No. 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORMER FEDERAL OFFICIALS OF THE DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS IN SUPPORT OF PETITIONER

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December 14, 2021

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QUESTION PRESENTED

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

2. Can a university reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are former officials of the U.S. Department of Education's Office for Civil Rights, having served under former Secretary of Education Betsy DeVos, and are interested in the lawful and appropriate enforcement of Title VI of the Civil Rights Act of 1964.

Kenneth L. Marcus is the former Assistant Secretary for Civil Rights, having served from 2018 to 2020.

Kimberly M. Richey is the former Principal Deputy Assistant Secretary for Civil Rights, having served from 2018 to 2021, including as Acting Assistant Secretary for Civil Rights for parts of 2020 and 2021.

Candice Jackson is the former Deputy Assistant Secretary for Strategic Operations and Outreach, having served from 2017 to 2018, including as Acting Assistant Secretary for Civil Rights for parts of 2017 and 2018.

David C. Tryon is a former Deputy Assistant Secretary for Policy and Development, having served from 2019 to 2021.

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[1] The parties were timely notified and have consented to the filing of this *amici curiae* brief. *See* Supreme Court Rule 37.2(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

William E. Trachman is a former Deputy Assistant Secretary for Policy and Development, having served from 2017 to 2019, and later as Senior Counsel from 2019 to 2021.

Christian Corrigan is a former Senior Counsel to the Assistant Secretary in the Office for Civil Rights, having served from 2019 to 2021.

Sarah Perry is a former Senior Counsel to the Assistant Secretary in the Office for Civil Rights, having served from 2020 to 2021.

The Department of Education's Office for Civil Rights ("OCR") functions as an administrative law enforcement agency. OCR has jurisdiction over nearly all recipients of federal funds from the Department of Education, and enforces several federal civil rights statutes, including Title VI of the 1964 Civil Rights Act and its implementing regulations. 42 U.S.C. § 2000d; 34 C.F.R. § 100, *et seq.*[2]

As part of its enforcement authority, OCR receives complaints from the public, and where appropriate, investigates those complaints and brings recipients of federal funds into compliance with Title VI through resolution agreements or enforcement proceedings. *See, e.g.*, U.S. DEP'T OF EDUC.'S OFFICE FOR CIV.

[2] OCR also enforces Title IX of the Educations Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, as well as Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* OCR also has jurisdiction over complaints arising under the Age Discrimination Act, 42 U.S.C. § 6101, *et seq.*, and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905.

RIGHTS, HOW TO FILE A COMPLAINT WITH THE DEPARTMENT OF EDUCATION (September 2010);[3] *see also* U.S. Dep't of Educ. YouTube Channel, *OCR Short Webinar: How to File an OCR Complaint* (Mar. 20, 2020).[4] OCR also initiates its own investigations in some instances, called Directed Investigations, and, separately, opens Compliance Reviews related to major OCR initiatives. *See* U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS, CASE PROCESSING MANUAL 23 (August 26, 2020) (describing Compliance Reviews in Section 401 of and Directed Investigations in Section 402).[5]

[3] https://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf.

[4] https://www.youtube.com/watch?v=BuwVa3JJE-4.

[5] https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf. On January 17, 2019, for instance, OCR announced a Compliance Review initiative on the topic of the inappropriate use of restraint and seclusion with respect to students with disabilities. *See U.S. Department of Education Announces Initiative to Address the Inappropriate Use of Restraint and Seclusion to Protect Children with Disabilities, Ensure Compliance with Federal Laws* (Jan. 21, 2019), Campus Safety Magazine, https://www.campussafetymagazine.com/safety/u-s-dept-ed-children-disabilities/. Similarly, on February 26, 2020, OCR announced a major initiative to open Compliance Reviews on the topic of sexual assault in elementary and secondary schools. *See* Letter to Superintendents from Assistant Secretary for Civil Rights Kenneth L. Marcus, *Secretary DeVos Announces New Civil Rights Initiative to Combat Sexual Assault in K-12 Public Schools* (Feb. 26, 2020), https://content.govdelivery.com/accounts/USED/bulletins/27debd7.

