

No. 20-1199

In The
Supreme Court of the United States

—◆—
STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

—◆—
**BRIEF OF AMICUS CURIAE
SOUTHEASTERN LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

—◆—
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QUESTIONS 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?

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INTEREST OF AMICUS CURIAE¹

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, free speech, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000); *Northeast Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

This case concerns SLF because SLF advocates for a color-blind interpretation of the Constitution and preservation of the rights granted all citizens in the Equal Protection Clause, and it defends the rights to educational opportunities regardless of race. This case is important to SLF because Harvard threatens to erode the achievements our nation has made regarding

¹ Rule 37 statement: The parties were notified that Amicus intended to file this brief more than 10 days before its filing and consented to its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

race in college admissions. SLF also has an abiding interest in the preservation of the college campus as the traditional “marketplace of ideas.” Too often, colleges and universities suppress diversity of thought and the free exchange of ideas. Through its 1A Project, SLF educates college students and administrators about the First Amendment, and it defends the right to engage in open inquiry on our nation’s college campuses.



SUMMARY OF ARGUMENT

One thing is clear: “Harvard is obsessed with race.” Pet. at 41. From the very beginning of the admissions process, Harvard recruits high schoolers based on the color of their skin. *Id.* at 8. The racial makeup of each admitted class remains astonishingly stable from year to year, largely because of “one-pagers” the Dean of Admissions provides to the admissions committee. *Id.* at 9. These one-pagers inform the committee about the racial composition of past classes and how the current class’s racial composition is shaping up. *Id.* The committee relies on the one-pagers while making its final decisions, but along the way, any admissions officer can take race into account when considering an application. App. 126. This lies in stark contrast to other elite universities like the California Institute of Technology (Caltech), where the university does not consider race during the admissions process and where the number of admitted Asian Americans has steadily increased over time. CA1.Joint.App’x (JA) 160–162.

Colleges have taken this Court's holding in *Grutter v. Bollinger* too far. 539 U.S. 306 (2003). Although the Court posited in *Grutter* that diverse races may contribute diverse viewpoints in the classroom, *id.* at 329, our nation's postsecondary institutions are abandoning their role as the marketplace of ideas at an alarming rate. Rather than promote diversity of views, colleges and universities obsess over the color of their students' skin. They zero in on race as early as the high school recruitment stage, and throughout the formative college years, they reinforce the idea that race informs every decision, action, and relationship. Racial hyperawareness has sowed visible seeds of discord on today's college campuses. Faculty and staff are encouraged to address interpersonal and student-related issues through the lens of race, graduation ceremonies are segregated, and students cannot even bear to sit in the same room as peers of a different color.

Amicus urges this Court to reconsider its holding in *Grutter* by examining how that decision has played out in tangible ways since 2003. Whereas the Court in *Grutter* held that race-consciousness may serve an important diversity interest in the educational setting, the opposite has proven true: colleges are hardly the bastion of free speech and open inquiry they once were, and interactions on campus have become increasingly divisive and polarizing along racial lines. Certiorari is needed to restore our nation's colleges as forums for true diversity.



ARGUMENT**I. This Court should grant certiorari because the holding in *Grutter* has allowed colleges to unconstitutionally consider applicants' race in the admissions process.**

It is “patently unconstitutional” for a college or university “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” *Grutter*, 539 U.S. at 329 (quoting *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)) (internal quotation marks omitted). Rather than use racial balancing to achieve a target number of representation among each racial group, a university can only examine race on an individual basis and in a way that directly provides educational benefits to the student body. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007).

If the racial composition of an admitted class remains relatively unchanging from year to year, there is strong evidence of racial balancing. *Id.* at 710; see also *Cavalier ex rel. Cavalier v. Caddo Par. Sch. Bd.*, 403 F.3d 246, 248 (5th Cir. 2005); *Perrea v. Cincinnati Public Schools*, 709 F. Supp. 2d 628, 635, 645–46 (S.D. Ohio 2010). In the decade following *Grutter*, the racial makeup of Harvard’s admitted classes hardly wavered. This is because Harvard looks at race throughout its admissions process in a way that can only be deemed unconstitutional.

For example, each year Harvard establishes a “target number” of applicants to admit because the College only has room for about 1,600 students. App. 132. The admissions office bases the number upon a yield rate, which predicts the number of applicants who will accept an offer of admission. *Id.* at 24–25. The admissions office relies on racial data to determine the yield rate “because different racial groups historically accept offers to attend Harvard at differing rates.” *Id.* at 137. And throughout the application review process, Harvard monitors the “racial distribution” of the incoming class to ensure it maintains diversity without overenrolling students. *Id.* at 137.

