

Nos. 20-1199, 21-707

---

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

STUDENTS FOR FAIR ADMISSIONS, INC.,

*Petitioner,*

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

*Respondent.*

STUDENTS FOR FAIR ADMISSIONS, INC.,

*Petitioner,*

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,

*Respondents.*

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

**BRIEF OF AMICI CURIAE YOUTH  
ADVOCATES AND EXPERTS ON  
EDUCATIONAL ACCESS IN SUPPORT OF  
RESPONDENTS**

MIRIAM ROLLIN  
EDUCATION CIVIL RIGHTS ALLIANCE  
NATIONAL CENTER FOR YOUTH LAW  
1212 Broadway, Suite 600  
Oakland, CA 94612  
(510) 835-8090

KELLY M. DERMODY\*  
NIGAR A. SHAIKH  
NICHOLAS W. LEE  
LIEFF CABRASER HEIMANN &  
BERNSTEIN, LLP  
275 Battery Street, 29<sup>th</sup> Floor  
San Francisco, CA 94111  
(415) 956-1000

*\*Counsel of Record*

Counsel for *Amici Curiae*

---

**TABLE OF CONTENTS**

	<b>Page</b>
INTEREST OF <i>AMICI CURIAE</i> .....	1
ARGUMENT.....	4
I. SECONDARY EDUCATION LARGELY REMAINS “SEPARATE AND UNEQUAL.”.....	4
A. Students Of Color Are More Likely To Attend Underfunded And High-Poverty K-12 Schools. ....	7
B. School Segregation Reduces Access To Advanced Coursework, Extracurricular Activities, And Standardized Test Prep.....	8
II. RACE AND ETHNICITY DISPROPORTIONATELY PREDICT STUDENT OUTCOMES, EVEN FOR STUDENTS OF COLOR WITH GREATER ACCESS. ....	11
A. Studies Show That Grades And Standardized Test Scores Are Racially Biased And Reflect Historical Inequities.....	13
B. Racial Disparities In Access To Advanced Coursework Persist In More Resourced Schools.....	19

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
III. COLLEGES MUST HAVE THE ABILITY TO CONSIDER APPLICANT RACIAL AND ETHNIC IDENTITY IN ASSESSING THE FULL PANOPLY OF INDICIA OF MERIT AND SELECT THE MOST COMPETITIVE CANDIDATES. ....	20
A. Many Non-Traditional Indicia Of Merit Are Important Predictors Of Success. ....	24
B. Many Students Of Color Develop Skills Such As Problem-Solving, Communication, And Self-Reliance Because Of Experiences Related To Their Ethnic Or Racial Identities. ....	25
C. Omitting Race And Ethnicity Deprives Colleges Of The Ability To Assess Applicants' Maturity and Perspective Across Life Experiences. ....	29

**TABLE OF CONTENTS  
(continued)**

	<b>Page</b>
IV. ELIMINATION OF RACE-CONSCIOUS ADMISSIONS COMPROMISES COMPETITION FOR TALENT AND ARTIFICIALLY EXCLUDES HIGHLY QUALIFIED APPLICANTS OF COLOR FROM ACCURATE ASSESSMENT FOR COLLEGE ADMISSIONS. ....	35
A. The Number Of Underrepresented Minorities Will Drop Even Further If Schools Are Unable To Consider Race.....	35
B. Many Highly Qualified Students Would Choose Not To Attend Selective Colleges If They Did Not Use Race-Consciousness In Admissions.....	37
CONCLUSION .....	39

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Brown v. Bd. of Educ. of Topeka, Shawnee Cty.</i> , Kan., 347 U.S. 483 (1954).....	5
C. Dominik Güss, <i>The Brain and Thinking Across Cultures</i> , FRONTIERS FOR YOUNG MINDS (Aug. 24, 2015), <a href="https://kids.frontiersin.org/articles/10.3389/frym.2015.00012">https://kids. frontiersin.org/articles/10.3389/frym.2015. 00012</a> .....	31
ERICA FRANKENBERG ET AL., C.R. PROJECT, HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER <i>BROWN</i> (May 10, 2019), <a href="https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf">https://www.civilrightsproject.ucla.edu/ research/k-12-education/integration-and- diversity/harming-our-common-future- americas-segregated-schools-65-years- after-brown/Brown-65-050919v4-final.pdf</a> .....	5
GRETCHEN W. RIGOL, COLL. BD., ADMISSIONS DECISION-MAKING MODELS: HOW U.S. INSTITUTIONS OF HIGHER EDUCATION SELECT UNDERGRADUATE STUDENTS (2003).....	23

