Fall 2020, the Fairfax County School Board, which governs admissions to TJ, overhauled the admissions process. The Coalition for TJ, represented by Pacific Legal Foundation, challenged the Board's action in federal court—alleging that the Board's decision to revise the admissions process was motivated by a discriminatory purpose and produced a discriminatory effect. *See Coal. for TJ*, No. 21-296. The Board's decision to overhaul the admissions process was undertaken against the backdrop of George Floyd's murder; a Virginia diversity, equity, and inclusion reporting requirement; and a low number of black students earning admission to TJ

[5] https://twitter.com/howard/status/1497766101375062023.

during the previous admission cycle. In a procedurally irregular vote at a "work session," the Board removed the admissions test and set up a new system. Four hundred TJ slots were allocated to the top 1.5% of students from each Fairfax County public school, with 100 left for any students not qualifying through the 1.5% guarantee. Students from underrepresented middle schools within that latter pool received an additional boost. *See* Memorandum Opinion granting Plaintiff's Mot. for Summary Judgment, *Coal. for TJ*, No. 21-296, ECF No. 143 at 4 (E.D. Va. Feb. 25, 2022) Because Asian American students tend to be concentrated in particular Fairfax County middle schools, some of which offer specialized courses for gifted students, it was predictable that the new procedures would lead to sharply decreased Asian American enrollment. Indeed, the year after the changes, there were 56 fewer Asian Americans than in the previous year (despite a larger class size), and the percentage of the admitted class that was Asian American dropped from 73% to 54%. *Id.* at 4–5.

The Board's changes to the admissions process at TJ were motivated by a racial purpose. The Board's restructuring of admissions was "infected with talk of racial balancing from its inception." *Id.* at 25. The first proposal the Board considered declared that TJ "should reflect the diversity of [Fairfax County Public Schools], the community and Northern Virginia." *Id.* at 7. Slides presented at a September 2020 work session—which first compared historical TJ admissions data by race with the school district's overall racial demographics and then discussed the racial impact of the proposed changes—indicated the Board understood "diversity" to mean primarily "racial diversity." *Id.* at 20. It also adopted a

resolution declaring its goal as having "TJ's demographics represent" the demographics of Northern Virginia. *Id.* at 8.

Communications among School Board members also showed racial motivations at play. Board members Abrar Omeish and Stella Pekarsky recognized that Asian Americans are "discriminated against in this process," that "there has been an anti [A]sian feel underlying some of this," and that the superintendent has "made it obvious" with "racist" and "demeaning" references to "pay to play," referring to test prep for the former TJ admissions exam. *Coalition for TJ v. Fairfax County School Board*, Emergency Application to Vacate the Stay Pending Appeal at 6 (No. 21A590, docketed Apr. 8, 2022).[6] Ms. Pekarsky acknowledged the racial motivations behind the changes when she communicated to a colleague that one of the superintendent's proposals would "whiten our schools and kick [out] Asians" and asked, "How is that achieving the goals of diversity?" *Id.*

On cross-motions for summary judgment, the district court held that the Board's use of racial proxies discriminated against Asian Americans in violation of the Equal Protection Clause. Memorandum Opinion, *Coal. for TJ*, No. 21-296, ECF No. 143 at 30. A divided Fourth Circuit panel stayed the district court's judgment pending appeal. This Court denied the Coalition's application to vacate the stay over the dissent of three justices. *See* Order, No. 21A590, *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*

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[6] https://pacificlegal.org/wp-content/uploads/2022/04/2022.04.08-Coalition-for-TJ-emergency-application.pdf.

(Apr. 25, 2022), and the case is currently being briefed on an expedited basis in the Fourth Circuit.

B. Magnet Middle Schools in Montgomery County, Maryland

Montgomery County Public Schools (MCPS) is Maryland's largest public school district, the 14th largest district in the country, and one of the best public school districts in the state. MCPS operates four selective middle school magnet programs—two focus on humanities and two focus on Science, Technology, Engineering, and Mathematics (STEM) programs. *See Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ.*, No. 20-2540, 2021 WL 4197458 (D. Md. Sept. 15, 2021), slip op. at 3; Compl. at 7.

These magnet schools offer opportunity to gifted students who want to attend a school tailored to their ability, but whose parents do not have the means to send them to expensive private schools. In 2014, Asian American students occupied 45.5% of the magnet middle school seats. *Id.*

That appeared to be a problem for the school district, which hired a consulting firm to study the district's academic programs and recommend ways to make them more "equitable." The school district's revised admissions process was to consider whether applicants to these magnet schools attended schools with academic peer groups, defined as a cohort of 20 or more students with comparable academic achievements. *Ass'n for Educ. Fairness*, 2021 WL 4197458, slip op. at 12. Because Asian American students in Montgomery County disproportionately cluster in academically high-achieving elementary schools, the peer group criteria produced the insidious

effect of filtering out high performing Asian American students who previously would have been able to attend the magnet middle schools merely because those students attended elementary schools alongside other high performing Asian American students. *Id.* at 13.