The portion of each racial group per admitted class has remained shockingly stable at Harvard since the *Grutter* decision. Harvard keeps its numbers stable by looking at the racial composition of the incoming class—and even past classes—as it makes admissions decisions. Pet. at 9. And Harvard is not alone; most, if not all, Ivy League schools have similar data that reflects racial balancing in the admissions process. JA156. The data at these schools contrasts significantly with the data at other elite colleges, such as Caltech, where the admissions office does *not* consider race at any point and where the racial composition of each admitted class has fluctuated noticeably over time. JA160–162.

A. Data shows that Harvard engages in racial balancing through its admissions process.

Asian-American admissions at Harvard peaked in the early 1990s and have remained stagnant since then. App. 140; JA156–157 (citing Ron Unz, *The Myth of American Meritocracy*, *American Spectator* (Dec. 2012)). One study shows that despite “high fluctuations in the number of applications,” Asian-American enrollment at Harvard barely varied from 1995 to 2011. JA157. In fact, it remained “within a single point of the 16.5 percent average[.]” *Id.* When examining the racial makeup of Harvard’s admitted classes in more recent years, the data is still stagnant. *See, e.g.*, JA4434–4435. Each year, a class consists of almost the same percentages of African-American, Hispanic-American, Asian-American, and white students as the year before. *Id.*

The following charts depict the racial composition of minorities within each admitted class at Harvard for the Classes of 2010 to 2017. The charts reflect stability among each racial group over the years, as each portion of the admitted class remained within a small range of percentage points.

Percentage of Admitted Class by Race (Old Methodology)								
	Class of 2010	Class of 2011	Class of 2012	Class of 2013	Class of 2014	Class of 2015	Class of 2016	Class of 2017
Asian Am.	17.6	19.5	19.1	17.5	19.8	19.3	20.3	19.5
African Am.	10.4	10.5	10.0	10.4	11.1	11.6	10.0	11.4
Hispanic Am.	9.7	9.9	8.9	10.6	8.8	11.1	9.3	10.4

JA4434–4435. The portion of Asian Americans making up each admitted class ranged from 17.5% to 20.3%, thus staying within a range of 2.8%. Hispanic-American students stayed within 2.3%, and African-American students stayed within an even smaller range of 1.6%.

Percentage of Admitted Class by Race (New Methodology)				
	Class of 2014	Class of 2015	Class of 2016	Class of 2017
Asian Am.	17.9	17.6	20.5	19.9
African Am.	11.0	11.6	10.0	11.4
Hispanic Am.	10.0	12.1	11.1	11.5

JA4446–4447. Even with a new methodology,² the numbers were essentially the same. Asian Americans made

² Harvard adopted a new methodology for admissions that took better account of students who identified across more than one racial group. App. 136 n.22. “This avoids double counting but results in the underreporting of the representation of minority

up about 17.6% to 19.9% of the admitted classes from 2014 to 2017—a range of 2.9%. Hispanic-American students stayed within the range of 2.3%, and the range of African-American students did not change at all at 1.6%. As the United States pointed out on behalf of Petitioner before the First Circuit Court of Appeals, “[T]he minimal variation . . . is much narrower than the 6.6-percentage-point range in underrepresented minorities the Supreme Court sustained in *Grutter*.” CA1.U.S.Br. 14 (citing *Grutter*, 539 U.S. at 336).

In contrast, Harvard has offered inflated numbers that suggest a major variation within each racial group over the years. *See, e.g.*, App. 206–208; JA6114–6115; JA5735–5742. But Harvard only produces its data on a group-by-group basis, without examining the variation of each racial group *within the context of the overall admitted class*. For example, under the old methodology, the percentage of Asian Americans admitted to the Class of 2014 was 19.8%, an increase of 2.3% from the prior year. JA4435. Yet Harvard claims that the percentage of admitted Asian-American students skyrocketed by 21 percentage points (-8% to 13%). JA6114. This, Harvard argues, shows that no racial balancing occurred.

To illustrate Harvard’s misleading data, imagine that Harvard only admitted one Asian-American student in 2013, and two Asian-American students in 2014. Its graphs would show a 100% increase between

racial and ethnic groups because many students identify with two or more racial groups.” *Id.*

2013 and 2014. If Harvard then admitted just one student in 2015, the numbers would show a 50% decrease that year. If the College admitted one more student in 2016, the numbers would show a 100% increase, and so on. These percentages, the College would say, do not lend themselves to racial balancing because the variations between them are so large. But in reality, Harvard would have stayed within a very small range, fluctuating between only one and two admitted Asian-American students over the years. This minor variation points to racial balancing. *See Parents Involved*, 551 U.S. at 710 (striking down as unconstitutional a school district’s efforts to maintain a “predetermined range” of racial groups among students at each school).