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
JULIANA M. HOROWITZ, ANNA BROWN, & KIANA COX, PEW RSCH. CTR., RACE IN AMERICA 2019 (2019), <a href="https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2019/04/Race-report_updated-4.29.19.pdf">https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2019/04/Race-report_updated-4.29.19.pdf</a> .....	29
Letter from Kristi R. Harris, Supervisory Att’y, U.S. Dep’t Educ., Off. C.R., to Jennifer R. Story, Advoc. Child. Serv. (Feb. 12, 2018).....	15, 16
<i>Students for Fair Admissions, Inc. v. President &amp; Fellows of Harvard Coll.</i> , 980 F.3d 157 (1st Cir. 2020), <i>cert. granted</i> , 142 S. Ct. 895 (2022).....	31
<i>Students for Fair Admissions, Inc., v. President &amp; Fellows of Harvard. Coll.</i> , No.14-14176 (D. Mass. Oct. 29, 2018).....	<i>passim</i>
<i>Students for Fair Admissions, Inc., vs. Univ. N.C. et al.</i> , No. 1:14-cv-954 (M.D. N.C. 2020).....	27, 28, 38, 39
 <b>Other Authorities</b>	
23 Billion, EdBuild (Feb. 2019), <a href="https://edbuild.org/content/23-billion/full-report.pdf">https://edbuild.org/content/23-billion/full-report.pdf</a> .....	2, 7

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Andre M. Perry, <i>Students Need More Than an SAT Adversity Score, They Need a Boost in Wealth</i> , THE BROOKINGS INST., (May 17, 2019), <a href="https://www.brookings.edu/blog/the-avenue/2019/05/17/students-need-more-than-an-sat-adversity-score-they-need-a-boost-in-wealth/">https://www.brookings.edu/blog/the-avenue/2019/05/17/students-need-more-than-an-sat-adversity-score-they-need-a-boost-in-wealth/</a> .....	17
Andrew J. Fuligni et al., <i>Ethnic Identity and the Academic Adjustment of Adolescents from Mexican, Chinese, and European Backgrounds</i> , 41 DEV. PSYCHOL. 799, (2005).....	29, 33
Ann Meier, <i>A Quarter Century of Participation in School-Based Extracurricular Activities: Inequalities by Race, Class, Gender, and Age?</i> , 47 J. YOUTH & ADOLESCENCE 1299 (2018), <a href="https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6776430/pdf/nihms-1051832.pdf">https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6776430/pdf/nihms-1051832.pdf</a> (citations omitted).....	9, 10
Arthur L. Coleman & Jamie Lewis Keith, <i>Understanding Holistic Review in Higher Education Admissions: Guiding Principles and Model Illustrations</i> 5-7 (2018).....	2, 20

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Becoming a Tar Heel</i> , UNIV. N.C., <a href="https://admissions.unc.edu/prepare/becoming-a-tar-heel/">https://admissions.unc.edu/prepare/becoming-a-tar-heel/</a> .....	21
BILL HUSSAR, ET AL., U.S. DEP'T EDUC. INST. EDUC. SCI., THE CONDITION OF EDUCATION 2020 (May 2020), <a href="https://nces.ed.gov/pubs/2020/2020144.pdf">https://nces.ed.gov/pubs/2020/2020144.pdf</a> .....	6
Brian L. Wright, <i>I Know Who I Am, Do You? Identity and Academic Achievement of Successful African American Male Adolescents in an Urban Pilot High School in the United States</i> , 46 URBAN EDUC. 611, 613 (2011).....	30
C. Kirabo Jackson et al., The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes 1, 3-5 (Nat'l Bureau Econ. Research, Working Paper No. 20118, 2014), <a href="https://www.nber.org/system/files/working_papers/w20118/w20118.pdf">https://www.nber.org/system/files/working_papers/w20118/w20118.pdf</a> .....	7
Claude M. Steele & Joshua Aronson, <i>Stereotype Threat and the Intellectual Test Performance of African Americans</i> , 69 J. PERSONALITY & SOC. PSYCH. 797 (1995).....	16

