

Nos. 20-1199 & 21-707

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**In the Supreme Court of the United States**

STUDENTS FOR FAIR ADMISSIONS, INC.,  
PETITIONER,

*v.*

PRESIDENT & FELLOWS OF HARVARD COLLEGE,  
RESPONDENTS.

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STUDENTS FOR FAIR ADMISSIONS, INC.,  
PETITIONER,

*v.*

UNIVERSITY OF NORTH CAROLINA ET AL.,  
RESPONDENTS.

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*ON WRITS OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT AND  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**BRIEF OF SOUTHERN GOVERNORS AS AMICI CURIAE  
IN SUPPORT OF RESPONDENTS**

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## INTEREST OF AMICI CURIAE<sup>1</sup>

*Amici Curiae*, listed in the accompanying appendix, are current and former governors of States in the American South. Southern States have a particular and painful history of discrimination against racial minorities. *Amici* have worked tirelessly to overcome this history and make the promise of freedom and equality real for every resident of their respective States. *Amici* are proud of the progress their States have made, but they take a sober view of the work that remains to free the South—and the rest of the Nation—from the last vestiges of racial discrimination.

Part of that work is ensuring that state, local, and municipal governments are diverse and representative. As chief executives, *Amici* have accounted for the importance of diversity when discharging their duties to appoint executive officers, fill judicial vacancies, and staff boards and committees. And as leaders of diverse populations, *Amici* have worked hard to assemble broad and diverse coalitions to ensure the popularity and legitimacy of government action.

Governors of Southern States have immense responsibility for education in their States—from Pre-K to universities and community colleges. Collectively, the signatories to this brief have decades of education policy experience focused on achieving positive outcomes for all students and closing the achievement gap.

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<sup>1</sup> The parties have lodged blanket letters of consent to the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and no person other than *Amici* or their counsel have made any monetary contributions intended to fund preparation or submission of this brief.

*Amici* also know how vital public colleges and universities are in maintaining effective state government. *Amici* include proud graduates of public colleges and universities, including respondent the University of North Carolina, and they have all drawn heavily from their States' public institutions of higher learning in their administrations. *Amici* know that the next generation of leaders at all levels of government are likely to flow from public colleges and universities. And *Amici* have enacted a broad array of public programs to ensure educational equality for younger children in their States. Those programs are threatened by the extreme position pushed by Petitioners' *amici*.

*Amici* submit this brief in support of respondents to emphasize the continuing importance of ensuring that public colleges and universities can use race as one factor among many in admissions decisions. To illustrate the importance of these policies, this brief focuses on the experience of a handful of States and *Amici*. But all of the signatories of this brief share the belief, borne out by their decades of experience as public servants, that race-conscious admissions policies are critical to maintaining diverse, representative, trusted, and effective government institutions.

#### SUMMARY OF ARGUMENT

This Court has affirmed and reaffirmed the existence of a compelling government interest in the educational benefits of diversity. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) ("*Fisher I*"); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) ("*Fisher II*"). One reason that interest remains so compelling is that diversity in education fosters diversity in government. Government of the people, by



the people, and for the people demands leaders who reflect the diversity of the people they govern.

As the Court recognized in *Grutter*, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” 539 U.S. at 332. But for much of our Nation’s history, the path to leadership for racial minorities has been strewn with obstacles. As leaders of Southern States, *Amici* know all too well the detrimental effects those obstacles can have not only on individual residents, but on the enterprise of government itself.

Race-conscious admissions programs have been a critical tool in efforts to clear those obstacles and open the path to leadership for a more diverse group of residents. Many current leaders of state, local, and municipal governments are graduates of public colleges and universities that employ race-conscious admissions strategies to achieve diverse student bodies. Allowing schools to maintain those narrowly tailored race-conscious admissions programs will ensure that the future leaders continue to reflect the diversity of their home States. Diverse student bodies also encourage civic engagement and promote skills that future leaders need, like openness to debate and a willingness to seek out different viewpoints.