Throughout this lawsuit, Harvard has zoomed in too closely on the data. It distracts by pointing to the year-to-year fluctuations within a racial group while omitting the racial group’s makeup within the larger admitted classes. Its data thus disregards the overall stability of each racial group within each admitted class in the decade following *Grutter*. Such stability, this Court has held, is evidence of racial balancing. *See, e.g., Parents Involved*, 551 U.S. at 710; *accord Cavalier*, 403 F.3d at 248 (relying on Supreme Court precedent to find a school cannot set a target number of enrollment percentages based on race); *Perrea*, 709 F. Supp. 2d at 645–46 (finding unconstitutional a school’s attempts to maintain the same rough percentages of racial groups among teachers).

B. Other elite colleges and universities appear to engage in racial balancing.

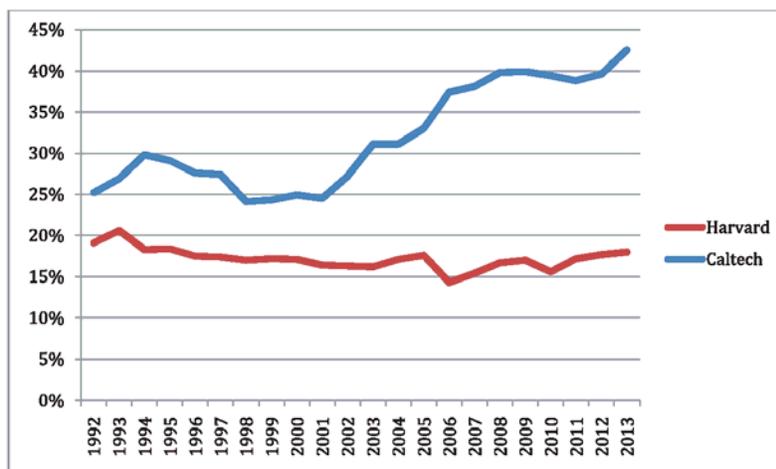
Data also reveals that Harvard is not alone. All Ivy League colleges have shockingly similar percentages to Harvard's, suggesting that most colleges engage in some sort of racial balancing.

Percentage of Asian-American Enrollment by Ivy League							
	2007	2008	2009	2010	2011	2012	2013
Brown	15	16	15	15	14	12	14
Columbia	17	17	16	16	16	16	18
Cornell	16	17	17	16	16	16	16
Dartmouth	14	14	15	15	14	14	14
Harvard	15	17	17	16	17	18	18
Penn	17	17	18	18	18	18	18
Princeton	14	15	16	17	18	19	17
Yale	14	14	15	15	15	16	16

JA156. This chart demonstrates that the rough percentage of Asian Americans enrolled in Ivy League colleges stayed around 15% from 2007 to 2013. More tellingly, the percentage range over the years within each school was relatively unchanging. Brown had the highest range at 4%, while Cornell, Dartmouth, and Penn each stayed within a range of 1% or less.

As Petitioner pointed out in its Complaint before the district court, other elite universities, like Caltech, do not consider race during the admissions process. JA160. For example, the following table and graph generally show how the percentages of Asian-American enrollment diverged between Harvard and Caltech.

Percentage of Asian-American Enrollment		
	Harvard	Caltech
1992	19.1	25.2
1993	20.6	26.9
1994	18.3	29.8
1995	18.4	29.1
1996	17.5	27.6
1997	17.4	27.4
1998	17.0	24.1
1999	17.2	24.3
2000	17.1	24.9
2001	16.4	24.5
2002	16.3	27.2
2003	16.2	31.1
2004	17.1	31.1
2005	17.6	33.0
2006	14.3	37.4
2007	15.4	38.1
2008	16.7	39.8
2009	17.0	39.9
2010	15.6	39.4
2011	17.2	38.8
2012	17.7	39.6
2013	18.0	42.5



JA161–162. In 1993, the portion of enrolled Asian-American students at Harvard was its highest at 20.6%. Since then, the number has stayed between about 15% and 18%. In contrast, Caltech’s enrollment in 1993 was 26.9% Asian-American. In the late 1990s and early 2000s, that number went down to roughly 24%. But from 2001 to 2013, it steadily increased to 42.5%.