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Colleen R. Hensman, <i>The Effect of Orthodox Jewish Education on Adolescent Identity</i> (Jan. 2003) (M. Ed. thesis, University of South Africa), <a href="https://uir.unisa.ac.za/bitstream/handle/10500/1030/dissertation.pdf?sequence=1&amp;isAllowed=y">https://uir.unisa.ac.za/bitstream/handle/10500/1030/dissertation.pdf?sequence=1&amp;isAllowed=y</a> .....	34
Darren Isom, et al., <i>What Everyone Can Learn From Leaders of Color</i> , STAN. SOC. INNOVATION REV. (Jun. 28, 2022) <a href="https://ssir.org/articles/entry/what_everyone_can_learn_from_leaders_of_color">https://ssir.org/articles/entry/what_everyone_can_learn_from_leaders_of_color</a> .....	26
David Card & Jesse Rothstein, <i>Racial Segregation and the Black-White Test Score Gap</i> (Nat'l Bureau of Econ. Rsch., Working Paper No. 12078, Mar. 2006).....	10
Deborah Archer, <i>Race-Conscious Admissions Policies Are Crucial to an Equitable Society</i> , BLOOMBERG L. (Feb. 1, 2022), <a href="https://news.bloomberglaw.com/us-law-week/race-conscious-admissions-policies-are-crucial-to-an-equitable-society">https://news.bloomberglaw.com/us-law-week/race-conscious-admissions-policies-are-crucial-to-an-equitable-society</a> .....	36
Dominique J. Baker & Michael N. Bastedo, <i>What If We Leave It Up to Chance? Admissions Lotteries and Equitable Access at Selective Colleges</i> , 51 EDUC. RESEARCHER 134 (2022) .....	36

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Don Hossler et. al, <i>A Study of the Use of Nonacademic Factors in Holistic Undergraduate Admissions Reviews</i> , 90 J. HIGHER EDUC. 833 (2019) .....	8, 21
Emma Garcia, <i>Schools Are Still Segregated, and Black Children are Paying a Price</i> , ECON. POL'Y INST. (Feb. 12, 2020), <a href="https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/">https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/</a> .....	6, 10
Eric Hoover, <i>What Colleges Want in an Applicant (Everything)</i> , N.Y. TIMES (Nov. 1, 2017), <a href="https://www.nytimes.com/2017/11/01/education/edlife/what-college-admissions-wants.html">https://www.nytimes.com/2017/11/01/education/edlife/what-college-admissions-wants.html</a> .....	22
GENEVIEVE SIEGEL-HAWLEY ET AL., PENNSTATE COLL. EDUC., CTR. FOR EDUC. & C.R., SEGREGATION WITHIN SCHOOLS: UNEQUAL ACCESS TO AP COURSES BY RACE AND ECONOMIC STATUS IN VIRGINIA (2021), <a href="https://cecr.ed.psu.edu/sites/default/files/Segregation_within_Schools_Unequal_Access_Virginia_2021.pdf">https://cecr.ed.psu.edu/sites/default/files/Segregation_within_Schools_Unequal_Access_Virginia_2021.pdf</a> .....	20