In addition, race-conscious admissions programs further effective state government by increasing public faith in government. *Amici*’s experiences leading state governments in the South confirm that representative diversity in our institutions inspires confidence and creates cohesion in civic life. Representation is particularly important for public colleges and universities because they are state institutions funded by taxpayer dollars. A diverse student body powerfully demonstrates to residents

of all races and ethnicities that they can share in the benefits of state government and not just the tax burdens.

Although these cases focus on the admissions programs at UNC and Harvard, their potential impact is much broader. Petitioners' *amici* argue that the Court should hold any consideration of race in education unconstitutional. Such a ruling would not just be unprecedented; it would break with decades of precedent that *Amici* and other leaders have relied on in creating education programs across the country. Many of these programs use considerations that correlate with race, like income, to identify the students most in need of additional support. The Court should not adopt a rule that would seriously disrupt Southern States' ongoing efforts to reduce educational inequality.

*Amici* strongly believe that racial discrimination has no place in American society. But careful consideration of race as one factor in an individualized assessment of a college applicant is not discrimination. The States that *Amici* have led should be permitted to continue to account for race when selecting the students who will become the backbone of the South's state and local governments. The judgments of the district court and court of appeals should be affirmed.

## ARGUMENT

### **I. Diverse, High-Achieving Student Bodies are Critical To Maintaining Effective State Government.**

*Amici* have devoted their careers to serving the people of their States. In their collective decades of public service, *Amici* have seen first-hand that effective government requires highly skilled leaders who both reflect and understand the populations they serve. In Southern States, that means leaders must be racially and ethnically

diverse. Public colleges and universities with race-conscious admissions programs are crucial to forging future generations of diverse state and local leaders, and to building public confidence in the institutions they will lead.

**A. Effective State Government Requires Leadership that is Broadly Representative of the State’s Population.**

1. Southern public colleges and universities with race-conscious admissions are some of the most fertile training grounds for the next generation of diverse public servants. In fact, it is at the heart of their mission. UNC, for example, exists to “serve[] North Carolina, the United States, and the world through teaching, research, and public service.”<sup>2</sup> And public colleges and universities educate a significant percentage of public servants throughout the country.

The central role those institutions play is not new. For decades, this Court has recognized that the “‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” *Bakke*, 438 U.S. at 313 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)). For Southern States, with their vast and historical diversity, that principle rings especially true.

To effectively lead increasingly diverse communities, government officials must be able to identify, understand, and respond to perspectives that are different from their own. Public colleges and universities that use race-con-

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<sup>2</sup> Univ. of N.C. at Chapel Hill, *Mission and Values* (2022), <https://www.unc.edu/about/mission/>.

scious admissions to create a diverse educational environment play a key role in fostering those capabilities in future leaders.

Many young people arrive at college having had limited exposure to people of different races, from different places, and with different lived experiences. And they may have implicit assumptions about how those people think and act. College provides an opportunity to displace those assumptions and understand diverse experiences, perspectives, and ideas. Students learn to accept and appreciate traditions and backgrounds different than their own. By broadening their horizons in this way, students become better prepared to join the workforce of the world economy.

A diverse educational environment is especially beneficial in building critical leadership traits. Students improve cultural awareness, relate better to people from different backgrounds, and show increased levels of “civic engagement.” Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 *Rev. Educ. Res.* 29, 46-47 (2011); Jiali Luo & David Jamieson-Drank, *A Retrospective Assessment of the Educational Benefits of Interaction Across Racial Boundaries*, 50 *J.C. Student Dev.* 67, 80-81 (2009). And diversity fosters more complex styles of thinking and improved critical thinking and problem solving. Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 *Rev. Educ. Res.* 4, 20-21 (2010); Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 *Psych. Sci.* 507, 509 (2004). Diverse learning environments thus foster the kind of creativity and innovation that drives our economy forward.

Students educated in diverse college environments are also more open to having their views challenged and more tolerant of others with different beliefs. They hone the ability to “see multiple perspectives,” to “work cooperatively with diverse people,” and to “discuss and negotiate controversial issues.” Mark E. Engberg, *Educating the Workforce for the 21st Century: A Cross-Disciplinary Analysis of the Impact of the Undergraduate Experience on Students’ Development of a Pluralistic Orientation*, 48 Res. Higher Educ. 283, 285, 307-08 (2007). In short, students “learn the lessons that will shape their behavior for the rest of their lives.” Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 Pepp. L. Rev. 663, 703 (2008).