Represented by Pacific Legal Foundation, the Association for Education Fairness—which counts many parents of children seeking admission to magnet middle schools as its members—challenged Montgomery County's admissions changes. The Association argued that the changes violated the Fourteenth Amendment because they were animated by an intent to reduce the number of Asian American students at the magnet middle schools and had the effect of doing precisely that. The district court denied the school board's motion to dismiss. In so doing, the court held that the statements of board members could reflect a discriminatory purpose, and there was "no real dispute" that the revised admissions scheme "disproportionately affected Asian American students." *Id.* at 34, 36.[7]

C. Stuyvesant, Bronx Science, and Specialized High Schools in New York

New York City's nine specialized high schools are among the most academically rigorous and prestigious in the country. Their students' achievements are all the more impressive given that

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[7] After the lawsuit was filed, MCPS announced another change to the admissions process that it stated was related to the COVID-19 pandemic. Yet the new admissions process continues to discriminate against Asian American students. *See* Am. Compl., *Ass'n for Educ. Fairness*, No. 20-2540, ECF No. 23 at ¶¶ 87, 89.

many are recent immigrants and come from poor backgrounds. According to the demographics of one recent class at Stuyvesant High School, for instance, 44.3% of students are eligible for free or reduced-price lunch, yet 75% of students score over 1470 out of 1600 on the SAT I. *See Christa McAuliffe PTO v. de Blasio,* No. 18-11657, Compl., ECF No. 1 at ¶ 17 (2017–18 demographics). These schools have provided a path towards a better future for many of New York's residents. Stuyvesant has produced four Nobel laureates; Bronx Science, another specialized school, has produced eight. *Id.* at 7.

Admission to these schools has long been governed by performance on an objective standardized test. Yet that was not enough for then-Mayor Bill de Blasio and Richard Carranza, who was at the time Chancellor of the New York City Department of Education. The problem, as they saw it, is that the percentage of Asian American students at these schools outnumbered the percentage of Asian Americans in the general population. According to de Blasio, the fact that the demographics in specialized schools did not reflect the demographics of the general population was a "monumental injustice." Bill de Blasio, *Mayor Bill de Blasio: Our specialized schools have a diversity problem. Let's fix it*, Chalkbeat (June 2, 2018).[8]

With an eye toward achieving a different racial balance, New York City school officials revised the Discovery program, which originally offered economically disadvantaged students scoring just below the exam cut-off an opportunity to attend

[8] https://ny.chalkbeat.org/2018/6/2/21105076/mayor-bill-de-blasio-our-specialized-schools-have-a-diversity-problem-let-s-fix-it.

specialized schools. Beginning with the 2018–19 admissions cycle, however, Mayor de Blasio and Chancellor Carranza revised the definition of "economically disadvantaged" with the goal of cutting off access to students from certain low-income schools—those that were predominantly Asian American. Pacific Legal Foundation represented a group of plaintiffs, including a parent-teacher organization at Christa McAuliffe Intermediate School, in challenging the revisions to the admissions program.

Students at Christa McAuliffe previously qualified for admission to specialized schools through the Discovery Program. The school was considered "economically disadvantaged," because roughly two-thirds of its students were in poverty. But in an effort to increase diversity at specialized schools, Mayor de Blasio and Chancellor Carranza revised the Discovery Program to exclude Christa McAuliffe's students—most of whom were low-income Asian American students. As a result, Asian American students whose parents were not wealthy enough to send them to private school could now no longer access specialized schools under a program designed for students with precisely their socioeconomic status.

D. World-Class Magnet Schools in Hartford, Connecticut

In Hartford, Connecticut, efforts at racial balancing have prevented black and Hispanic students stuck in failing neighborhood schools from accessing the opportunities offered by magnet schools. *See Robinson v. Wentzell*, 18-cv-274 (D. Conn. filed Feb. 15, 2018). Thousands of Hartford's most needy students suffered under an education bureaucracy

that is more concerned with the color of a child's skin than their academic future. A quota reserved 25 percent of the seats at Hartford magnet schools for white and Asian students. But because not enough white and Asian students—many of whom were already attending high-quality schools in the suburbs—wanted to commute to attend magnet schools in Hartford, black and Hispanic students in the City of Hartford languished on waitlists to magnet schools with empty seats.