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
GEORGE D. KUH ET AL., NAT'L POSTSECONDARY EDUC. COOP., WHAT MATTERS TO STUDENT SUCCESS: A REVIEW OF THE LITERATURE (2006), <a href="https://nces.ed.gov/npec/pdf/kuh_team_report.pdf">https://nces.ed.gov/npec/pdf/            kuh_team_report.pdf</a> .....	4
Gregory M. Walton & Steven J. Spencer, <i>Latent            Ability</i> , 20 PSYCH. SCI. 1132 (2009) ....	3, 16, 17
<i>How to Write a Personal Statement</i> , MICH. STATE UNIV., <a href="https://jmc.msu.edu/current-students/academics/writing-consultancy/personal-statements.html">https://jmc.msu.edu/current-            students/academics/writing-            consultancy/personal-statements.html</a> .....	23
James J. Heckman et al., <i>The Effects of            Cognitive and Noncognitive Abilities on            Labor Market Outcomes and Social            Behavior</i> , 24 J. LABOR ECON. 411, 412 (2006), <a href="http://jenni.uchicago.edu/papers/Heckman-Stixrud-Urzua_JOLE_v24n3_2006.pdf">http://jenni.uchicago.edu/papers/            Heckman-Stixrud-Urzua_JOLE_            v24n3_2006.pdf</a> .....	24
Jason A. Grissom & Christopher Redding, <i>Discretion and Disproportionality:            Explaining the Underrepresentation of            High-Achieving Student of Color in Gifted            Programs</i> , 2 AERA OPEN 1 (2016).....	19

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Jason A. Okonofua & Jennifer L. Eberhardt, <i>Two Strikes: Race and the Disciplining of            Young Students</i> , 26 PSYCH. SCI. 617 (2015).....	14
Jay P. Greene, <i>The Weak Predictive Power of            Test Scores</i> , EDUC. NEXT (May 3, 2016), <a href="https://www.educationnext.org/the-weak-predictive-power-of-test-scores/">https://www.educationnext.org/the-weak-predictive-power-of-test-scores/</a> .....	22, 24
Jeanne Batalova & Jie Zong, <i>Language Diversity            and English Proficiency in the United            States</i> , MIGRATION POL'Y INST. (2016), <a href="https://www.migrationpolicy.org/article/language-diversity-and-english-proficiency-united-states-2015">https://www.migrationpolicy.org/article/language-diversity-and-english-proficiency-united-states-2015</a> .....	18
JENNIFER GIANCOLA & RICHARD KAHLENBERG, JACK KENT COOKE FOUND., TRUE MERIT: ENSURING OUR BRIGHTEST STUDENTS HAVE ACCESS TO OUR BEST COLLEGES AND UNIVERSITIES 19 (2016), <a href="https://www.jkcf.org/wp-content/uploads/2018/06/JKCF_True_Merit_FULLReport.pdf">https://www.jkcf.org/wp-content/uploads/2018/06/JKCF_True_Merit_FULLReport.pdf</a> .....	2

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
John M. Carey et al., <i>It's College Admissions Season, and Students Are Looking For Diverse Campuses</i> , WASH. POST (Apr. 14, 2022, 7:00 AM ET), <a href="https://www.washingtonpost.com/politics/2020/04/14/its-college-admissions-season-students-are-looking-diverse-campuses/">https://www.washingtonpost.com/politics/2020/04/14/its-college-admissions-season-students-are-looking-diverse-campuses/</a> .....	37
Kenneth A. Shores et al. <i>Categorical Inequality in Black and White: Linking Disproportionality across Multiple Educational Outcomes</i> , (Annenberg Inst. at Brown Univ., EdWorkingPaper No. 19-168 2019), <a href="http://www.edworkingpapers.com/ai19-168">http://www.edworkingpapers.com/ai19-168</a> .....	6
KENNETH C. GREEN, INSIDE HIGHER ED, THE 2011 INSIDE HIGHER ED SURVEY OF COLLEGE & UNIVERSITY ADMISSIONS DIRECTORS 5 (2011) .....	22
Kyung Hee Kim et al., Cultural Bias in Assessment: Can Creativity Assessment Help?, 6 INT'L J. OF CRITICAL PEDAGOGY 129 (2019), <a href="https://uscseps.org/wp-content/uploads/2020/07/standardized-testing.pdf">https://uscseps.org/wp-content/uploads/2020/07/standardized-testing.pdf</a> .....	18