Those lessons are critical for future leaders of all stripes, but they are especially critical for students who embark on careers in public service. As *Amici* can attest, state and local government leaders in particular need to serve increasingly diverse communities. As of the 2020 Census, nonwhite people collectively make up over 38% of the population nationwide, an 8.6% increase in the past decade.<sup>3</sup> Being educated in a diverse environment is critical to understanding and responding to the unique perspectives, ideas, and concerns of our increasingly diverse communities. Indeed, it is the only way representative democracy can work for its people.

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<sup>3</sup> U.S. Census Bureau, *Race and Ethnicity in the United States: 2010 Census and 2020 Census* (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>.

2. The makeup of state governments throughout the South illustrates the importance of public colleges and universities with race-conscious admissions programs. Many Southern state executives, legislators, and judges come from those institutions, as do local and municipal leaders across every State.

Take North Carolina as one example. About three-quarters of the General Assembly attended a public college or university, and almost a third went to school in the UNC system.<sup>4</sup> Leaders of the North Carolina judiciary have a similar profile: some 77% of the judges on the North Carolina Supreme Court and Court of Appeals attended a public college or university, and over half were educated in the UNC system.<sup>5</sup>

Governors from both political parties have also recognized the importance of diverse cabinets. Many of those appointees are graduates of public colleges and universities too. Consider Governor Cooper's current cabinet in North Carolina. Over half went to a public college or university, and nearly a third went to UNC.<sup>6</sup>

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<sup>4</sup> See N.C. Gen. Assembly, *North Carolina Representatives (2021-2022 Session)*, <https://www.ncleg.gov/Members/MemberList/H>; N.C. Gen. Assembly, *North Carolina Senators (2021-2022 Session)*, <https://www.ncleg.gov/Members/MemberList/S>.

<sup>5</sup> See N.C. Jud. Branch, *Meet the Justices*, <https://www.nccourts.gov/courts/supreme-court/meet-the-justices>; N.C. Jud. Branch, *Biographies of the Judges*, <https://www.nccourts.gov/courts/court-of-appeals/biographies-of-the-judges>.

<sup>6</sup> See NC.gov, *Cabinet: Department Secretaries Appointed by the Governor*, <https://www.nc.gov/your-government/executive>.

Simply put, public colleges and universities produce a significant percentage of state and local government leaders. The perspectives, skills, and understanding that diverse educational environments cultivate enable those leaders to do the people’s work most effectively.

*Amici* know this from experience. Diverse groups in state government produce better outcomes. For example, a diverse cabinet and diverse leadership in state agencies means that more perspectives and experiences are brought to the table for decisionmaking, creating more innovation and better teamwork.

3. *Grutter* anticipated that in 25 years’ time, the use of race in admissions would no longer be necessary. 539 U.S. at 343. That timeline has proven overly optimistic. *Amici* are proud of the significant strides their States have made over the past two decades. The “path to leadership” for racial minorities is clearer today than it has ever been, thanks in part to this Court’s decisions blessing race-conscious admissions and the programs that have followed in their wake. But there remains a long road ahead. Continued use of race-conscious admissions is vital to ensuring that progress is not prematurely cut short.

Census data shows that in the years immediately following *Grutter*, roughly 29% of the white population over 25 years of age had a bachelor’s degree, compared to 17% of the Black population.<sup>7</sup> By 2019, white and Black bachelor’s degree rates had both increased by 4.4 percentage

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<sup>7</sup> Kevin McElraith & Michael Martin, *Bachelor’s Degree Attainment in the United States: 2005 to 2019* tbl. 1 (Feb. 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-009.pdf>.

points, to roughly 33% vs. 21%. *Id.* The result is that although encouraging progress has been made, a striking disparity persists.