These efforts trace back to a Connecticut Supreme Court decision, *Sheff v. O'Neill*, 238 Conn. 1 (1996), holding that racial imbalance in Hartford's public schools violated the state constitution. A stipulation between the parties in *Sheff* required magnet schools to be at least 25% white or Asian to reduce "racial isolation." *Id.* Yet this had insidious effects. Rather than increasing opportunity by filling empty seats at world-class magnet schools, this program prevented black and Hispanic students from the City of Hartford from obtaining a better education all because of an interest in racial diversity. Yet the neighborhood schools from which these students were attempting to escape were even more "racially isolated" and, worse, were failing the students. Pacific Legal Foundation represented eight black and Hispanic parents whose children were stuck on waitlists of world-class magnet schools. The State of Connecticut eventually entered into a settlement agreement that abandoned the pernicious racial quotas.[9]

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[9] Press Release, *Victory for Hartford Families Fighting Schools' Racial Discrimination*, Pacific Legal Foundation, Jan. 29, 2020, https://pacificlegal.org/press-release/victory-for-hartford-families-fighting-schools-racial-discrimination/.

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The cases above concern different admissions programs, different schools, and different students. But two common themes run through all of them. First, although schools should be doing the hard work of innovating to increase opportunity for low-performing students, many of these cases involve government efforts to paper over real problems by eliminating objective measures of performance. This "race to the bottom" has no place in education. Instead, students should be encouraged to strive for academic excellence. Second, although marketed as more inclusive, the revised programs in these cases have the pernicious effect of keeping out deserving students on account of their race. This is inconsistent with the principle of equality before the law.

III. This Court Should Advance Equality and Opportunity By Strongly Enforcing Constitutional Rights

Racial preferences create mismatch rather than opportunities. *See* Althea Nagai, *Campus Diversity and Student Discontent: The Cost of Race and Ethnic Preferences in College Admissions*, Center for Equal Opportunity, Jan. 27, 2021.[10] Summarizing the current research, the Center for Equal Opportunity concluded that racial preferences harm the very students they purportedly benefit. *Id.* at 29–30. Students who receive racial preferences are more likely to transfer to other schools, take longer to graduate, and are less satisfied with their college

[10]https://www.ceousa.org/2021/01/27/campus-diversity-andstudent-discontent-the-costs-of-race-and-ethnic-preferences-incollege-admissions-2/.

experience than those students who do not receive a racial preference in admissions. *Id.* Thus, racial preferences do not increase opportunities even for their intended beneficiaries. There is a better path to enhance opportunities for all Americans—one that involves enforcing civil rights rather than sidestepping the principle of equal protection and handing out benefits and burdens on the basis of race.

First, this Court should vindicate the right to earn a living. The constitutional right to earn a living is central to individual dignity and empowerment—and one that ought to be considered fundamental under the Due Process Clause of the Fourteenth Amendment. *See generally* Timothy Sandefur, *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty* (2015). Yet the right to earn a living has been relegated to second-tier status. When considering challenges to laws that infringe one's right to earn a living, courts often apply the "anything goes" approach of the rational basis test. One judge even summarized his belief that the test requires judges to "cup [their] hands over [their] eyes." *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

The results have been tragic for people seeking to escape their circumstances or earn a living for their families. For example, one court recently rubber stamped a law that has kept Ursula Newell-Davis—a social worker and mother of a special needs child—from providing care to disabled children in New Orleans. *See* Order on Motions for Summary Judgment, *Ursula Newell-Davis v. Phillips*, No. 21-49, ECF 107 (E.D. La. Mar. 22, 2022). The restriction, called Facility Need Review, allows the state to keep

qualified applicants from providing care to special needs children when it believes another provider is "not needed." The government did not have one piece of evidence that the restriction benefitted the public and instead attempted to justify it by claiming that it saves the government from having to spend resources regulating additional providers. On that reasoning, and despite dozens of studies showing that Facility Need Review wreaks substantial harm to entrepreneurs and the children they seek to serve, the court upheld the law.

This cannot be right. The right to earn a living provides people like Ursula the ability to pursue their passions and it gives families the care that they desperately need. Individuals ought to be permitted to seek refuge in the courts when the legislature deprives them of this fundamental right. Yet the rational basis test leaves entrepreneurs, small business owners, and other Americans without shelter. By offering the protection that the Constitution affords to economic liberty, this Court can mark a better path for Ursula and individuals like her: One grounded firmly on her right to make the most for herself based on her individual abilities rather than on her membership in any collective group.

Second, this Court should continue to enforce the right of parents to choose the best school for their children. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (affirming the "liberty of parents and guardians to direct the upbringing and education of children under their control"). In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2251 (2020), this Court invalidated Montana's rule preventing

parents and children from participating in the state's school choice program because of a school's religious affiliation. As Justice Alito observed in his concurring opinion in that case, laws that stifle school choice can often trace their roots to the failed Blaine Amendment, which "was prompted by virulent prejudice against immigrants, particularly Catholic immigrants." *Id.* at 2268 (Alito, J., concurring).