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Leslie Killgore, <i>Merit and Competition in Selective College Admissions</i> , 32 REV. HIGHER EDUC. 469 (2009) .....	21
Lily Lamboy, <i>Democratizing Success: Why We Need to Change Who Defines Merit in College Admissions</i> , MEDIUM (Mar. 17, 2019), <a href="https://medium.com/age-of-awareness/democratizing-success-why-we-need-to-change-who-defines-merit-in-college-admissions-367d5da82a0f/">https://medium.com/age-of-awareness/democratizing-success-why-we-need-to-change-who-defines-merit-in-college-admissions-367d5da82a0f/</a> .....	27
Mark J. Chin et al., <i>Bias in the Air: A Nationwide Exploration of Teachers' Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes</i> (Annenberg Brown Univ., Working Paper No. 20-205, Feb. 2020) <a href="https://www.edworkingpapers.com/sites/default/files/ai20-205.pdf">https://www.edworkingpapers.com/sites/default/files/ai20-205.pdf</a> .....	14, 15
MELISSA CLINEDINST, NAT'L ASS'N COLL. ADMISSION COUNSELING, 2019 STATE OF COLLEGE ADMISSION (2019).....	10, 21

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Michael T. Nietzel, <i>Yale and Princeton Will Extend Test-Optional Admissions for Another Year</i> , FORBES (Feb. 16, 2022, 2:26 PM ET), <a href="https://www.forbes.com/sites/michaelnietzel/2022/02/16/yale-and-princeton-will-extend-test-optional-admissions-for-another-year/">https://www.forbes.com/sites/michaelnietzel/2022/02/16/yale-and-princeton-will-extend-test-optional-admissions-for-another-year/</a> .....	19
Nancy R. Whitesell et al., <i>A Longitudinal Study of Self-Esteem, Cultural Identity, and Academic Success Among American Indian Adolescents</i> , 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 38 (Jan. 2009).....	24
Oren R. Shewach, <i>Differential Prediction in the Use of the SAT and High School Grades in Predicting College Performance: Joint Effects of Race and Language</i> , 36 EDUC. MEASUREMENT ISSUES & PRAC. 46, <a href="https://onlinelibrary.wiley.com/doi/epdf/10.1111/emip.12150">https://onlinelibrary.wiley.com/doi/epdf/10.1111/emip.12150</a> .....	18
Paul Tough, <i>What College Admissions Offices Really Want</i> , N.Y. TIMES MAG., Sept. 10, 2019, <a href="https://www.nytimes.com/interactive/2019/09/10/magazine/college-admissions-paul-tough.html">https://www.nytimes.com/interactive/2019/09/10/magazine/college-admissions-paul-tough.html</a> .....	13

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
R.E. Anderson & H.C. Stevenson, <i>RECASTing Racial Stress and Trauma: Theorizing the Healing Potential of Racial Socialization in Families</i> , 74 AM. PSYCH. 63, 63-75 (2019), <a href="https://pubmed.ncbi.nlm.nih.gov/30652900/">https://pubmed.ncbi.nlm.nih.gov/30652900/</a> .....	31
Rachel Rubin, <i>Who Gets In and Why? An Examination of Admissions to America's Most Selective Colleges and Universities</i> , 2 INT'L ECON. REV. 1 (2014) .....	22, 23
RAJ CHETTY ET AL., U.S. CENSUS BUREAU, RACE AND ECONOMIC OPPORTUNITY IN THE UNITED STATES: AN INTERGENERATIONAL PERSPECTIVE (Mar. 2018), <a href="http://www.equality-of-opportunity.org/assets/documents/race_paper.pdf">http://www.equality-of-opportunity.org/assets/documents/race_paper.pdf</a> .....	11, 12
Resolution Agreement, No. 11-13-1175 (U.S. Dep't Educ., Off. C.R. Feb. 1, 2018).....	16
ROBY CHATTERJI ET AL., CTR. AM. PROGRESS, CLOSING ADVANCED COURSEWORK EQUITY GAPS FOR ALL STUDENTS 11-12, 15 (June 30, 2021), <a href="https://www.americanprogress.org/article/closing-advanced-coursework-equity-gaps-students/">https://www.americanprogress.org/article/closing-advanced-coursework-equity-gaps-students/</a> .....	3, 8