SUMMARY OF THE ARGUMENT

Existing case law regarding race-conscious policies under the Equal Protection Clause and Title VI has led to radically vacillating federal policy guidance and administrative enforcement conduct—all depending on who sits in the Oval Office. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (establishing the principle that Title VI and equal protection coverage overlap completely, based on legislative intent). Schools and students could be forgiven for confusion over whether all manner of race-conscious education policies are allowed, or whether such policies implicate fundamental anti-discrimination principles.

The extraordinary and rapid shifts in federal policy undermine consistency and predictability for thousands of schools and millions of students. At the same time, public confidence in the administration of civil rights laws is undermined when the same body of caselaw is read in such disparate fashion. And schools, in particular, must confront this confusing landscape against the backdrop of the incredibly severe consequence of losing all federal education funds in an OCR enforcement action. 34 C.F.R. § 100.8(c).

Before *Amici*'s tenure in OCR, the Obama Administration actively encouraged schools to adopt race-conscious policies, providing schools with suggestions and guidelines regarding race-conscious scholarships, student retention, mentoring, and elsewise. In 2018, OCR withdrew most of the Obama-

era guidance on these topics, and in 2020 and 2021, issued other guidance and information on the limited ability for schools to use race under Title VI. Now, since January 2021, the Biden Administration has already undone much of that work, which offered information regarding the limited lawful use of race in admissions, grading, discipline, and other arenas. In short, existing case law on the issue of diversity has given rise to widely divergent views of the permissible scope of the use of race, and subjects students and schools to legal "whiplash" on this topic. In the meantime, many schools continue to expand their use of race-conscious policies, sometimes under the guise of "diversity" and "equity" as an all-purpose exception to Title VI.

The fact that the exact same body of caselaw can be used to either encourage the use of race or, on the other hand, describe how limited the lawful use of race is, should give this Court serious concern. Students and schools deserve to know whether they are appropriately following guidance from Executive Branch agencies, or in fact acting illegally.

This Court should thus grant this Petition as a companion to *Students for Fair Admissions, Inc. v. President and Fellows of Harvard University*, No. 20-1199, to further clarify whether schools can extensively use race in numerous facets of education policy. This is especially important now, given that the Court's 25-year admonition in *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003), is approaching, but is itself on uncertain ground. *Compare id.* at 310 ("The Court expects that 25 years from now, the use of racial

preferences will no longer be necessary to further the interest approved today."), *with Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 980 F.3d 157, 192 (1st Cir. 2020) ("Indeed, the Supreme Court never mentioned *Grutter*'s 25-year timeline in *Fisher I or Fisher II*."). Only this Court can address the widespread uncertainty on the lawfulness of the increasing use of race in American schools.

Notably, the United States argued in its brief as Amici Curiae in *Students for Fair Admission v. President and Fellows of Harvard College*, No 20-1199, that this Court should decline to grant certiorari in that matter, in part due to Harvard being a private college not bound by the Equal Protection Clause, which poses difficult *stare decisis* questions surrounding statutory precedents. This Court solves that issue by granting certiorari with respect to both the Harvard petition and the instant petition, and consolidating the matters.

ARGUMENT

I. OCR Guidance Issued Under the Obama Administration Encouraged Schools to Use Race-Conscious Policies.

On December 2, 2011, the Department of Education and the Department of Justice issued a joint "Dear Colleague" letter purporting to "explain how educational institutions can lawfully pursue voluntary policies to achieve diversity or avoid racial isolation . . . ." U.S. DEP'T OF EDUC.'S OFFICE FOR CIV.

RIGHTS AND U.S. DEP'T OF JUST.'S OFFICE FOR CIV. RIGHTS, GUIDANCE ON VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY OR AVOID RACIAL ISOLATION (Dec. 2, 2011) ("DECEMBER 2011 DEAR COLLEAGUE LETTER").[6]

The Dear Colleague letter was published with two companion guidance documents entitled: (1) Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools,[7] and (2) Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (together, the three "December 2011 Documents").[8]

The Dear Colleague Letter stated that together, the December 2011 Documents reviewed "three key Supreme Court rulings on the use of race by educational institutions." DECEMBER 2011 DEAR COLLEAGUE LETTER 1. The December 2011

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[6] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201111.pdf.