Today, barriers to school choice primarily stifle opportunity for those from disadvantaged backgrounds. *See* Patrick J. Wolf, *Programs Benefit Disadvantaged Students*, EducationNext, Spring 2018, Vol. 18, No. 2.[11] Because children from wealthy families typically go to good schools, school choice caters primarily to "families that are most in need of school choice—minorities, low-income households, and students with lower prior academic achievement." Corey DeAngelis, *Vouchers Tend to Serve the Less Advantaged*, EducationNext (Mar. 8, 2018).[12] School choice has produced tremendous results for many of those families. Studies have found that school choice participants fare better in terms of ultimate educational attainment—high school graduation, college graduation, and so on. Wolf, *supra*. Participation in Florida's tax credit scholarship program, for instance, increased the college enrollment rate by 15% to 43% depending on how long the student participated in the program. *Id.* And a study of Washington, D.C.'s Opportunity Scholarship Program, which gives low-income families choice,

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[11] https://www.educationnext.org/programs-benefit-disadvantaged-students-forum-private-school-choice/.

[12] https://www.educationnext.org/vouchers-tendserve-less-advantaged/.

showed that it raised the likelihood that participating students would complete high school by 12%. *See* Patrick Wolf, et al., U.S. Dep't of Educ., Evaluation of the D.C. Opportunity Scholarship Program: Final Report 41 (June 2010).[13] Thus, this Court's decisions vindicating the right of parents to choose the best schools for their children expand opportunity for all.

Third, the Court should expand opportunity for all by taking a fresh look at housing policies that wrongfully deprive individuals of their property rights. "Property rights are fundamental." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2081 (2021) (Kavanaugh, J., concurring). But government often puts that right out of reach for many Americans. One example is rent control laws. Studies have shown that rent control laws decrease the supply of housing and drive up the cost. *See* Michael Hendrix, *Issues 2020: Rent Control Does Not Make Housing More Affordable*, Manhattan Institute (Jan. 8, 2020). Because rent control benefits incumbents who were able to obtain housing long ago, rent control laws disproportionately harm black and Hispanic individuals. *See id.* Rent control laws can also raise significant constitutional concerns. In one case, a federal district court declared unconstitutional a San Francisco ordinance that "require[d] property owners wishing to withdraw their rent-controlled property from the rental market to pay a lump sum to displaced tenants." *Levin v. City and Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1074 (N.D. Cal. 2014). The court held that "the Ordinance effects an unconstitutional taking by conditioning property owners' right to withdraw their property [from the rental market] on a monetary exaction not

[13] https://ies.ed.gov/ncee/pubs/20104018/ pdf/20104018.pdf.

sufficiently related to the impact of the withdrawal." *Id.*

Other examples come in the form of zoning laws based on prejudice or community opposition masked by facially neutral justifications. These laws include bans on low-income housing and senior living facilities, and restrictions on the number of individuals that can reside in each home. As scholar Ilya Somin has explained, the elimination of these zoning laws would "expand[] housing and job opportunities for the poor," and eliminate restrictions that were routinely "established for the purpose of keeping out African Americans and other racial minorities." *See* Ilya Somin, *A Cross-Ideological Case for Ending Exclusionary Zoning*, Reason, Apr. 28, 2021. As multiple members of this Court indicated in a recent decision, the historical motivation for these laws may be enough to invalidate them on constitutional grounds. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring); *see also id. at* 1417 (Kavanaugh, J., concurring). This Court can promote equality and opportunity for all by fully protecting fundamental property rights.

In sum, racial preferences are not only pernicious, but ineffective at remedying any of the perceived problems identified by those who support them. The *Grutter* Court viewed racial preferences as a stop-gap measure and predicted that they would no longer be necessary in 25 years. But it has been nearly 25 years, and it is clear that racial preferences are not perishing but proliferating. *Grutter*'s prediction was demonstrably wrong, and this Court should overrule that decision. To be sure, many laws, policies, and other government action today prevent individuals—

including individuals who are classified as members of minority groups—from reaching their full potential. But the solution is not to depart from the constitutional and moral imperative of racial neutrality. It is to protect the fundamental right to earn a living, the right of parents to choose the best school for their children, and fundamental property rights. The way to ensure equality and opportunity is not to expand government programs, it is to limit government to its proper role of protecting individual rights.

Equality and opportunity are complementary principles embedded in the Fourteenth Amendment. This Court should not countenance the universities' efforts to distribute burdens and benefits on the basis of race, which subverts both principles. Equality of treatment and equality of liberty mark the best path to the pursuit for happiness.

CONCLUSION

The judgments of the lower courts should be reversed.

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Respectfully submitted,

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