The need for further progress is particularly pressing in the South, where educational attainment for white and minority residents alike remains lower relative to other parts of the country. Take the Carolinas. For decades, the percentage of North and South Carolinians with a bachelor's degree has trailed the national average.<sup>8</sup> The results have been predictable. As of 2019, North and South Carolinians of all education levels earn less than the national average and participate in the labor force at lower-than-average rates. *Id.*

The numbers are even starker by race. In 2019, 23.1% of white North Carolinians had a bachelor's degree, but the same is true of only 14.6% of Blacks and 11.1% of Hispanics. *Id.* And in South Carolina, 21.4% of whites have a bachelor's degree compared with 11% of Blacks and 12.6% of Hispanics. *Id.*

The relative trickle of racial minorities through the higher education pipeline today naturally affects the supply of state leaders tomorrow. *Amici*, with the help of public colleges and universities in their States, have worked hard to cultivate that next generation of leaders

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<sup>8</sup> Fed. Rsrv. Bank of Richmond, *Educational Attainment in North Carolina—2019*, [https://www.richmond-fed.org/-/media/RichmondFedOrg/research/regional\\_economy/reports/special\\_reports/pdf/educational\\_attainment\\_nc.pdf](https://www.richmond-fed.org/-/media/RichmondFedOrg/research/regional_economy/reports/special_reports/pdf/educational_attainment_nc.pdf); Fed. Rsrv. Bank of Richmond, *Educational Attainment in South Carolina—2019*, [https://www.richmondfed.org/-/media/RichmondFedOrg/research/regional\\_economy/reports/special\\_reports/pdf/educational\\_attainment\\_sc.pdf](https://www.richmondfed.org/-/media/RichmondFedOrg/research/regional_economy/reports/special_reports/pdf/educational_attainment_sc.pdf).



and to shore up the legitimacy of state and local government institutions. But more work remains to be done. This Court should not hamper that effort by depriving public colleges and universities of the essential tool of race-conscious admissions.

**B. Diverse Colleges and Universities Build Public Confidence in State Government.**

*Grutter* and *Fisher II* further recognized that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” *Grutter*, 539 U.S. at 332. “Effective participation” in civic life includes participation in public higher education. Diversity not only produces better students and better leaders, but also produces better and more engaged participants in civic life.

To achieve effective participation by all in the civic life of our States, it is important for our public universities to build a team of students that mirrors the diversity of the overall population. Race-conscious admissions policies are a key tool that public colleges and universities use to meet this goal. The policies allow schools to assemble an incoming class that looks as much like the State as possible, while still accounting for other important factors, like academic performance, community involvement, and life experience.

In North Carolina, the effort to bring students together to create a representative student body is part and parcel of the state government’s commitment to developing the talents of all individuals from all walks of life. North Carolina’s reputation as “the education state” requires nothing less than a system of public education—including higher education—that values, supports, and

mirrors the great diversity of the State and provides equal opportunity to all to pursue their dreams.

North Carolina pursues this goal not only at the State’s flagship university at Chapel Hill and across the State’s entire system of 16 public universities, but also within the North Carolina Community College System. In many ways, community colleges form the backbone of public higher education by offering an open door to all students through affordable access, quality education, and opportunity for economic mobility and effective participation in civic life. Community colleges have long served as an exemplar of the value of diversity in higher education. And community colleges continue to support access and success for a diverse group of students, particularly students from groups that have been historically and systematically disadvantaged.<sup>9</sup>

By doing the work to realize the goals of full representation and participation, public universities in the South—and the state governments that support them—earn the confidence of “[a]ll members of our heterogeneous society.” *Grutter*, 539 U.S. at 332. Public higher education systems that are truly open to all help legitimize our social and political institutions. *See id.*; *see also* Goodman, *supra*, at 670.

Appreciation of diversity is a deeply held value in the States served by *Amici* (and around the country). When state leaders invest significant financial and other re-

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<sup>9</sup> *See, e.g.*, N.C. Cmty. Colls., NCCS Diversity, Equity and Inclusion Task Force, *Final Report* (July 31, 2021), [https://www.nccommunitycolleges.edu/sites/default/files/state-board/planning/plan\\_02\\_-\\_ncccs\\_dei\\_task\\_force\\_final\\_report\\_0.pdf](https://www.nccommunitycolleges.edu/sites/default/files/state-board/planning/plan_02_-_ncccs_dei_task_force_final_report_0.pdf).

sources to ensure our public colleges and universities reflect the diversity of our States, the public understands and appreciates that its leaders are acting in service of a core societal ideal.

