No. 11-345

In The Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE ASIAN AMERICAN LEGAL FOUNDATION AND THE JUDICIAL EDUCATION PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

GORDON M. FAUTH, JR.
LITIGATION LAW GROUP
1801 Clement Avenue
Oakland, CA 94501
(510) 238-9610

LEE CHENG
ALAN TSE
ASIAN AMERICAN LEGAL FOUNDATION
11 Malta Street
San Francisco, CA 94131
(510) 238-9610

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

CARRIE SEVERINO
THE JUDICIAL EDUCATION PROJECT
113 2nd Street, NE
Washington, DC 20002

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE* [1]

Amicus curiae the Asian American Legal Foundation ("AALF"), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans. Americans of Asian origin have a particular interest in use of race in public university admissions. They have historically been, and continue to be, denied access to public schools due to overt racial and ethnic prejudice as well as ostensibly well-intentioned "diversity" programs such as the program at issue here. In case after case, only strict application of the Fourteenth Amendment's guarantee of equal protection has allowed Asian Americans to live free of racial persecution.

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles, and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on our society. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media.

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

SUMMARY OF ARGUMENT

Government action based on race and racial stereotypes is repugnant to the principles of a society based on equality under the law. It also is corrosive to human dignity and the fundamental value of individual rights under our Constitution. The experience of Asian Americans illustrates the great dangers, and the substantial costs, of allowing race to play any role in government decisions generally, and in education in particular.

1. In the name of racial diversity, racial preferences in college admissions programs in general, and at the University of Texas at Austin ("UT") in particular, discriminate against Asian-American applicants by deeming them overrepresented relative to their demographics in the population and thus less worthy of admission than applicants of underrepresented races. At highly selective schools, such discrimination imposes an admissions penalty on Asian Americans equivalent to hundreds of SAT points relative to Hispanic and African-American applicants, and a lesser, but still significant, admissions penalty relative to White applicants. The empirical experiences of Texas, Florida, and California when they eliminated race-based admissions policies likewise demonstrate that such policies discriminate against Asian Americans. The very fact that UT currently deems Asian Americans overrepresented and seeks to reduce demographic differences between its student population and the State as a whole shows that the use of race in admissions will aim to reduce the representation of Asian Americans while increasing the representation of Hispanics and African Americans.

Such discrimination is especially pernicious given that Asian Americans as a group have long faced government discrimination in this country. In education, in particular, Asian-American schoolchildren were some of the first victims of the separate-but-equal doctrine endorsed in *Plessy* v. *Ferguson*. Though the stereotypes and justifications for such classifications have changed over time, discrimination against Asian Americans continues to this day. Regardless of the justifications for racial limits on educational opportunities for Asian Americans, such discrimination was and remains odious to the ideals of this nation and destructive to the individuals affected.

UT's race-based admissions policies are merely the latest method for government to pick and choose among the races, to the benefit of whichever races are currently in political favor and to the detriment of whichever races are not. In the end, however, it is the individual students, judged by the color of their skin rather than by their individual qualities and achievements, who pay the price.

The Asian-American experience with racial discrimination casts a hard and unflattering light on the use of race in the name of diversity and helps illustrate why such use of race in education is far from benign and should be rejected.

2. Racial diversity is not a compelling interest justifying the use of race in college admissions processes. This Court's endorsement of that interest in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and its application and the lax standard of review by the court below should be disavowed by this Court.

Regardless how many other factors are taken into account in UT's admissions program, where the baseline for diversity and eligibility for racial preferences are based on the comparative racial demographics between UT and the State, the program constitutes forbidden racial balancing. That UT's efforts are inefficient, in conflict with other admissions considerations, or slow to come to fruition does not change the structure and goals of UT's race-based policies and hence does not change their odious character.

Attempts to force racial diversity necessarily act to the detriment of genuine individual diversity. The very act of classifying students by "race" in the first place creates artificial groupings that mask the myriad differences within those classifications, and detracts focus from the individual. Asian Americans again illustrate this point. Though lumped together in a single group for racial diversity purposes, Asian Americans are in fact highly heterogeneous with extremely varied experiences and viewpoints. Treating them as one group for purposes of diversity merely promotes stereotypes that are detrimental to genuine diversity and is most harmful to those students who most need non-discriminatory access to educational opportunities.

While there is no doubt that diversity is valuable, true diversity is found only at the individual level, created by individual differences in ability, experience, interest, opinion, and other personal qualities, judged without resort to the invidious shortcut of racial stereotyping. *Racial* diversity is no more than a false proxy for individual diversity, perpetuates and exaggerates the role of race and racial stereotypes in

government and society, and makes impossible the goal and ideal that individuals be judged by the content of their character, and not the color of their skin. Indeed, racial diversity is literally only skin-deep.

The malleable and indeterminate nature of the interest in racial diversity as articulated in *Grutter* also encourages universities and others to be disingenuous regarding the role race plays in admissions. Admissions programs are encouraged to hide the use of race and their goal of proportional racial representation behind a façade of "holistic" evaluations, to bury or refuse to keep data on the use of race in their decisions, and to manipulate their definitions of "critical mass" in order to justify continuing preferences. Deference to the "good faith" of administrators in applying racial diversity likewise makes it more difficult to "smoke out" improper uses of race in admissions. *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Such an easily abused and misguided interest in racial diversity is not compelling and administrators should not be given deference in the pursuit of that interest. Rather, this Court should overrule those aspects of *Grutter* that accept racial diversity as a compelling interest and reinstate a faithful application of traditional, and highly skeptical, strict scrutiny to the use of race in UT's admissions process, and more generally to racial classifications in education.