At Caltech, the numbers of enrolled Asian-American students have significantly increased since the 1990s. But while the enrollment numbers at this elite school have steadily grown over time, Harvard’s remain the same. This is not for a lack of applications; despite making up only 6% of our nation’s population, Asian Americans have comprised approximately 22% of Harvard’s applicant pool in recent years. App. 112–113. Again, this reveals that Harvard has engaged in unconstitutional racial balancing.

C. Even without the data, practices by the admissions department show that Harvard is “obsessed with race.”

Harvard kicks off its admissions process each year by recruiting high school students based on the color of their skin. Pet. at 8. For example, Harvard invites students of African-American and Hispanic descent to apply to the College if they have a PSAT score of 1100 or higher. *Id.* Harvard does *not* extend the invitation to students of Asian-American descent unless they score at least 250 points higher than the other minorities. *Id.* When asked why it failed to apply the same recruitment standards to all minority students, Harvard could not give “a precise answer.” JA583:6–23.

Harvard admissions officers take race into account when considering whether to advance an application at each round in the admissions process. App. 126. First, as applications roll in, the Harvard admissions office condenses key data about each applicant into a two- to three-page summary sheet. *Id.* at 127. One of the data points is the applicant’s race. *Id.* at 128. Each time an admissions officer considers an application, he or she chooses whether to pass the application and summary sheet along to the next round. *Id.* at 127–133. Finally, once the application survives the winnowing process and appears before the full admissions committee, each applicant’s summary sheet—including the race of the applicant—is displayed on a screen. *Id.* at 129.

To ensure the admissions office is meeting its target number of racial groups each year, the Dean of Admissions tracks the ethnic makeup of the applicant pool through “one-pagers” that “provide a snapshot of the projected class and compare it to the prior year.” *Id.* at 135. The Dean frequently shares this data with the application review committee. “For example, at the start of the full Admissions Committee meetings, he usually states how many students are being recommended for admission by the subcommittees and how the breakdown of the class compares to the prior year in terms of racial identities and other demographics.” *Id.* at 136. And if a demographic group is not sufficiently represented in the applicant pool on a given year, Harvard can “give additional attention to applications from students within that group.” *Id.* at 136–137.

Finally, once the admissions committee has narrowed down its list of applicants to fall within the target range, it engages in a “lop process” to eliminate the final few candidates. *Id.* at 133. To assist with “lopping,” the committee considers five factors: athleticism, socioeconomic class, legacy status, gender, and race. *Id.* Once again, the Dean of Admissions informs the committee about the racial composition of the class before the committee determines which applications to reject. *Id.* Only after completion of this extensive, race-conscious process are acceptance letters finally mailed.

II. This Court should grant certiorari because the *Grutter* decision conflates diversity of color with diversity of thought in a way that harms college students.

This Court has long held that a college campus is the “marketplace of ideas” where students are exposed “to that robust exchange of ideas which discovers truth.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur. *Healy v. James*, 408 U.S. 169, 180 (1972). Open dialogue is particularly vital on college campuses where students are formed into tomorrow’s leaders; as such, they must be well-versed on matters of public import and our nation’s founding principles of freedom and equality. See *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

Diversity contributes significantly to a well-rounded college experience. Indeed, this Court held in *Grutter* that “attaining a diverse student body is at the heart of [a university’s] proper institutional mission” for exchanging ideas. *Grutter*, 539 U.S. at 329. But diversity of color alone does not necessarily produce diversity of thought in the classroom. In fact, to assume that members of one race will bring a particular point of view to campus is a form of stereotypical thinking. Pet. at 23–24 (“The Fourteenth Amendment normally forbids ‘the assumption that race or ethnicity determines how [individuals] act or think.’”) (quoting *Metro*

Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

Moreover, college students feel there is a *decrease* in diversity of thought on campus. For example, in a recent survey of nearly 20,000 college students, a shocking 60% of students revealed that they have withheld viewpoints on campus for fear of how others would respond. Press Release, Foundation for Individual Rights in Education, *Largest Ever Free Speech Survey of College Students Ranks Top Campuses for Expression* (Sept. 29, 2020).³ Students at Ivy League schools were most in favor of using violence to shut down speech events. *Id.* And minority groups, including women, LGBTQ students, and African-American students, were statistically less tolerant of others' views. *Id.*

This Court's reasoning in *Grutter*—that considering race in the admissions process allows colleges to fulfill their educational goals—has not held true in practice. In many ways, it undermines the advancements of this country because it allows members of a university to examine everything through a racial lens, starting at the very beginning with the admissions process. It reinforces the harmful idea that students should be hyperconscious of the color of their skin and that of their peers. For if colleges can form first impressions of students based on their race, what is to prevent college students from doing the same?