[7] U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS AND U.S. DEP'T OF JUST.'S OFFICE FOR CIV. RIGHTS, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (Dec. 2, 2011), https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf ("DECEMBER 2011 ELEMENTARY AND SECONDARY GUIDANCE").

[8] U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS AND U.S. DEP'T OF JUSTICE'S OFFICE FOR CIV. RIGHTS, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION (Dec. 2, 2011), https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf ("DECEMBER 2011 POSTSECONDARY GUIDANCE").

Documents, however, *encouraged* the use of race across a broad spectrum of educational activities:

> For example, the elementary and secondary guidance discusses school districts' options in areas such as student assignment, student transfers, school siting, feeder patterns, and school zoning. Similarly, the postsecondary guidance provides examples of how colleges and universities can further diversity in contexts including admissions, pipeline programs, recruitment and outreach and mentoring, tutoring, retention, and support programs.

Id. The three cases reviewed in the December 2011 Documents were *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). Additionally, the December 2011 Dear Colleague Letter withdrew guidance documents issued during the Bush Administration. *See* DECEMBER 2011 DEAR COLLEAGUE LETTER 1 ("This guidance replaces August 2008 letters . . . .").[9]

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[9] *See* U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS, DEAR COLLEAGUE LETTER ON THE USE OF RACE IN POSTSECONDARY STUDENT ADMISSIONS (Aug. 28, 2008), https://www2.ed.gov/about/offices/list/ocr/letters/raceadmissionpse.html (withdrawn on December 2, 2011, republished on July 3, 2018); U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS, DEAR COLLEAGUE LETTER ON THE USE OF RACE IN ASSIGNING STUDENTS TO ELEMENTARY AND SECONDARY SCHOOLS (Aug. 28, 2008), https://www2.ed.gov/about/offices/list/ocr/letters/raceassignmen

Notably, the December 2011 Documents directly equate race-conscious admissions policies with obtaining a diversity of individual perspectives, stating that "Interacting with students who have different perspectives and life experiences can raise the level of academic and social discourse both inside and outside the classroom." DECEMBER 2011 POSTSECONDARY GUIDANCE 1. In other words, the December 2011 Documents suggested to schools that race is a stand-in for having students who have "different perspectives," such that racial diversity necessarily entailed actual diversity of perspective and life experiences.

Additionally, the documents drew heavily from Justice Kennedy's concurring opinion in *Parents Involved,* 551 U.S. at 782 (Kennedy, J., concurring) handpicking elements from that concurrence and joining them with the views of the dissenters to offer purported affirmative points of law. *See* 2011 ELEMENTARY AND SECONDARY GUIDANCE 5 ("Although *Parents Involved* ultimately was decided on other grounds, a majority of Justices expressed the view that schools must have flexibility in designing policies that endeavor to achieve diversity or avoid racial isolation, and, at least where those policies do not classify individual students by race, can do so without triggering strict scrutiny.").[10]

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tese.html (withdrawn on December 2, 2011, republished on July 3, 2018).

[10] This Court has specifically cautioned against this sort of "vote tallying" of concurrences and dissents. *See, e.g.*, *Marks v. United*

To drive home the point, the December 2011 Documents prognosticated about what this Court might do if faced with a case where a school adopted a host of race-conscious policies that stopped just short of making decisions specifically based on the race of individual students:

> Thus, although there was no single majority opinion on this point, *Parents Involved* demonstrates that a majority of the Supreme Court would be "unlikely" to apply strict scrutiny to generalized considerations of race that do not take account of the race of individual students.

2011 ELEMENTARY AND SECONDARY GUIDANCE 5. This analysis, although it appeared in the Elementary and Secondary Guidance document, was not clearly limited to that context. And, although the guidance was reaffirmed as operative by OCR as late as 2016,[11] it was in tension with *Fisher II*, which suggested that "race-neutral" plans adopted for race-conscious reasons are on just as shaky ground as outright racial preferences. In *Fisher II*, this Court held:

States, 430 U.S. 188, 193 (1977) (advising that when the Court is fragmented, "the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.").