ARGUMENT

I. Racial Diversity Programs Continue a Long History of Invidious Discrimination Against Asian Americans.

Efforts to manipulate the racial composition of schools necessarily come with a steep cost – borne in the first instance by individuals on the wrong side of the racial balancing act because their racial groups lack political or social clout. Schools in general, and highly competitive universities in particular, have a limited number of slots. Every slot allocated to someone who would not have been admitted but for their race is a slot *denied* to someone else who would have been admitted but for their race. The costs of such racial gerrymandering fall not merely on members of a supposedly privileged racial majority, but on individuals belonging to *any* non-preferred or "over-represented" race that must be displaced in order to increase the numbers of a preferred or "under-represented" race or ethnicity. UT's current racial diversity efforts exact just such a cost and discriminate against Asian Americans.

Asian Americans have long been the victims of racial discrimination in education and elsewhere. Early on they were excluded from schools based on derogatory racial stereotypes of inferiority. Lately it seems their numbers are being limited because they would make up too large a percentage of certain schools if Asian-American individuals were judged solely by their individual qualifications and qualities. Neither excuse can justify judging individuals by the color of their skin.

A. Racial Diversity Programs Discriminate Against Asian-American Individuals by Treating Them as Members of an Overrepresented, and Hence Disfavored, Race.

The origin and structure of UT's racial-preference program reveal that a core purpose and goal of that program is to increase admissions of underrepresented minorities and to make the racial composition of the student body more closely approximate the racial composition of the State. In its proposal to adopt the race-based admissions policy under review in this case, UT asserted that "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission."[2] UT claimed that the mismatch in demographics meant that its students were "being educated in a less-than-realistic environment that [was] not conducive to training the leaders of tomorrow." Pet. App. 49a-50a (citation omitted).

The racial composition of Texas as of the 2010 Census was:

45.3% Non-Hispanic Whites;

37.6% Hispanic;

11.8% African American; and

3.8% Asian American.

---

[2] *Proposal to Consider Race and Ethnicity in Admissions* at 24 (June 25, 2004) (hereinafter "2004 Proposal"). Supp. Joint App. ("SJA") 24a.

http://en.wikipedia.org/wiki/Demographics_of_Texas.[3]

The racial demographics of UT in 2010, however, was:

52.1% Non-Hispanic White;

17.6% Hispanic;

4.5% African American; and

15.9% Asian American.

University of Texas at Austin Accountability Report, January 2012, at 2 (available at http://www.txhighereddata.org/Interactive/Accountability/UNIV_Complete_PDF.cfm?FICE=003658).[4]

Having defined mismatched racial composition as detrimental to UT's mission, the inevitable and intended function of UT's racial preference program is to correct that mismatch; admitting more students of "underrepresented" races and fewer students of "overrepresented" races. At UT, therefore, the goal of "realistic" racial demographics means racial preferences are necessarily used to try to increase the percentage of Hispanics and African Americans and to decrease or limit the percentage of Whites and Asian Americans.

UT's representational goal is corroborated by its treatment of Hispanics and African Americans, but not Asian Americans, as underrepresented minori-

---

[3] Those racial categories account for 98.5 percent of the population of Texas, with small percentages of Native Americans, Pacific Islanders, and other groups filling out the mix.

[4] This figure includes 0.2% of multi-racial students where one part of the racial mix is African American. *Accountability Report* at 2.

ties. Pet. App. 126a n. 5 (D.Ct. Opinion) ("UT does not consider Asian-American students to constitute an underrepresented minority at the University."). Indeed, under UT's theory of reproducing a demographically "realistic" environment, Asian Americans – a demographic minority long subject to racial discrimination – are necessarily viewed as *over*represented at the University. As such, the race of Asian-American applicants can serve only as a thumb on the scales against them – their potential presence in the class filling spots that could otherwise go to students from underrepresented races.

Data from affirmative action programs around the country and the empirical experience in Texas, Florida, and California confirm that the inevitable result of race-conscious admissions policies is to discriminate against Asian-American students.

A 2005 study by Thomas Espenshade and Chang Chung of Princeton University attempted to quantify the effects of race-conscious admissions policies in 1997 at several elite universities and reached a deeply troubling conclusion. Controlling for numerous factors, their study found that, all other things being equal, race-conscious admissions policies provided African-American applicants the "equivalent of 230 extra SAT points (on a 1600-point scale)" and 185 extra points to Hispanic applicants relative to White applicants. Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOCIAL SCI. QUARTERLY 293 (June 2005).

Asian-American applicants, by contrast, faced the equivalent of a 50-point *penalty* relative to White ap-

plicants. *Id.* at 293-94. The net penalty for Asian Americans under those race-based diversity programs, therefore, was 280 SAT points relative to African-American applicants and 235 points relative to Hispanic applicants. In other words, under race-based admissions policies, Asian-American applicants face a 235- to 280-point higher admissions hurdle than Hispanic and African-American applicants and a 50-point higher admissions hurdle than White applicants solely because of their race.