By the same token, institutions that fail to promote diversity in public higher education risk losing the confidence of the public. Representation in higher education is especially important for state institutions, which are supported largely through taxpayer funding. Every family that has ever made a purchase in North Carolina has paid a sales tax that funds public colleges. Those taxpayers are more likely to support spending on public education when they see that the population of admitted students is broadly representative of a State's demographics. If public education fails to provide opportunities for certain groups, those groups may be likely to support state leaders who put taxpayer money to use in other areas where members of those groups see some value. Over time, if enough people think and vote that way, public education would lose funding and would be eroded.

Part of the value that state governments bring to the public through diverse public higher education flows from the creation of fully inclusive learning spaces that both the private sector and K-12 public schools are largely unable to replicate. Although businesses are encouraged to create diverse workplaces, the business world is limited to hiring from the qualified workforce produced by each institution. If public universities do not produce talented, diverse classes, that will have a negative impact on institutional reputations and employment opportunities for all graduates. Public schools in the K-12 years are also limited in their ability to create diverse environments because their student bodies are often drawn from racially

and economically segregated geographies. Public colleges and universities therefore serve as a unique site for individuals from widely diverse backgrounds to interact and learn from each other.

As one commentator has explained, in the context of legal education:

A democratic rationale for affirmative action in legal education looks forward to creating diverse democratic leadership for the future. But it also looks back to a time when our democracy stood on the verge of collapse because we did not fully subscribe to the foundational democratic principles of freedom, inclusion, and equality. The civil unrest that erupted during the Civil Rights Movement is indicative of what can happen when a nation that proudly professes to be built upon democratic ideals fails to extend the rights and privileges of democracy to everyone equally.

Carla D. Pratt, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 Hous. L. Rev. 55, 62 (2006).

Unfortunately, many public colleges and universities still struggle to achieve student bodies that reflect the diversity of their home States. Indeed, UNC itself is only partway along this journey. In recent years, barely half of student respondents to campus surveys expressed satisfaction with the racial/ethnic and socio-economic diversity of the student body at UNC Chapel Hill.<sup>10</sup> At the

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<sup>10</sup> Off. of Institutional Rsch. & Assessment, *UNC-Chapel Hill Undergraduate Student Perceptions of the*

same time, nearly 70% of respondents agreed that UNC is committed to diversity and over 85% expressed that they were comfortable with the climate for diversity and inclusion at the university. *Id.* at 20.

In short, race-conscious admissions programs like UNC's policies are not only vital to allowing colleges and universities to become more representative, but also play an important role in inspiring confidence that public higher education and state government are committed to diverse representation in public life.

**II. Overturning Narrowly Tailored Race-Conscious Admissions Policies Would Threaten Other Efforts by Southern States to Increase Academic Achievement and Promote Diversity.**

Petitioners promote policies like Texas' Top Ten Percent Plan as alternatives to the narrowly tailored race-conscious programs at issue in these cases. But some of petitioners' *amici* go much further, advocating an extreme position that could call into question those "alternative" policies as well.

Under the sweeping rule urged by petitioners' *amici*, scores of race-neutral programs could be invalidated if a judge detects even a whiff of race-conscious planning, motivation, or impact measurement. Programs across the South designed to ensure equity and access to quality education for all would be thrown into doubt. The Court

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*Campus Climate for Diversity and Inclusion: Highlights from Recent Surveys* 11 (Mar. 2019), <https://oira.unc.edu/wp-content/uploads/sites/297/2019/03/Undergrad-Diversity-Survey-Highlights.pdf>.

should hesitate before issuing a broad ruling that could upset these important efforts.

1. The Court’s prior cases have held that facially race-neutral education programs are constitutional even when those programs were created with racial considerations in mind. *See* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 Ala. L. Rev. 653, 669-71 (2015); Derek W. Black, *Fisher v. Texas and the Irrelevance of Function in Race Cases*, 57 How. L.J. 477, 480 (2014). The Court has approved such programs both for college admissions, as in *Fisher I* and *II*, and for K-12 school assignments, as in *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring).

