No. 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 Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because permitting public educational institutions to treat people differently based on race is anathema to the Constitution. This case presents an excellent vehicle for the Court to reconsider its precedent in this area.

SUMMARY OF ARGUMENT

Petitioner filed this case as a companion to *Students for Fair Admissions, Inc. v. President and Fellows of Harvard University*, No. 20-1199. But were the Court to grant certiorari in *Harvard* but not here, it would lack a more detailed picture of the failings of *Grutter v. Bollinger*, 539 U.S. 306 (2003) and would leave unaddressed a situation where racial classifications are most harmful: when they are implemented by the state.

In the modern era, this Court has always reviewed affirmative action programs in higher education in

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[1] Rule 37 statement: All parties were timely notified of and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

the context of public institutions, and it should do so again now. The fact that a final judgement has not been entered should not deter the Court from taking the case: the Court frequently hears companion cases in such circumstances. We urge the Court to grant certiorari here alongside the *Harvard* case.

ARGUMENT

I. GRANTING CERTIORARI WHERE A PUBLIC INSTITUTION IS AT ISSUE WILL FURTHER ILLUMINATE THE PROBLEMS WITH RACIAL CLASSIFICATIONS

First, when *public* institutions, like the University of North Carolina, apply racial classifications, the legal injury is particularly cruel. While it is true that Title VI imposes restrictions on all universities accepting federal funds that are equivalent to the protections of the Fourteenth Amendment's Equal Protection Clause, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 286 (1978), racial classifications *by the government* tend "ultimately [to] have a destructive impact on the individual and our society." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 316 (2013) (*Fisher I*) (Thomas, J., concurring) (internal quotation marks omitted). They "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (cleaned up). Racial preferences by private universities certainly have negative effects on individuals too. But it is one thing to be viewed through a racial lens by a private institution or fellow citizen, quite another—and

substantially more harmful—for a polity to reduce people to racial identifiers. Government racial classifications demean all citizens. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part).

Second, considering the specifics of UNC's admissions process alongside Harvard's will better allow the Court to explore the failings of *Grutter*. For example, while at a facial level Harvard's admissions process seems less likely to satisfy strict scrutiny than UNC's—the weight placed on race seems statistically larger—UNC's admissions officers often appear more explicitly engrossed by racial classifications.

Under current doctrine, "'a race-conscious admissions program,'" to satisfy strict scrutiny, "must 'remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" *Fisher I*, 570 U.S. at 309 (quoting *Grutter*, 539 U.S. at 334, 337). But the statistical reality of Harvard's admissions process demonstrates that Harvard commonly makes an applicant's race a determinative factor for whether he or she will be admitted. As the district court noted, "one third of the admitted Hispanics and more than half of the admitted African Americans, would most likely not be admitted in the absence of Harvard's race-conscious admissions process." *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard College*, 397 F. Supp. 3d 126, 178 (D. Mass. 2019).

By contrast, racial categories may seem relatively less determinative with UNC's process, but UNC still appears to make such classifications central to an

applicant's profile. Here, the district court found that race may have been determinative for "fewer than 5% of admission decisions." App. at 12–13. But on numerous occasions, UNC's admission officers have discussed an applicant's race as though it were as central to the applicant's candidacy as SAT or AP scores. *See* Pet. Br. at 5–6. And UNC has not set a goal of ending this practice. App. at 62.

Harvard alone may be sufficient for this Court to provide meaningful guidance given that current doctrine applies constitutional equal-protection standards to Title VI, but considering the use of race by public universities—and UNC's practices in particular—would benefit the Court in reevaluating *Grutter* and the use of racial classifications in higher education more broadly.

II. GRANTING CERTIORARI IN CONJUNCTION WITH THE *HARVARD* CASE IS CONSISTENT WITH THIS COURT'S PRACTICE

All of this Court's recent cases involving affirmative action programs in higher education confronted such programs in public institutions. In *Bakke*, the Court was faced with the admissions practices of the medical school of the University of California at Davis. 438 U.S. at 269, 315–20. In *Grutter* and *Gratz v. Bollinger*, this Court addressed the admissions policies of the University of Michigan for both undergraduates and law students. *Gratz v. Bollinger*, 539 U.S. 244, 249–50 (2003); *Grutter*, 539 U.S. at 311. And of course, in the *Fisher* duo, this Court tackled the University of Texas at Austin's undergraduate admissions process. *Fisher I*, 570 U.S. at 300–01; *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198,

2205 (2016) (*Fisher II*). Perhaps for reasons similar to those outlined above, a public institution has always been part of the Court's evaluation of racial preferences in higher education. Were this Court to take up *Harvard* alone, it would be an outlier.

Moreover, the Court frequently permits certiorari before judgment where a companion case would assist in informing it on how to respond to a particular issue. *Grutter* and *Gratz* themselves illustrate this fact. The Court had already agreed to hear *Grutter* when it decided to examine *Gratz* also, to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." 539 U.S. at 260. Similarly, the Court granted certiorari before judgment in *Bolling v. Sharpe* as a companion case to *Brown v. Board of Education* to ensure that the requirement for the desegregation of schools under the Fourteenth Amendment applied both to states and the District of Columbia. *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In a noneducational but similarly high-profile context, the Court acted similarly in *United States v. Fanfan* and *United States v. Booker*, 543 U.S. 220, 226–29 (2005) (consolidated), which dealt with the constitutionality of federal sentencing guidelines. *Id.* The Court should follow its past practice here.

CONCLUSION

To better address *Grutter*'s failings and limit racial discrimination by government actors, the Court should grant certiorari.

Respectfully submitted,

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