The study further concluded that eliminating racial preferences (both positive and negative) would result in a 33% increase in Asian Americans admitted to these schools (an increase from 23.7% to 31.5%, or 7.8%, of admitted students). *Id.* at 297-99. In the group of 45,549 applicants and 9,988 admitted students who were studied, that translates to 772 Asian-American applicants who were denied admission because of their race. And that was for just *three* universities in one year.[5]

A 2008 study out of the University of Florida sought to test the predictions of Espenshade and Chung by looking to the real-world results in California, Texas, and Florida during the time period sur-

---

[5] The impact on White applicants of eliminating all racial preferences was a 2.4% increase in Whites admitted (an increase from 51.4% to 52.8%, or 1.4%, of admitted students), translating to 122 students denied admission because of their race. *Id.* at 297-99. Whatever the total numbers for different racial *groups*, however, the impact on *individual students* denied admission because of their race is exactly the same – they suffer racial discrimination, are demeaned as individuals, and are denied the equality and dignity this country rightly claims are the entitlement of all persons, regardless of race.

rounding the elimination of race-based preferences in those States. David R. Colburn, Charles E. Young & Victor M. Yellen, *Admissions and Public Higher Education in California, Texas, and Florida: The Post-Affirmative Action Era*, 4 INTERACTIONS: UCLA J. OF EDUC. AND INFORMATION STUDIES (2008) (available at http://escholarship.org/uc/item/35n755gf). Looking at freshman enrollment patterns from five universities in those States from 1990 to 2005, they concluded that "Asian-American students in California were the major beneficiaries of" eliminating race-based admissions policies in California, making substantial gains in admittance at the three top University of California schools. *Id.* at 10-12. Asian Americans likewise made significant, though somewhat smaller, gains in Texas and Florida, with their gains limited to some extent by the smaller Asian populations in those States and by the impact of alternative programs – the top 10% program in Texas and a similar top 20% program in Florida – adopted to mitigate the effect of eliminating race-based affirmative action.[6] The authors ultimately determined that "[o]ur conclusions underscore much of what Espenshade and Chung (2005) and others have argued." *Id.* (abstract).

Professor Espenshade and another colleague returned to the issue of racial preferences and "recently completed an extensive examination of how much

---

[6] Looking at additional schools in States that maintained their race-based admissions policies, the authors found that the results from that "control group reveal that their racial and ethnic diversity numbers remained relatively constant throughout [the same period] as compared to those for the California, Florida, and Texas universities." *Id.* at 17.

weight is placed on applicants' many characteristics in the elite private university admission process." Thomas J. Espenshade & Alexandria Walton Radford, *Evaluative Judgments vs. Bias In College Admissions*, FORBES.COM, Aug. 11, 2010 (available at http://www.forbes.com/2010/08/01/college-admissions-race-politics-opinions-best-colleges-10-espenshade-radford.html). The more recent evidence is that race now seems to play an even larger role:

> Measured on an all-other-things-equal basis, black applicants have an admission advantage compared with whites equivalent to 310 SAT points (on the old 1,600-point scale), while the advantage for Hispanic candidates is 130 points. Asian-American applicants face a disadvantage of 140 SAT points. This means that Asian students have to have an SAT score 450 points higher than otherwise similar black applicants to have the same chance of being admitted.

Id.

This extensive evidence confirms that race-based admissions policies, at UT and around the country, exact a heavy toll on, and operate as a racially discriminatory barrier to entry for, Asian-American students.[7]

---

[7] That the total number and percentage of Asian Americans have in fact increased at UT in the last ten years says little about UT's treatment of Asian Americans, other than that its efforts at racial balancing are less effective that it would like (or might have been throttled back in recent years due to the pendency of this litigation). It also might well reflect that many Asian Americans in Texas go to public school and may benefit

B. Discrimination Against Asian-American Individuals in Order to Benefit Other Races Is Odious and Demeaning to Individual Students.

It is *amici*'s firm conviction that the use of race to judge individuals is odious and particularly offensive when done by the government. *See Shaw* v. *Reno,* 509 U.S. 630, 643 (1993) ("[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'") (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)).

Defenders of race-based admissions policies perhaps take comfort in imagining that current racial preferences merely make up for past racial discrimination – a claim not seriously advanced by respondents in this case – and that the students injured thereby are merely Whites who have unfairly benefited from past discrimination. By themselves those excuses merely mirror the offensive treatment of current students as representatives of their race, rather than as individuals. With respect to racial preferences that work to the detriment of Asian-American students, however, those excuses are doubly offensive – treating them as racial avatars and ignoring the

---

from the Top Ten program. But that would mean only that the racial preferences and discrimination applied to students who are not in the top 10% of their classes must be even more aggressive in order to supplement or mitigate the effects of that program. The racial bar for Asian Americans who do not conform to the academic stereotypes of model-minority overachievers thus would be even higher in order to limit what UT views as an already overrepresented race.

long and ugly history of racial discrimination against Asian Americans.

Asian Americans have long been subject to overt racial discrimination in this country. In the 1800s and 1900s, individuals of Chinese descent were disparagingly viewed as faceless members of a "yellow horde" and subject to numerous racist restrictions purporting to serve the greater public good. Such restrictions extended to numerous areas of life and business. *See, e.g.*, Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982). Restrictions on Chinese Americans were so common and oppressive that they gave rise to the expression "a Chinaman's Chance," a phrase meaning "having little or no chance of succeeding." *News Watch Diversity Style Guide*, *at* http://www.ciij.org/publications_media/20050321-133409.pdf.

Such overt discrimination likewise took place in education. Chinese-American children were excluded from public schools or forced into segregated schools. *Ho* v. *San Francisco Unified Sch. Dist.*, 147 F.3d 854, 864 (CA9 1998) (describing public school discrimination and segregation targeting Chinese-American children in San Francisco and elsewhere); *see generally,* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools,* 5 ASIAN L.J. 181, 207-208 (May 1998).

In fact, although it is not widely recognized, Chinese-American schoolchildren were some of the earliest victims of "separate but equal" jurisprudence as it related to education. *See Wong Him* v. *Callahan,* 119 F. 381, 382 (C.C.N.D. Cal. 1902) (denying a child of Chinese descent the right to attend his neighborhood school in San Francisco, holding that the more distant "Chinese" school was "separate but equal"); *Gong Lum* v. *Rice,* 275 U.S. 78, 87 (1927) (applying separate-but-equal doctrine of *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), to deny a nine-year-old Chinese-American girl in Mississippi entry to a "white" school because she was a member of the "yellow" race).