Consistent with the Court’s guidance, *Amici* have designed and implemented a variety of plans to address racial inequality in K-12 education. Many of these programs work by identifying a population of “at risk” students and providing them additional educational resources. The population of these “at risk” students, in turn, is often disproportionately comprised of racial minorities.

For example, North Carolina’s NC Pre-K Program (previously known as the “*More at Four*” program) provides high-quality educational experiences to four-year-old children within the State. Eligibility for the program is determined based on factors that correlate with race, such as income and whether the child speaks English as a second language.<sup>11</sup> Indeed, when “*More at Four*” was created in 2001, criteria developed for identifying “at risk”

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<sup>11</sup> *See* N.C. Div. of Child Dev. & Early Educ., *North Carolina Pre-Kindergarten (NC Pre-K) Program*

children included family income, special needs, education level and employment status of the primary caregiver, family composition, English proficiency, and minority status (when coupled with other risk factors).<sup>12</sup> Extensive research has demonstrated that NC Pre-K has strong positive effects for participants, especially for children from Black families.<sup>13</sup> Students who are not “at risk” benefit, too, by allowing teachers in kindergarten and beyond to spend less time bringing the entire class up to grade level.

If, as petitioners’ *amici* say, *any* consideration of race in education is constitutionally suspect, programs like NC Pre-K are no alternative at all. After all, as Justice Ginsburg recognized in *Fisher I* and the majority reiterated in *Fisher II*, “It is race consciousness, not blindness to race, that drives such plans.” *Fisher II*, 579 U.S. at 386. In other words, the position advocated by petitioners’ *amici* could call even facially race-neutral programs into question if it can be argued that adoption of those programs was motivated in part by a desire to address racial ine-

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*Requirements and Guidance* (Mar. 2018), [https://ncchild-care.ncdhhs.gov/Portals/0/documents/pdf/N/NCPre-K\\_Program\\_Requirements\\_Guidance.pdf](https://ncchild-care.ncdhhs.gov/Portals/0/documents/pdf/N/NCPre-K_Program_Requirements_Guidance.pdf).

<sup>12</sup> See *More at Four Pre-Kindergarten Program*, Governor’s Office, *More at Four Pre-Kindergarten Program Progress Report to the General Assembly On Section 21.76B* at 12, (Dec. 31, 2001), <https://web-services.ncleg.gov/ViewDocSiteFile/15855>.

<sup>13</sup> See Kenneth Dodge et al., *Evaluation of North Carolina Early Childhood Program Among Middle School Students*, at 26-27 (Duke Univ. Working Paper, 2019), <https://duke.app.box.com/s/ospjbc5z1021crd5i1cn48vzj3htu57g>.

quality. A rule that *any* consideration of race is unconstitutional would upset earlier precedent, potentially rendering invalid many programs aimed at improving racial inequality in education.

2. Petitioners' *amici* acknowledge that facially race-neutral programs like those adopted by governors across the South are subject to challenge under the theories articulated in this case.

According to these *amici*, "When [socio-economic status] preferences or percent solutions [like Texas' Top Ten Percent Plan] are adopted *because of* their effect on the racial composition of the class, they are on the same legal and constitutional footing as racial preferences." Br. *Amici Curiae* of Gail Heriot and Peter N. Kirsanow, at 28. Attempting to reassure the Court, *amici* assert that not every program with preferences based on socio-economic status would be invalidated. How is one to discover whether such a plan is constitutional? "The best way to tell whether these universities are using SES preferences as a pretext," these *amici* claim, "is to look at their SES metrics." *Id.* at 29. Apparently, if policies have an impact on race, or if race is ever mentioned in the inception or design, or if race is considered when measuring a policy's effect, it should be invalid. *See* Br. *Amici Curiae* of Hamilton Lincoln Law Inst. and Ilya Shapiro, at 8-10; Br. *Amici Curiae* of Pacific Legal Found., et al., at 13-16. Judges could, with every new education-related plan or policy, be set on the hunt for race-consciousness. If the court can discern a different impact or intent based on race, the policy could be found unconstitutional as a consequence of a dramatic reversal of precedent here by this Court. Indeed, such a legal rule could have the paradoxical effect of freezing policies and outcomes because any



policy that improved outcomes for minorities would be inherently suspect.