[11] *See* U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS, QUESTIONS AND ANSWERS ABOUT FISHER V. UNIVERSITY OF TEXAS AT AUSTIN II at 2 (Sept. 30, 2016) (Question 2), https://www2.ed.gov/about/offices/list/ocr/docs/qa-fisher-ii-201609.pdf.

> As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, *though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment*. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." *Fisher I,* 570 U.S., 133 S. Ct., at 2433 (Ginsburg, J., dissenting). "It is race consciousness, not blindness to race, that drives such plans." [*Id*.] Consequently, *petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.*

Fisher v. University of Texas at Austin ("*Fisher II*"), 136 S. Ct. 2198, 2213 (2016) (emphasis added); *see also Students for Fair Admissions, Inc. v. President and Fellow of Harvard College*, 397 F. Supp. 3d 126, 200–01 (D. Mass. 2019) ("[P]etitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral. Here, just as in *Fisher II*, the Court is not persuaded that such a plan would actually be more race neutral.") (internal quotation marks omitted).

Moreover, in the December 2011 Documents, the Department cited Justice Kennedy's concurrence in *Parents Involved* for the proposition that schools are entitled to consider the racial impact of their decisions on diversity and racial isolation, but only so long as those considerations are not in furtherance of an

invidious purpose. *See* DECEMBER 2011 POSTSECONDARY GUIDANCE 5, n.11 ("[L]eeway to devise race-conscious measures to achieve diversity or avoid racial isolation extends only to circumstances where entities pursue the goal of bringing together students of diverse backgrounds and races.") (internal quotation marks omitted); DECEMBER 2011 ELEMENTARY AND SECONDARY GUIDANCE 5, n.11 (same).

Thus, during the Obama Administration, OCR relied on Justice Kennedy's concurrence for the proposition that some "good" race consciousness was permitted, and not subject to strict scrutiny. This position, however, is in deep tension with other longstanding precedents. *See Adarand Constructors v. Pena*, 515 U.S. 200, 226 (1995) ("[D]espite the surface appeal of holding 'benign' racial classifications to a lower standard, it may not always be clear that a so-called preference is in fact benign. More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.") (internal quotation marks and citations omitted); *see also Fisher v. University of Texas at Austin* ("*Fisher I*"), 570 U.S. 297, 328 (2013) (Thomas, J., concurring) ("The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities."); *Bakke*, 438 U.S. at 307 (1978) (opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

In addition to the December 2011 Documents, the Department of Education and Department of Justice later issued joint guidance after *Fisher I*. U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS AND U.S. DEP'T OF JUST.'S OFFICE FOR CIV. RIGHTS, QUESTIONS AND ANSWERS ABOUT *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN* (Sept. 27, 2013).[12] This document reiterated in full the Departments' earlier guidance, *id.* at 3, but also characterized this Court's decision in *Fisher I* as an extremely narrow holding, which applied essentially only to admissions policies. The Departments suggested ways that schools could generate "racial diversity" by sidestepping this Court's precedents. *Id.* at 2. Specifically, the Departments stated: "The Court's opinion does not address a college or university's ability to promote diversity through other efforts that do not consider an individual's race in admissions, such as engaging in targeted outreach and recruitment or partnering with high schools through pipelines programs to promote student body diversity." *Id.* at 2 (Answer 2).

Catherine Lhamon, who was in October 2021 once again confirmed as Assistant Secretary for the Office for Civil Rights under President Biden, echoed this prior position—of tallying the votes of Justice Kennedy and the dissenters in *Parents Involved*—in her Questions for the Record, addressed to the U.S. Senate:

> [Question] 25. Has the U.S. Supreme Court ever ruled that K-12 schools have a

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[12] https://www2.ed.gov/about/offices/list/ocr/docs/qa-fisher-ii-201609.pdf.

> compelling state interest in a student body diversity?
>
> [Answer] In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), a majority of the justices on the Supreme Court recognized the compelling interests that K-12 schools have in obtaining the benefits that flow from achieving a diverse student body and avoiding racial isolation. *Justice Kennedy, in concurrence, explained that he was in agreement with Justice Breyer's dissenting opinion*, which was joined by Justices Stevens, Souter, and Ginsburg, in recognizing these compelling interests.
>
> [Question] 26. Has the U.S. Supreme Court ever recognized "reducing racial isolation" as a compelling state interest that justifies racial preferences at the K-12 level?
>
> [Answer] Please see the previous answer.