Only through vigorous and repeated resort to the Equal Protection Clause has such discrimination been kept even partially at bay, most famously in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which held that Chinese Americans were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance.[8]

---

[8] *See also Ho Ah Kow* v. *Nunan*, 5 Sawy. 552 (C.C.D. Cal. 1879) (invalidating San Francisco's infamous "Queue Ordinance" – which forced Chinese-American prisoners to cut off their long ponytails or "queues" – on equal protection grounds); *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880) (striking down prohibition on Chinese Americans fishing in California waters); *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880) (declaring unconstitutional a California constitutional provision that forbade corporations and municipalities from hiring Chinese); *In re Lee Sing*, 43 F. 359 (C.C.D. Cal. 1890) (striking down "Bingham Ordinance," which mandated residential segregation of Chinese Americans); *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898) (holding that Chinese-American boy, born in San Fran-

Likewise in education, Asian Americans have long been forced to rely on the Equal Protection Clause to combat repeated efforts at discrimination. For example, in *Tape* v. *Hurley*, 66 Cal. 473, 6 P. 129 (1885), the court had to order San Francisco public schools to admit a Chinese-American girl who was denied entry because public schools were not open to "Mongolian" children. *See* McClain, *In Search of Equality*, at 137. In response, the California legislature authorized separate "Chinese" schools to which Chinese-American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864; *see also* Kuo, 5 ASIAN L.J. at 207-208 (discussing "Chinese" segregation).

This Court itself has not been unmindful of the discrimination in education faced by Asian Americans and the essential role of the Fourteenth Amendment in combating that discrimination. In *Lee v. Johnson,* 404 U.S. 1215, 1215-16 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry * * * was the classic case of *de jure* segregation involved in *Brown* v. *Board of Education,* 347 U.S. 483 [1954] * * *." This Court recognized that "*Brown* v. *Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco." *Lee,* 404 U.S. at 1216 (citing *Yick Wo* v. *Hopkins,* 118 U.S. 356).

---

cisco, could not be prevented from returning to the city after a trip abroad).

Notwithstanding repeated resort to the Fourteenth Amendment and the courts, discrimination against Asian Americans, particularly in education, has continued well into modern times, though often glossed over with more creative claims to be acting in the public interest. *See* David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer,* 16 HARV. BLACKLETTER L.J. 39, 54 (Spring 2000). In the 1998 *Ho* case, for example, Chinese Americans were still battling express racial quotas limiting the percentage of Chinese students in any individual San Francisco public school, including magnet schools. *Ho*, 147 F.3d at 857. For the Chinese-American students who made up a substantial percentage of the student population throughout the city and of students eligible for certain selective magnet schools, such racial caps had a severe and negative impact. John C. Yoo & Eric M. George, *When Desegregation Turns Into Discrimination*, WALL STREET J., May 26, 1998 (available at http://www.law.berkeley.edu/faculty/yooj/professional/writings/lowell.html).[9] While the *Ho* case was settled after an appellate ruling made it obvious that the School District would be unable to satisfy strict scrutiny of their racial restrictions, there is little doubt

---

[9] *See also* Lawrence Siskind, *Racial Quotas Didn't Work in SF Schools,* SAN FRANCISCO EXAMINER (July 6, 1994) (at http://heather.cs.ucdavis.edu/pub/AffirmativeAction/Siskind.html) ("In 1993, Chinese-American applicants [to San Francisco's 'academically preeminent Lowell High School'] were required to score 66 out of a perfect 69 to gain admittance. 'Other Whites' and several other groups could qualify with a 59; blacks and Spanish-surnamed, with a 56.")

that many cities and States will resume such racially discriminatory policies if they believe this Court's jurisprudence will allow it. This case thus can be either the starter's gun or the death knell for more aggressive anti-Asian racial restrictions in education in the future.

The admissions data discussed in the previous section also shows that discrimination against Asian Americans continues. The higher bar for admissions imposed on Asian-American applicants at selective colleges and universities may not be based on racist notions of Asian inferiority as was past discrimination, but it is still based on offensive racial stereotypes regarding the academic prowess, but supposedly uninteresting and fungible sameness, of Asian Americans. *See, e.g.*, Daniel Golden, *The Price of Admission* 201 (1997) (describing a Dean of Admissions as stereotyping a Korean-American applicant as looking "like a thousand other Korean kids with the exact same profile of grades and activities and temperament" and as "yet another textureless math grind").

In fact, much of the current discrimination against Asian-American students – particularly when done in the name of increasing racial diversity – painfully echoes the treatment of Jewish students in the 1920s through the 1950s. In the 1920s, Harvard College and other prominent universities reacted to the perceived "over-representation" of Jews in their student

bodies by setting up informal quotas and other restrictive policies that persisted through the 1950s.[10]

Those institutions argued that their diversity schemes brought benefits to all and would lessen ethnic tension. "Harvard initiated its diversity discretion program to decrease the number of Jewish students; President Lowell of Harvard called it a 'benign' cap, which would help the University get beyond race." Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability Of Dworkin's Defense Of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 36 (1996). No matter how lofty the stated purpose, however, these race-based admissions programs injured individuals by singling them out for unequal treatment. "In the 1930s, it was easier for a Jew to enter medical school in Mussolini's Italy than in Roosevelt's America." Siskind, *Racial Quotas Didn't Work in SF Schools, supra* at 17 n. 9.

Today, "Asian Americans are the new Jews, inheriting the mantle of the most disenfranchised group in college admissions." Golden, *The Price of Admission* at 199-200.