³ www.thefire.org/largest-ever-free-speech-survey-of-college-students-ranks-top-campuses-for-expression/.

Take Columbia University, for instance. The Ivy League recently made headlines for its 2021 graduation plans. See Dustin Barnes, *Columbia University Offering Graduation Ceremonies Based on Race, Ethnicity, Income Status*, USA Today (Mar. 16, 2021).⁴ Along with its typical schoolwide commencement, the university has planned at least six “Multicultural Graduation Celebrations” for students who “self-identify in a variety of ways.” Ben Zeisloft, *‘The Endpoint of Critical Race Theory’: Columbia University Faces Backlash for Segregated Graduations*, Campus Reform (Mar. 16, 2021).⁵ As the Columbia website shows, the celebrations are divided by race, socioeconomic status, and even sexual orientation:⁶

EVENT REGISTRATION

For each graduation celebration you register for below, you will receive the link for the virtual event, details on submitting congratulatory messages to graduates and information about event recordings.

I would like to register for the following: *

Asian Graduation Celebration

Black Graduation Celebration

FLI Graduation Celebration (First-generation and/or low income community)

Latinx Graduation Celebration

Lavender Graduation Celebration (LGBTQIA+ community)

Native Graduation Celebration

Select all that apply.

Submit

⁴ www.usatoday.com/story/news/education/2021/03/16/columbia-university-offers-graduation-ceremonies-based-race-income/4716586001/.

⁵ <https://campusreform.org/?id=17040>.

⁶ <http://web.archive.org/web/20210308102343/www.cc-seas.columbia.edu/multicultural/graduationguests>.

Although Columbia has since clarified that the celebrations are voluntary and open to any student, its website shows that it still plans to tailor each celebration specifically to racial minorities, low-income students, and students who identify as LGBTQ. *Id.*

And at Smith College, an elite private institution not far from Harvard, an employee recently resigned from her position in the Department of Residential Life. Bari Weiss, *Whistleblower at Smith College Resigns over Racism* (Feb. 19, 2021).⁷ Through training sessions, curriculum, and conversations, the College informed the employee, a white woman, that she must view everything “through the lens of race, projecting rigid assumptions and stereotypes on students, thereby reducing them to the color of their skin.” *Id.* The employee sat in meetings where the College openly discussed racial quotas in the hiring process. *Id.* And at a staff meeting in 2020, the employee indicated that she did not feel comfortable responding to personal questions about her racial identity. *Id.* The facilitators said that such discomfort was “an act of aggression” and a sign of “white fragility.” *Id.* In her resignation letter, the employee wrote, “Under the guise of racial progress, Smith College has created a racially hostile environment in which individual acts of discrimination and hostility flourish.” *Id.*

Most harmful of all, the reinforcement of racial differences and “otherness” has trickled down to college

⁷ <https://bariweiss.substack.com/p/whistleblower-at-smith-college-resigns>.

students. For instance, at the University of Virginia in 2020, an African-American student asked white students to leave the college's new Multicultural Student Center. Edmund DeMarche, *University of Virginia Student Says 'Too Many White People' at School's New Multicultural Center: Report*, Fox News (Feb. 13, 2020).⁸ The student announced, "[T]here are just too many white people in here, and this is a space for people of color, so just be really cognizant of the space that you're taking up, because it does make some of us [people of color] uncomfortable when we see too many white people in here." *Id.*

Openly encouraging staff to form assumptions about students based on their race. Segregating college graduations and campus facilities. Is this what diversity looks like? Under *Grutter*, the answer appears to be yes. The *Grutter* decision does not uphold true diversity—of thought, religion, politics, or culture—because it still allows colleges like Harvard to significantly weigh race in the admissions process for the sake of educational diversity. The *Grutter* reasoning exacerbates racial stereotypes by conflating diversity of viewpoint with diversity of color. And as the examples above show, if race is allowed to infiltrate admissions decisions from the outset, there is nothing to stop race from informing and motivating every action on our nation's college campuses moving forward.



⁸ www.foxnews.com/us/university-of-virginia-student-says-too-many-white-people-at-schools-new-multicultural-center-report.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this amicus curiae brief, this Court should grant the petition for writ of certiorari.

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