See U.S. Senate Health Committee Questions for the Record for Catherine Lhamon, Nominee to be Assistant Secretary for Civil Rights, Department of Education (July 14, 2021), at 14-15 (emphasis added).[13]

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[13] https://mslegal.org/wp-content/uploads/2021/08/Republican-HELP-Committee-QFRs-for-OCR-Nominee-Catherine-Lhamon-7.19.21.pdf.

Indeed, even before Ms. Lhamon's confirmation in October 2021, OCR had announced that much of the guidance that *Amici* were instrumental in rescinding was actually back "under review" as of July 30, 2021. While the documents referred to above have yet to be fully reinstated, the obvious message to schools and students is that they may yet be, so be ready. *See* Under Review Portal, Department of Education Office for Civil Rights.[14] This sort of ambiguity on the issue of the use of race in schools can only be addressed by this Court.

II. Between 2017 and 2021, OCR Withdrew Prior Guidance and Published New Material.

After reviewing and thoroughly considering the guidance documents published between 2011 and 2016 on the topic of race-conscious policies, the Department of Justice and the Department of Education opted to withdraw them all. On July 3, 2018, the Departments wrote in a Dear Colleague Letter: "The Departments have reviewed the documents and have concluded that they advocate policy preferences and positions beyond the requirements of the Constitution, Title IV, and Title VI."[15]

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[14] https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/underreview.html (last visited December 8, 2021).

[15] U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS AND U.S. DEP'T OF JUST.'S OFFICE FOR CIV. RIGHTS, UPDATES TO DEPARTMENT OF EDUCATION AND DEPARTMENT OF JUSTICE GUIDANCE ON TITLE

Schools continued to struggle, however, with issues of race during *Amici*'s tenure. In 2020, for instance, schools were confronted with the COVD-19 pandemic, which caused many institutions to cease in-person instruction. As schools began reopening their physical spaces, OCR received reports that schools would re-open specifically by allowing students of certain racial demographics to return first. OCR was forced to respond to these troubling reports as part of its public-facing policy guidance. U.S. DEP'T OF EDUC.'S OFFICE FOR CIV. RIGHTS, QUESTIONS AND ANSWERS FOR K-12 PUBLIC SCHOOLS IN THE CURRENT COVID-19 ENVIRONMENT (Sept. 28, 2020).[16] In one document, OCR answered the following question:

> Question 1:
>
> As school districts phase in the use of physical facilities and in-person instruction as a part of their reopening plans, may they prioritize students' return to in-person instruction based on their race, color, or national origin?
>
> Answer:
>
> No. A reopening plan—or any school policy—that prioritizes, otherwise gives preference to, or limits programs, supports

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VI (July 3, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf.

[16] https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf.

> or services to students based on their race, color, or national origin—regardless of how that plan is formulated—would likely violate Title VI of the Civil Rights of 1964.

Id. at 1 (*citing Gratz*, 539 U.S. at 275). Apart from formal policy guidance, OCR's other public-facing documents describe some of the cases that it handled during the period between 2017 and 2021. For instance, in a webinar released on January 19, 2021, OCR described the following cases:

> The first complaint involved two Kentucky Department of Education scholarship programs. These programs were administered in a way that restricted the awards to members of certain racial groups. OCR found that the rationale offered—which was increasing the number of minority teachers, the need for minority role models, and remedying past segregation—were insufficient to satisfy the compelling interest prong under Title VI, because the diversity sought was not broader than mere racial diversity. The school's rationale, therefore, was not a compelling interest that justified the use of race by an educational institution. The Kentucky Department of Education voluntarily agreed to discontinue the program in order to comply with Title VI.
>
> The second complaint also involved the use of race in awarding scholarships.