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Ron Lieber, <i>Another Admissions Advantage for the Affluent: Just Pay Full Price</i> , N.Y. TIMES (Mar. 15, 2019), <a href="https://www.nytimes.com/2019/03/15/your-money/college-admissions-wealth.html">https://www.nytimes.com/2019/03/15/your-money/college-admissions-wealth.html</a> .....	22
SEAN F. REARDON & MICHAL KURLAENDER, POL'Y ANALYSIS FOR CAL. EDUC., EFFECTS OF THE CALIFORNIA HIGH SCHOOL EXIT EXAM ON STUDENT PERSISTENCE, ACHIEVEMENT, AND GRADUATION, (Policy Br. 09-3, Aug. 2009) .....	16, 17
Sean F. Reardon, et al., <i>What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action? Evidence from a Simulation Model</i> , 37 J. POL'Y ANALYSIS & MGMT. 630, 633, 650 (2018).....	36
Shawn Hubler, <i>University of California Will End Use of SAT and ACT in Admissions</i> , N.Y. TIMES (May 21, 2020), <a href="https://www.nytimes.com/2020/05/21/us/university-california-sat-act.html">https://www.nytimes.com/2020/05/21/us/university-california-sat-act.html</a> .....	19

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
Shervin Assari et al., Black-White Achievement Gap: Role of Race, School Urbanity, and Parental Education, 12 PEDIATRIC HEALTH, MED. THERAPEUTICS 1 (2021), <a href="https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7797342/">https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7797342/</a> .....	12
Stephen Menendian, et al., The Roots of Structural Racism Project (June 21, 2021), <a href="https://belonging.berkeley.edu/roots-structural-racism">https://belonging.berkeley.edu/roots-structural-racism</a> .....	5
<i>Strong Personal Statements, Part 3: Showcasing Your Passion</i> , Emory Univ. (Oct. 12, 2016), <a href="https://blog.emoryadmission.com/2016/10/strong-personal-statements-part-3-showcasing-your-passion/">https://blog.emoryadmission.com/2016/10/strong-personal-statements-part-3-showcasing-your-passion/</a> .....	23
<i>Students for Fair Admissions, Inc. v. President and Fellows of Harvard College</i> , Dist. Mass., No. 14-cv-14176, (D. Mass. 2008), <a href="https://www.naacpldf.org/wp-content/uploads/ECF-No.-504-Amicus-Br.-in-oppn-to-SFFAs-Mot.-for-Summ.-J.-1.pdf">https://www.naacpldf.org/wp-content/uploads/ECF-No.-504-Amicus-Br.-in-oppn-to-SFFAs-Mot.-for-Summ.-J.-1.pdf</a> .....	17
Susan P. Farrugia et al., <i>Noncognitive Factors and College Student Success</i> , 20 J. COLL. STUDENT RETENTION 308, 321 (2018) .....	24, 25

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
TOMAS MONARREZ & KELIA WASHINGTON, URBAN INST., RACE AND ETHNIC REPRESENTATION IN POSTSECONDARY EDUCATION 15 (June 2020), <a href="https://www.urban.org/sites/default/files/publication/102375/racial-and-ethnic-representation-in-post-secondary-education_1.pdf">https://www.urban.org/sites/default/files/publication/102375/racial-and-ethnic-representation-in-post-secondary-education_1.pdf</a> .....	36
Travis Riddle & Stacey Sinclair, <i>Racial Disparities in School-Based Disciplinary Actions are Associated with County-Level Rates of Racial Bias</i> , 116 PNAS 8255, 8259 (2019), <a href="https://www.pnas.org/doi/pdf/10.1073/pnas.1808307116">https://www.pnas.org/doi/pdf/10.1073/pnas.1808307116</a> .....	3, 12
Uma Mazyck Jayakumar & Scott E. Page, <i>Cultural Capital and Opportunities for Exceptionalism: Bias in University Admissions</i> , 92 J. HIGHER EDUC. 1109, 1109-1139 (2021).....	9
UNIV. N.C. CHAPEL HILL, <i>2016 Entering Class Profile First-Year Students</i> , <a href="https://admissions.unc.edu/wp-content/uploads/sites/1130/2020/11/2016-Class-Profile.pdf">https://admissions.unc.edu/wp-content/uploads/sites/1130/2020/11/2016-Class-Profile.pdf</a> .....	38
<i>What We Look For</i> , Harvard Coll., <a href="https://college.harvard.edu/admissions/apply/what-we-look">https://college.harvard.edu/admissions/apply/what-we-look</a> .....	20