This Court repeatedly has warned that "[c]lassifications based on race carry a danger of stigmatic harm," may "promote notions of racial infe-

---

[10] *See* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws*, 66 BROOK. L. REV. 71, 111-12 (2000); Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 385-399 (1979); Nathan Glazer, *Diversity Dilemma*, THE NEW REPUBLIC (June 22, 1998) (available at http://www.tnr.com/archive/0698/062298/glazer062298.html).

riority," and threaten "to incite racial hostility." *Croson*, 488 U.S. at 493; *Shaw*, 509 U.S. at 643. Once again, the Asian-American experience bears out this concern.

In San Francisco, for example, discrimination against Asian-American schoolchildren led to precisely the type of stigmatization this Court warned against in *Croson* and *Shaw*. In connection with the *Ho* case challenging San Francisco's racial quota system, newspapers widely reported the shame and anger felt by children targeted by the racial quotas. As stated by the parent of one "Chinese" youth turned away because of his ethnicity, "[h]e was depressed and angry that he was rejected because of his race." Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon,* SAN FRANCISCO EXAMINER (Feb. 14, 1999) (available at http://www.sfgate.com/cgi-bin/article.cgi?f=/e/a/1999/02/14/METRO13421.dtl&ao=all). "Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?" *Id.*

Asian Americans familiar with the situation in San Francisco, including *amicus* AALF's own Lee Cheng, have testified regarding the emotional fall-out from discrimination against Asian Americans in education:

> Many Chinese-American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

Lee Cheng, *Group Preferences and the Law,* United States H.R. Sub-Comm. on the Constitution, Hearings (June 1, 1995) (available at http://judiciary.house.gov/legacy/274.htm).[11] Many Asian-American students are unwilling to state their race at all on college applications or, if of mixed heritage, will self-identify with their non-Asian parents.[12]

These very real and personal examples of stigmatization and injury to Asian-American students excluded from schools because of their race confirm and illustrate this Court's recognition that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her

---

[11] Indeed, *amicus* AALF had its inception largely as an outgrowth of the need to bring about the *Ho* case, and its founders played an instrumental role in bringing that challenge. They have personally lived through and been affected by the discriminatory laws and policies in San Francisco and California that limited Asian-American enrollment and made it more difficult for Asian Americans to gain entry into quality academic institutions such as Lowell High School in San Francisco, U.C. Berkeley, U.C. Hastings School of Law, and U.C. Berkeley-Boalt Hall School of Law. The matters raised in this brief are not merely debating points for this Court; they are a product and reflection of the personal experience of individuals who know precisely what it is like to be discriminated against because of their race or ethnicity.

[12] Rich Lowry, *Hiding their Race: Asians' new college fear*, NEW YORK POST (ONLINE), Dec. 16, 2011 (http://www.nypost.com/p/news/opinion/opedcolumnists/hiding_their_race_sKvjDf84vh22J21Ri7DDNK); *Some Asians' College Strategy: Don't check "Asian,"* USA TODAY (ONLINE), Dec. 3, 2011 (http://www.usatoday.com/news/education/story/2011-12-03/asian-students-college-applications/51620236/1).

own merit and essential qualities." *Rice* v. *Cayetano,* 528 U.S. 495, 517 (2000). Glossing over racial discrimination as an attempt to create racial diversity, or to mirror the state population as an educational tool, alters the demeaning and stigmatizing qualities of such discrimination not one bit.

The Asian-American experience with racial discrimination – both past and present – should cast a far less benign light on current efforts to impose skin-deep diversity rather than to strive for genuine, non-race-based, individual diversity. Although UT's current foray into racial gerrymandering is framed in high-minded educational terms and prefers other minorities rather than the majority White race, it nonetheless continues to group individuals, including Asian Americans, based on race, and to tilt the scales against members of that historically disadvantaged group when they are deemed overrepresented in schools. But there is no "correct" proportion of racial representation in schools; only such individual diversity as varied accomplishment and personal qualities produce. Racial discrimination remains odious no matter the excluded student's race, and is an especially bitter pill when applied to Asian Americans, who constitute a minority without significant political influence and have been subject to a long and continuing history of such discrimination by those with greater political clout.

This Court has been mindful of the wrongs done to Asian Americans in the past, should continue to be mindful of the discriminatory costs of racial diversity efforts in the present case, and should reject UT's

scheme to categorize and gerrymander students by race.

II. Diversity Is Too Malleable and Slippery an Interest to Be Accepted as "Compelling" or Left to the "Good Faith" of Those Who Would Judge People, Even in Part, Based on Their Race.

In *Grutter*, 539 U.S. at 333, 337, this Court accepted the proposition that racial diversity was a compelling state interest that justified racial preferences if such preferences were buried within a broader "holistic" set of admissions policies directed at achieving an undefined "critical mass" of certain minority students. That holding encouraged racial gerrymandering so long as it was sufficiently concealed rather than blatantly overt, erroneously attributed to racial diversity the beneficial qualities of individual diversity, and encouraged ongoing and disingenuous manipulation by universities and the courts. This Court should disavow *Grutter*'s holding that *racial* diversity is a compelling interest and the lax standard of review that has evolved from that case. It should reinstate a faithful application of traditional strict scrutiny to racial classifications in education.

A. Attempts to Make Universities Look Like Society Are Just the Latest Excuses for Proportional Racial Representation and Quotas.

It is the current and correct wisdom that racial quotas are constitutionally unacceptable. *Grutter*, 539 U.S. at 330, 334. Overtly enforcing a particular racial composition of the student body presumably would be struck down by this Court without hesitation, regardless of any claimed benefits. However,

where the goal and means of racial balancing are hidden behind the façade of a "holistic" admissions program, justified by impossible-to-disprove educational claims, and are less immediate in reaching any final balance, they apparently receive a pass. *Id.* at 318-19, 337.