Washington University in St. Louis operated a racially exclusive scholarship program, which was open only to African American students. After the complaint was filed with OCR, the University voluntarily agreed to end the program. In the resolution with OCR, the University agreed to develop a plan and a proposed timeline for ensuring that the program and all race-restricted financial aid programs administered by the University, or administered on behalf of the University, would be revised to ensure that students were eligible to compete for such programs without regard to race, color, or national origin.

In the third complaint, OCR found that even though Texas Tech University Health Sciences Center had a compelling interest in a diverse student body, it had failed the "narrowly tailored" requirement of the strict scrutiny test. Although the school had considered race as only one factor in its individual consideration of applicants, it had not documented when and how it used race as a factor, or the necessity for the continued use of such preferences, or whether workable race-neutral alternatives would be as effective in achieving similar levels of diversity.

OCR's investigation into the use of race at Texas Tech University Health Sciences

> Center illustrates the need for a school to narrowly tailor the use of race as a factor, including determining whether the school can reach its interest in diversity through non-racial classifications and documenting its efforts.

U.S. DEP'T OF EDUC., OCR WEBINAR: USE OF RACE IN POSTSECONDARY ADMISSIONS 3–4 (Jan. 19, 2021) (Transcript).[17]

The document also addressed race-neutral alternatives, like those at issue in the present matter, and offered plainly accurate statements of black-letter law, such as: "Before using race, there must be serious good faith consideration of workable race-neutral alternatives." *Id.* at 3; *see also id.* ("If a school can use race-neutral alternatives to achieve their sought-after student body diversity, then using race as an explicit factor in admissions or financial aid is impermissible.").

Despite the fact that this material was descriptive in nature, and echoed long-established caselaw on the use of race, Biden Administration appointees in OCR swiftly withdrew it after January 20, 2021. Now, the material is flagged with a warning that it is "ARCHIVED AND NOT FOR RELIANCE," based on the claim that it "expresses policy that is inconsistent in many respects with Executive Order 13985 on Advancing Racial Equity and Support for

[17] https://www2.ed.gov/about/offices/list/ocr/docs/ocr-tvi-webinar-urpsa.pdf.

Underserved Communities through the Federal Government."[18]

So, are broad race restrictions on scholarships permissible? May schools use race as a factor in admissions indefinitely, without considering whether they may reach their goals without resort to race consciousness? Now that this material has been withdrawn, schools are left to wonder entirely whether OCR would make the same case findings now that it would have made before.

The District Court noted that in 2012, OCR found that the University had given good-faith consideration to race-neutral alternatives. Appendix 178. While correct that OCR dismissed the 2006 complaint, OCR's findings also included the statement that the Respondent "has further committed to end or reduce the consideration of race or national origin," if it could still achieve a "sufficient degree" of race-based

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[18] EXECUTIVE ORDER 13985, ADVANCING RACIAL EQUITY AND SUPPORT FOR UNDERSERVED COMMUNITIES THROUGH THE FEDERAL GOVERNMENT, 86 Fed. Reg. 7009 (Jan. 25, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf. The Webinar Transcript also states that it was been withdrawn because it was issued without "the review required under the Department's Rulemaking and Guidance Procedures," although a webinar describing recent OCR cases is neither policy guidance nor an agency rule. U.S. DEP'T OF EDUC., OCR WEBINAR: USE OF RACE IN POSTSECONDARY ADMISSIONS 3–4 (Jan. 19, 2021) (Transcript), *supra* n.18.

diversity.[19] Yet here we are, in 2021, still debating Respondent's use of race in admissions.

Separately, in another OCR webinar posted on January 19, 2021, OCR offered several statements advising schools of basic legal propositions pursuant to Title VI. OCR noted:

> Unfortunately, OCR is aware of recent concerning reports that schools across the country are discriminating on the basis of race in different ways. Sometimes, these reports have involved schools' purported efforts to promote diversity and equity among students, but are nevertheless prohibited because they violate Title VI. OCR offers this video to highlight how these and other examples may create Title VI violations.