**TABLE OF AUTHORITIES  
(continued)**

	<b>Page</b>
WILLIAM J. MATHIS, NAT'L EDUC. POL'Y CTR., THE EFFECTIVENESS OF CLASS SIZE REDUCTION (June 2016), <a href="https://nepc.colorado.edu/sites/default/files/publications/Mathis%20RBOPM-9%20Class%20Size.pdf">https://nepc.colorado.edu/ sites/default/files/publications/Mathis% 20RBOPM-9%20Class%20Size.pdf</a> .....	6

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

Convened by the National Center for Youth Law, the Education Civil Rights Alliance (ECRA) is a diverse and experienced group of organizers, educator organizations, community groups, professional associations, and civil rights organizations committed to protecting the civil rights of marginalized students. *Amici* are members and allies of ECRA whose work, research, and advocacy reflect their expertise in and dedication to analyzing and championing equitable education opportunities for all children and youth, especially those from historically marginalized communities. *Amici* have extensively studied the benefits of race-conscious college admissions policies.

*Amici* have a strong interest in sharing their expertise to advance equity and opportunity in post-secondary education. A full list of *amici* is set forth in the Appendix to this brief.

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to *amici curiae*'s deadline to file. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for any party authored this brief in whole or in part, and no counsel or party, nor any person or entity other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Colleges seeking the best candidates for admission want students who will thrive.<sup>2</sup> They determine this by evaluating intellectual ability and a host of skills and traits to predict success in post-secondary education and beyond. But not all applicants have access to primary and secondary schools that enable students to demonstrate their aptitude for success at the next level through traditional resume-building achievements.

It is indisputable that there is a vast funding gap – reported to be \$23 billion – between secondary school districts predominantly serving Caucasian students and those predominantly serving students who are Black/African American (hereinafter “Black”) and Hispanic/Latino (hereinafter “Latinx”).<sup>3</sup> Unsurprisingly, better-resourced schools offer more advanced coursework, additional extracurricular activities, smaller student-to-teacher ratios, and other opportunities for students to generate resume-worthy activities that are largely inaccessible to

---

<sup>2</sup> ARTHUR L. COLEMAN & JAMIE LEWIS KEITH, COLL. BD., UNDERSTANDING HOLISTIC REVIEW IN HIGHER EDUCATION ADMISSIONS 5-7 (2018) ; JENNIFER GIANCOLA & RICHARD KAHLENBERG, JACK KENT COOKE FOUND., TRUE MERIT: ENSURING OUR BRIGHTEST STUDENTS HAVE ACCESS TO OUR BEST COLLEGES AND UNIVERSITIES 19 (2016), [https://www.jkcf.org/wp-content/uploads/2018/06/JKCF\\_True\\_Merit\\_FULLReport.pdf](https://www.jkcf.org/wp-content/uploads/2018/06/JKCF_True_Merit_FULLReport.pdf).

<sup>3</sup> 23 BILLION, EDBUILD, at 2 (Feb. 2019), <https://edbuild.org/content/23-billion/full-report.pdf>.

equally talented students at lesser-resourced schools. However, racial disparities are not just a function of resource disparities. Even in non-segregated, higher-resourced schools, Black, Latinx, Native American/Alaska Native (“AI/AN”), and other students of color from educationally marginalized groups experience disparate outcomes in measures such as test scores, grades, discipline, and access to advanced coursework.<sup>4</sup> This is due to a variety of factors, including lack of institutional or peer support and exclusionary stereotypes impacting students of color.<sup>5</sup>

---

<sup>4</sup> See, e.g., Gregory M. Walton & Steven J. Spencer, *Latent Ability*, 20 PSYCH. SCI. 1132, 1132 (2009) (grades and test scores underestimate ability of Black and Latinx students); Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions are Associated with County-Level Rates of Racial Bias*, 116 PNAS 8255, 8259 (2019), <https://www.pnas.org/doi/pdf/10.1073/pnas.1808307116> (finding racially disproportionate student discipline increases as racial bias increases); ROBY CHATTERJI ET AL., CTR. AM. PROGRESS, CLOSING ADVANCED COURSEWORK EQUITY GAPS FOR ALL STUDENTS 11-12, 15 (June 30, 2021), <https://www.americanprogress.org/article/closing-advanced-coursework-equity-gaps-students/> (access to AP courses lower at schools serving Black, AI/AN, and Southeast Asian refugees and their descendants).