Such distinctions between overt and obscured racial balancing in the name of "diversity," however, are illusory where a university is given a presumption of acting in good faith in its use of race, and its supposed educational judgments are never second-guessed. Pet. App. 34a-37a (court of appeals decision). And where universities are also allowed to define the "critical mass" for various races as equivalent to the percentage of those races in the population at large, Pet. App. 40a-42a, 49a-51a, the distinction disappears entirely. Far from promoting genuine diversity – which is a function of individual qualities, abilities, experience and interests – using racial demographics as the yardstick for diversity merely masks racial stereotyping and appropriates the language of diversity for the far less noble goal of proportional racial representation.

The perversion of the otherwise worthwhile goal of "diversity" and of this Court's critical mass theory as justification for race-based admissions can be seen in the structure and implementation of UT's racial diversity program.

In addressing the critical mass argument in their 2004 proposal, UT expanded their argument to include the claim that individual classes, rather than the University as a whole, had insufficient underrepresented minorities to cure racial isolation or

generate sufficient interaction among the races. Pet. App. 21a-23a. But UT's disparate treatment of Asian Americans and Hispanics shows this argument to be a make-weight excuse for furthering its overarching goal of causing the racial composition of the school to reflect that of the State.

While UT's analysis of 2002 classes containing between 5 and 24 students revealed that 43% had only one or no Hispanic students, it also showed that 46% had had only one or no Asian-American students. Pet. App. 21a. Limiting that analysis to classes containing between 10 and 24 students similarly showed that 37% had only one or no Hispanics, whereas 41% had only one or no Asian Americans. Pet. App. 22a. The evidence below likewise showed that in 2008, the gross numbers and percentage of Hispanic students at UT exceeded that of Asian Americans. Pet. App. 154a-155a & n. 10; *see also 2012 Accountability Report* at 2 (in Fall of 2010 Hispanic students were 17.6% and Asian Americans 15.9%; in Fall 2011 Hispanic students were 18.2% and Asian Americans 16.2%).

Notwithstanding the favorable comparison of Hispanic presence at UT and Asian-American presence, the University views Hispanics, but not Asian Americans, as having failed to reach a critical mass and thus as entitled to racial preferences. The reality is that, by any objective standard, *both* groups have achieved the "meaningful representation" necessary to produce substantial educational benefits. *Grutter*, 539 U.S. at 319. This inevitably leads one to question whether UT's view of critical mass itself varies according to race, whether UT is simply indifferent to

the harms from a supposed lack of a critical mass when it comes to Asian Americans, or whether discussion of critical mass is merely subterfuge for the different goal of proportional racial representation. The latter answer is the most plausible given that UT applies its program only to "underrepresented minorities," which the district court recognized "necessarily involves the comparison of a minority group's representation at a university to its representation in society." Pet. App. 155a.

Given that UT expressly describes the difference between the racial composition of the State and the racial composition of the school as interfering with its mission, *see supra* at 7, there can be little doubt of its intent to use racial preferences as long and as much as necessary to eliminate that compositional difference, regardless of any genuine notion of achieving some critical mass of minority students.

In the end, using variance from the racial composition of the State as the yardstick for inclusion in a race-based admissions policy, and having elimination of the variance as the program's goal, is not meaningfully different from setting any other quota or racial balance. That UT has chosen to achieve this balance through incremental and less efficient uses of race rather than a forced percentage system does not change the essential nature of the quota imposed – it just means it will take somewhat longer to implement.[13]

---

[13] The notion that race plays only a minor role in admissions as part of a "holistic" evaluation deserves little credence where UT's express goal is a particular result and a particular racial balance mirroring that of the State. In early efforts, race may impact only a handful of admissions decisions for students who

But as long as the school's educational mission is viewed as requiring student exposure to a racial mix mirroring that of the State itself, race will always be decisive for each incremental step towards that goal.

B. Efforts to Generate Racial Diversity Lump Individuals into Misleading Racial Groups and Undermine Genuine Diversity.

Using race-based admission policies to attempt to replicate the racial composition of a State has the further and obvious problem of treating individuals as largely fungible representatives of broad racial and ethnic categories. Such categorizations – even if playing only a partial role in admission decisions – rely on racial stereotypes regarding the perspectives

---

are all close to the admissions line, but when that fails to achieve the requisite "diversity" in racial composition, it will necessarily play an ever-increasing role until the desired balance is achieved. (Indeed, the recent restriction of admissions under the Top Ten Percent program to 75% of admissions, Pet. App. 19a n. 56, seems precisely such an effort, increasing the number of slots subject to racial preferences in order to compensate for slow progress toward UT's racial composition goals.)

That UT claims its admissions officers do not track the racial balance of any given class during the admissions process, Pet. App. 32a-33a. does not mean they do not track the results of the previous years and the overall composition of the school. Knowing that their efforts the previous year fell short of the stated diversity goal, they will necessarily increase the weight accorded to race the following year. *See also*, Pet. App. 4a (discussing 5-year reviews addressing "an ever-present question of whether to adjust the percentage of students admitted under" UT's racial preference program). That they cannot track their results in real time, but only after the fact, only makes the process less efficient – it does not change the goal of a particular racial composition or the increased role of race when that goal is not reached.

and "diversity" value that different races bring to the table and are poor proxies for genuine diversity based on individual differences.

Once again, the Asian-American experience tellingly illustrates the fallacy of treating racial balancing as a proxy for diversity. While historically treated as either a faceless "yellow horde," or lately as a uniformly successful, though bland, "model minority" Asian Americans are in fact a highly heterogeneous group coming from numerous countries and widely varied ethnic, cultural, intellectual, economic, and political backgrounds.