U.S. DEP'T OF EDUC., OCR WEBINAR: RACIALLY EXCLUSIVE PRACTICES AND TITLE VI 1 (Jan. 19, 2021) (Transcript).[20] The Webinar offered several examples of diversity, equity, and inclusion programs that run afoul of Title VI:

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[19] COMPLIANCE RESOLUTION, Re: OCR Complaint No. 11-07-2016, Letter from Alice Wender, Director, U.S. Dep't of Educ. Office for Civil Rights, to Holden Thorp, Chancellor, University of North Carolina (Nov. 27, 2012), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11072016-a.html.

[20] https://www2.ed.gov/about/offices/list/ocr/docs/ocr-tvi-webinar-reptvi.pdf.

> For instance, schools may not designate certain housing or dormitories only for students of a specific race, or exclude students of a particular race or races from such housing.
>
> Similarly, schools may not create designated "safe spaces" that admit or exclude individuals on the basis of race.
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> Also, since the Supreme Court's landmark 1954 decision in *Brown v. Board of Education*, schools have been barred from segregating students according to race in classes, seminars, lectures, trainings, athletics, clubs, orientations, award ceremonies, graduations, or other meetings. This includes, of course, segregation that occurs in a virtual or online format as well.
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> …
>
> Schools are also not permitted to ask that certain students engage with the class in a specific manner, based on race. Similarly, it is improper to give students of a particular race extra time or resources, such as the use of notes or textbooks, to complete an assignment. Schools also may not grade students differently or apply different grading criteria to students based on race.

Id. at 2. Separately, the webinar addressed troubling complaints that schools were using a curriculum that

separated students by race and described racial demographic groups as having particular characteristics. OCR noted:

> One example that might violate Title VI is advocating a position that a particular race is collectively guilty of misconduct, or advocating a position that a particular race or something about that race is negative or evil. Title VI might also be violated if part of a curriculum instructs students that members of a particular race or racial identity pose specific dangers to other individuals, or if it advocates or forces members of certain races to deconstruct or confront their racial identities. For instance, a school may not advocate that students adopt specific beliefs based on their race, such as urging that white students be white without signing on to whiteness. These sorts of exercises would also be impermissible if used in the context of ascribing specific characteristics or qualities to all members of other races.

Id. at 2–3. Since January 20, 2021, however, Biden Administration officials in OCR have once again flagged this document with a warning that it is "ARCHIVED AND NOT FOR RELIANCE," based on Executive Order 13985. *See supra*, n.11.

Is prioritizing the return of students to in-person learning based on race legal, under notions of equity and diversity? What about segregating students or

staff by race for training purposes? As *Amici* have shown above, it depends on who is reading the Supreme Court's caselaw in this area. The Court's existing case law on racial preferences does not provide sufficient guidelines for schools and students to understand the firm boundaries of the law.

III. Since January 20, 2021, the Biden Administration has Suspended Pre-Existing Investigations Opened During *Amici*'s Tenure.

In OCR's 2020 Annual Report to the Secretary, the President, and the Congress, OCR noted the grave threats to non-discrimination that were the subject of complaints regarding colleges and school districts across the country. *See* U.S. DEP'T OF EDUC. OFFICE FOR CIV. RIGHTS, ANNUAL REPORT TO THE SECRETARY, THE PRESIDENT, AND THE CONGRESS 46 (January 2021).[21]

The 2020 Annual Report noted that unfortunately, schools have justified their actions by reference to diversity or equity in order to allegedly engage in conduct that distinguishes students by race, and compels students to act in specific ways, based on their race. Specifically, the Annual Report states:

> OCR is aware of concerning reports recently that schools across the country are discriminating on the basis of race in different ways. Sometimes, these reports

[21] https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf.

have involved schools' purported efforts to promote diversity and equity among students but are nevertheless prohibited because they violate Title VI. OCR has received complaints concerning the use of race-exclusionary policies or practices in schools. OCR has also opened investigations involving such complaints, including two directed investigations involving race exclusionary practices. A few of those investigations are briefly described below.

- A teacher in a Chicago-area school district filed a complaint with OCR alleging that the district implemented a series of racial "equity" policies and programs that discriminated against staff, students, and job applicants; implemented certain policies and programs that discriminate against staff, students, and job applicants, including segregating staff and students into affinity groups based on race; used "Black Lives Matter" materials to advocate to students that white individuals bear collective guilt for racism, police brutality, and other social ills; and failed to discipline some students appropriately by allegedly taking race into consideration in its disciplinary decisions.