More troublingly still, petitioners' *amici* suggest that an educational program could be invalidated even when there is no mention of race in its planning or purpose. Br. *Amici Curiae* of Gail Heriot and Peter N. Kirsanow, at 29. Instead, if a judge believes that a particular metric aligns with a specific racial group (either positively or negatively), that would be sufficient to invalidate the plan. If admissions preferences were given to urban households under the explicit goal of socio-economic diversity, a judge could determine that the preference is a proxy for race because it might give a boost to Black applicants. Or, *amici* propose, if a similar plan gave additional points to fatherless households, a judge might determine that this harms Asian applicants. *Id.* Race need not be mentioned at all.

At bottom, petitioners' *amici* are not only attacking race consciousness in admissions to higher education; they also aim to eliminate opportunities in elementary, middle, and high school that would expand opportunities to *earn* admission to university. Quality education at one level makes quality education at the next level more accessible. By choking off earlier access to the best elementary, middle, and high schools, petitioners' *amici* insist that everyone close their eyes to racial disparities in education while guaranteeing those disparities remain.

3. Petitioners sensibly do not advocate a bright-line rule against any consideration of race in education. But reliance interests and judicial restraint counsel hesitation before the Court issues any holding that could be interpreted as supporting a blanket rule prohibiting any consideration of race in education.

*Amici* and other leaders throughout the South have relied heavily on this Court's decisions in the *Fisher* cases, *Grutter*, *Bakke*, and *Parents Involved*. They have faithfully followed the guidance in these decisions that race-neutral policies pass constitutional muster even if those policies were born out of a race-conscious attention to diversity and racial makeup of educational environments. Predictability and certainty are important to well-functioning government generally, but they are especially critical in the education space, where achieving results requires careful long-term planning. This Court should hesitate before announcing a dramatic change that might destabilize the last forty-plus years of precedents established by the Court and embraced by States, K-12 school districts, and university systems across the country.

The Court does not need to decide whether *any* consideration of race at all is unconstitutional to decide this case. And “[i]f it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_ (Roberts, C.J., concurring in judgment at 2). The Court has repeatedly affirmed certain considerations of race, affirmations that respondents and *Amici* have relied upon to design programs in compliance with the law and the Constitution. A dramatic and consequential ruling reversing those affirmations is not absolutely necessary. *See id.* This Court should decline the invitation of petitioners’ *amici* to upend every dimension of public and private education throughout the country.

**CONCLUSION**

The judgments of the district court and the court of appeals should be affirmed.

AUGUST 2022

Respectfully submitted,

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## **APPENDIX**

## APPENDIX

**Roy Cooper**, Governor of North Carolina (2017–present)  
University of North Carolina, *B.A., J.D.*

**John Bel Edwards**, Governor of Louisiana (2016–present)  
United States Military Academy, *B.S.*  
Louisiana State University, *J.D.*

**Roy Barnes**, Governor of Georgia (1999–2003)  
University of Georgia, *B.A., J.D.*

**Mike Easley**, Governor of North Carolina (2001–2009)  
University of North Carolina, *B.A.*  
North Carolina Central University, *J.D.*

**Jim Hodges**, Governor of South Carolina (1999–2003)  
University of South Carolina, *B.S.B.A., J.D.*

**Jim Hunt**, Governor of North Carolina (1977–1985; 1993–2001)  
North Carolina State University, *B.S., M.S.*  
University of North Carolina, *J.D.*

**Ray Mabus**, Governor of Mississippi (1988–1992)  
United States Secretary of the Navy (2009–2017)  
University of Mississippi, *B.A.*  
Johns Hopkins University, *M.A.*  
Harvard University, *J.D.*

**Terry McAuliffe**, Governor of Virginia (2014–2018)  
Catholic University of America, *B.A.*  
Georgetown University, *J.D.*

**Bev Perdue**, Governor of North Carolina (2009–2013)

University of Kentucky, *B.A.*

University of Florida, *M.Ed., Ph.D.*

**Richard Riley**, Governor of South Carolina (1979–1987);

United States Secretary of Education (1993–2001)

Furman University, *B.A.*

University of South Carolina, *LL.B.*