The catch-all category of Asian Americans includes individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population. Glenn Ryan DeGuzman, *The Impact of the Model Minority Myth in Higher Education*, 7 J. STUDENT AFF. 85, 88 (1998). Many have been in the United States for generations. Others are recent immigrants or the first generation children of immigrants. Different people and families came to the United States to escape communism, authoritarianism, war, poverty, or simply to seek the greater opportunities available in this country. Some come from highly educated backgrounds, many others not so much. Golden, *The Price of Admission* at 204. Some come from cultures that aggressively promote education, others from cultures that take a less demanding approach (not every Asian child has a "Tiger Mom"). They are of a wide range of religions, including Christians, Muslims, Buddhists, Jews and many others. The only true commonality among Asian

Americans is that they are all now Americans, and are here because they, their parents, and their ancestors believed that the United States would afford them and their descendants a better life, greater opportunity, and the blessings of liberty.

Given the tremendous variation within the artificial category of Asian American, it is absurd even to discuss whether that catch-all group is "overrepresented" at UT or any other university. It is equally absurd to imagine that any given percentage of Asian Americans exhausts that group's contribution to the diversity of a university setting. As already noted, any true diversity depends on individuals, not the racial groups to which they belong. But even at the group level, surely the perspectives and experiences of Indian-American students may differ from those of Japanese-American students; Vietnamese-American students may have different perspectives from Chinese-American students; and even Chinese-American students from mainland China and from Taiwan, may have highly diverse viewpoints on geopolitical and socioeconomic issues. Using racial stereotypes to imagine that all Asian Americans are representative of the others, provide fungible contributions toward diversity, and hence may be treated as overrepresented and unnecessary additions to diversity is both inaccurate and offensive.[14]

---

[14] It is likewise inaccurate to imagine that any and all Asian Americans are fungible when it comes to the goal of having a critical mass of minority students. One might reasonably wonder whether students of Korean and Japanese heritage would take comfort in each other's presence given the historic difficulties between those countries and peoples. Likewise with Indian

Such erroneous amalgamation of Asian Americans into a single stereotyped group also disserves the overwhelming portion of Asian Americans who, not surprisingly, do not in fact conform to the "model minority" stereotype. Most Asian Americans are not mechanistic overachievers. Many live in poverty. Golden, *The Price of Admission* at 204. Many do not have access to educational opportunities or have Tiger Moms to drive them. But the "model minority" stereotype of high-achieving Asians – particularly when used to raise the standards by which Asian-American applicants are judged – does an even greater disservice to such individuals by making it virtually impossible for an "average" or disadvantaged Asian American to compete with others who are held to a lower standard. Whatever discriminatory obstacle a several-hundred-SAT-point penalty creates for a gifted and academically successful Asian-American student, it poses a potentially insurmountable barrier for the many more Asian-American students who have the potential to do well, but may not reach the pinnacle of the academic curve.

Indeed, stereotype-driven barriers for Asian-American students hit particularly hard against the many Asian-American individuals and groups at the low end of the economic curve who will have their own set of perspectives that would differ considerably from others in their forced racial grouping. Grouping Asian Americans by race thus tends to disadvantage

---

and Chinese students, or other disparate or even antagonistic pairings. In the end, students can and should find comfort in the common quality of individuality among their classmates, not in superficial or forced groupings based on race.

the economically poorer individuals within that group and make economically homogenous those Asian Americans admitted.

Because *racial* diversity inevitably substitutes superficial qualities and stereotypes for genuine consideration of individual diversity, it is a poor candidate for a compelling interest and a poor justification for the use of race in admissions.

C. Current Jurisprudence on Diversity Merely Encourages Universities to Be Disingenuous in Their Use of Race.

Apart from the intrinsic flaws in the very notion of racial diversity as a substitute for individual diversity, *Grutter*'s racial diversity interest and seeming dilution of traditional strict scrutiny of racial classifications create substantial incentives for school administrators to be disingenuous regarding the true scope and significance of race and racial preferences in admissions decisions and the need and rational for using race at all.

Thus, in this case, UT has gone out of its way to obfuscate the quantity or degree of preference that results from using race. It hides it in the guise of a holistic evaluation, never saying – and keeping no records regarding – whether any given student would have been accepted but for the use of race. Pet. App. 32a-33a. UT likewise goes to some effort to pretend that admissions decisions are not made with an eye toward – or even an awareness of – the racial composition of a particular admissions class. *Id.* But surely that claim obfuscates the role race actually plays in admissions. The express goal of the program is to in-

crease the number and percentage of certain underrepresented races, and UT routinely measures its success or failure in advancing toward that goal.

The ill-defined nature of diversity and critical mass likewise encourages disingenuousness. As discussed above, where the total numbers of Hispanics seemed to be easily above a critical mass for UT as a whole, the University has adjusted its denominator to be that of individual classes and whether a critical mass has been achieved in those. We are not told what percentage of classes must be diverse in order to reach a critical mass, and that too may well be a moving target. In short, this Court's unwillingness or inability to objectively define the key concepts of diversity as a compelling interest simply invites universities to read whatever they want onto those concepts, so long as they provide lip service to the relevant buzz-words found in the cases.

The lack of well-defined and testable legal standards in an area as fraught with danger as the use of race by the government simply encourages and permits subterfuge and circumvention of the constitutional requirement of equality under the law. It damages this Court's jurisprudence and harms the credibility of our nation's educational and legal systems.