- OCR opened a directed investigation based on reports that a university in Kentucky segregated by race its incoming resident assistants for training purposes. As part of what the university called "White Accountability Training," resident advisors who identified as white were allegedly given training on "microaggressions" and "white privilege," while resident assistants who identify as "black, indigenous, [or] people of color," were given separate training.
- OCR opened a directed investigation to examine whether a university in New York is discriminating on the basis of race, color, or national origin by offering and/or providing an exemption from the requirement to obtain vaccinations to students "who identify as Black, Indigenous, or as a Person of Color" based on their race, color, or national origin.

OCR has concerns that using curricular or training materials for students or staff which are based on racial classifications or stereotypes of individuals—solely based on their race—may violate Title VI by requiring school personnel to engage in activities that result in the different treatment of students based on their race, or which constitute racial harassment. Such

> policies or pedagogical practices that perpetuate the idea that students may be categorized by race, assigned a set of characteristics, and be considered to possess certain characteristics based on that race, may subject students or staff to discrimination in violation of Title VI.

Id. at 46.

A spokesperson for the Department of Education publicly confirmed that, under *Amici*'s tenure, OCR had previously opened an investigation of a complaint against the Evanston/Skokie (IL) school district under Title VI. *See* Carl Campanile, *US Dept. of Education curbs decision on race-based 'affinity groups'*, NEW YORK POST (Mar. 7, 2021) ("The findings—reached during the waning days of former President Trump's time in office in early January— were in response to a complaint about a Chicago-area school district's 'racial equity' training programs and lesson plans.").[22] As reported by the New York Post:

> The 18-page "letter of finding" … was triggered by a complaint filed by a former NYC arts teacher who now works in the Evanston-Skokie, Illinois. school district.
>
> The DOE findings said the Evanston-Skokie School District violated civil rights law by:

[22] https://nypost.com/2021/03/07/education-dept-curbs-decision-on-race-based-affinity-groups/.

— Separating administrators in a professional development training program in August, 2019 into two groups based on race — white and non-white.

— Offering various "racially exclusive affinity groups" that separated students, parents and community members by race.

— Implementing a disciplinary policy that included "explicit direction" to staffers to consider a student's race when meting out discipline.

— Carried out a "Colorism Privilege Walk" that separated seventh and eight grade students into different groups based on race.

"If you are white take 2 steps forward. If you're a person of color with dark skin, take 2 steps back. If you're black, take 2 steps back," the privilege walk exercise said.

The goal was for white students to "learn more about white privilege, internalized dominance, microaggressions and how to act as an ally for students of color," the lesson plan said.

…

"These materials would have led students to be treated differently based on their race, depriving them of a class free from racial

> recrimination and hostility. Such treatment has no place in federally-funded programs or activities, nor is it protected by the First Amendment."

Id. A spokesperson for the Department of Education also confirmed that the investigation into Evanston/Skokie School District has been suspended, "pending its reconsideration of the case in light of the executive orders on racial equity issued by President Biden." *See* Houston Keene, *Biden admin suspends probe into school allegedly segregating students by race; Rep. Owens blasts decision* (Mar. 11, 2021).[23] In other words, what *Amici* determined to be race discrimination against teachers and students, the Biden Administration instead found to be potentially legal as a form of racial equity.

The fact of the matter is that the Supreme Court's caselaw in the area of race-conscious education policy offers significant ambiguity to students and schools throughout the country, so much so that depending on the presidential administration in power, OCR will offer diametrically opposed policy guidance, public-facing statements, and even case findings implicating a school's receipt of federal funds.

It is one thing to see shifts in legislative or regulatory changes, depending on who holds office. It is quite another for Executive Branch agencies to interpret the same cases to have wildly different results in the context of race discrimination. Students and schools

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[23] https://www.foxnews.com/politics/biden-admin-education-department-racial-segregation-burgess-owens.

can be forgiven for experiencing such policy "whiplash," but only the Court can address this problem.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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December 14, 2021 *Attorneys for Amici Curiae*