D. This Court Should Return to Genuine Strict Scrutiny and Reject Racial Diversity as a Compelling Interest.

Because the racial diversity rationale for race-based decisions is unworkable and harmful, this Court should overrule that aspect of *Grutter* and re-

turn to the strict scrutiny of cases such as *Adarand* and *Croson*. In *Adarand*, this Court correctly recognized that government use of race is always "suspect" and should be viewed with "hostility." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). And in *Croson* it correctly observed that the very purpose of applying strict scrutiny to government use of race "is to 'smoke out' illegitimate uses of race." 488 U.S. at 493. For those reasons this Court has repeatedly held that the burden of proving that the challenged program is narrowly tailored to address a compelling government interest rests firmly on the proponent of the race-based program. *See Johnson* v. *California,* 543 U.S. 499, 505 (2005).

The opinion in *Grutter*, and the broad application of that opinion by the court below, ill serves these fundamental principles and protections. Rather than being skeptical and hostile, the court of appeals' application of *Grutter* to UT's race-based program and justifications was accepting, uncritical, and deferential. As Judge Garza pointed out in his concurrence, Pet. App. 72a-73a, the fault lies as much in this Court's *Grutter* opinion as it does in the court of appeals' expansive application of that case. But one thing is certain from the decision below – neither *Grutter* nor that decision does justice to the personal nature of the right to Equal Protection, a right that vests solely in the individual, not in a group. *See Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948); *Adarand*, 515 U.S. at 227.

In addition, this Court should make clear that even assuming a well-meaning desire for diversity – which in its non-racial forms is both laudable and

permissible – there is no equal protection exception for the "good motives" of a state actor and there are no "benign" racial classifications. *Adarand*, 515 U.S. at 226. Throughout history proponents of racial classifications routinely justified their restrictions with appeals to the public good and claims of the great benefits from or necessity for racial classifications. However, over time each of those claims has been rejected as contrived, overstated, or simply inadequate to warrant the use of race by the government.

In *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), the Court accepted the view of society that, even though all persons were equal before the law, the public good allowed the use of "distinctions based upon color." The lone dissenter, Justice John Harlan, wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. * * * In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case * * * ." *Id.* at 559. History proved Justice Harlan to be right.

In *Brown* v. *Board of Education,* 347 U.S. 483 (1964), this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia and South Carolina that black and white children learned better in a single-race environment, and for societal purposes could be kept separate by state mandate. Expressly rejecting any contrary findings regarding "psychological knowledge" made in *Plessy v. Ferguson,* the Court found that use of race produces a "sense of inferiority." *Brown*, 347 U.S. at 494-95.

Similar claims of public interest and necessity were used by the military to justify Japanese intern-

ment during World War II, and racial segregation of the armed forces. *Korematsu* v. *United States*, 323 U.S. 214 (1944); *see Watkins* v. *United States Army*, 875 F.2d 699, 729 (CA9 1989) (Norris, J., concurring in the judgment) ("As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale."), *cert. denied*, 498 U.S. 957 (1990). Those claims, too, proved overblown, unsupported, and inadequate to justify the racial policies of their day. *Hirabayashi* v. *United States*, 828 F.2d 591 (CA9 1987); *See Korematsu* v. *United States,* 584 F. Supp. 1406, 1416, 1420 (N.D. Cal. 1984).[15] This Court should bear firmly in mind that the vigorous, and perhaps even heartfelt, rationales for the use of race in every generation have been viewed far less favorably with the passage of time.[16] Rather than repeat history, we should

---

[15] Just as with the military's overblown justification for racial discrimination during World War II, so too the military's claim that racial preferences are needed to help the military today should be viewed with skepticism. *See Grutter*, 539 U.S. at 331. The military also once used military necessity to justify its efforts to continue segregation. The military's various claims regarding the use of race to enhance its operations have never stood the test of time, and there is no reason to believe that its more recent arguments in support of racial classifications will do so either.

[16] Indeed, some Asian Americans themselves believe that racial preferences – properly calibrated—can help Asian Americans. That view, however unlikely to bear fruit, is both shortsighted and unprincipled. Indeed, it is reminiscent of arguments by some African Americans that segregation benefited certain segments of African-American society and should be accommodated. That view was discredited then for African Americans and so too should it be now with Asian Americans. Re-

learn from it and be skeptical from the outset of claims – whether by government, academics, or putative experts – that the latest interest offered up is finally important and genuine enough to justify the use of race. In time, *Grutter* will be seen as the *Plessy* of its generation. Rather than wait 58 years this time, this Court should expeditiously reject racial diversity as a compelling interest and overrule its holding in *Grutter* to the contrary.

* * * * *

In case after case, the single historical truth that emerges from the Asian-American experience is that the rights of American citizens of Asian descent – and of all Americans – have been vindicated only by strict application of the Fourteenth Amendment's protection of individual rights, applying a "hostile" standard of "strict scrutiny" to the government's use of race. The Fifth Circuit's ready acceptance of UT's racial diversity rationale and application of a deferential "good faith" standard ignores what history has taught us, flies in the face of both the Constitution and this Court's seminal jurisprudence on race, and, if allowed to stand, will continue to result in unacceptable racial discrimination against Asian Americans and others.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

---

gardless of the effect on admissions rates, racial classifications discriminate against Asian Americans and should not be tolerated. There is no benign racial discrimination.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

GORDON M. FAUTH, JR.
LITIGATION LAW GROUP
1801 Clement Avenue
Oakland, CA 94501
(510) 238-9610

LEE CHENG
ALAN TSE
ASIAN AMERICAN LEGAL
FOUNDATION
11 Malta Street
San Francisco, CA 94131
(510) 238-9610

CARRIE SEVERINO
THE JUDICIAL
EDUCATION PROJECT
113 2nd Street, N.E.
Washington, DC 20002

Counsel for Amici Curiae

Dated: May 29, 2012