<sup>5</sup> See Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions are Associated with County-Level Rates of Racial Bias*, 116 PNAS 8255, 8258 (2019), <https://www.pnas.org/doi/pdf/10.1073/pnas.1808307116> (finding that “the association between racial bias and disciplinary disparities would be

To properly assess the qualities linked to success in college and as an adult—including maturity, resilience, intellectual curiosity, honesty, and motivation—colleges must be able to consider each candidate’s full identity and the context for their achievements, including as a student of color or as an ethnic or religious minority student. “[S]tudents do not come to postsecondary education tabula rasa. Rather, they are the products of many years of complex interactions with their family of origin and cultural, social, political, and educational environments.”<sup>6</sup> Barring colleges from full consideration and valuation of students’ experiences, including race-related information and experiences, will impede fair and robust competition for talent. It will also erase educational opportunity for the most marginalized students, who are disproportionately Black and Latinx.

## ARGUMENT

### I. SECONDARY EDUCATION LARGELY REMAINS “SEPARATE AND UNEQUAL.”

In 1954, this Court cited the harms of segregation on children, holding that “[s]eparate

---

strongest in counties with a large proportion of the population that is white”).

<sup>6</sup> GEORGE D. KUH ET AL., NAT’L POSTSECONDARY EDUC. COOP., WHAT MATTERS TO STUDENT SUCCESS: A REVIEW OF THE LITERATURE, at 3 (2006), [https://nces.ed.gov/npec/pdf/kuh\\_team\\_report.pdf](https://nces.ed.gov/npec/pdf/kuh_team_report.pdf).

educational facilities are inherently unequal.”<sup>7</sup> But *Brown*’s promise to ensure “equal educational opportunity” by eliminating racial segregation has not been realized.<sup>8</sup> Indeed racial segregation has not only persisted; since 1990, it has increased.<sup>9</sup>

The percentage of Black students who attend an “intensely” segregated school (*i.e.*, 90-100% either Black or Caucasian) has increased from 5.7% in 1988 to 18.2% in 2016.<sup>10</sup> Almost seven decades after *Brown*, Black children are still five times as likely as white children to attend schools highly segregated by race and ethnicity and more than twice as likely as white children to attend high-poverty schools (*i.e.*, those in which 51-100 percent of students qualify for free/reduced-price lunch).<sup>11</sup> In 2017, 45% of Black,

---

<sup>7</sup> *Brown v. Bd. of Educ. of Topeka, Shawnee Cty.*, Kan., 347 U.S. 483, 495 (1954).

<sup>8</sup> *Brown*, 347 U.S. at 493-94.

<sup>9</sup> STEPHEN MENENDIAN, ET AL., OTHERING & BELONGING INST., THE ROOTS OF STRUCTURAL RACISM PROJECT (June 21, 2021), <https://belonging.berkeley.edu/roots-structural-racism> (showing that 81% of metropolitan areas with more than 200,000 residents were more segregated in 2019 than 1990).

<sup>10</sup> ERICA FRANKENBERG ET AL., C.R. PROJECT, HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* 21 (May 10, 2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf>.

<sup>11</sup> Emma Garcia, *Schools Are Still Segregated, and Black Children are Paying a Price*, ECON. POL’Y INST. (Feb. 12, 2020), <https://www.epi.org/publication/schools->

45% of Hispanic, and 41% of American Indian/Alaska Native (“AI/AN”) students attended high-poverty public schools, compared with only 9% of white students.<sup>12</sup>

School segregation reinforces gaps in school funding, which results in larger class sizes with fewer teachers,<sup>13</sup> less access to advanced courses and extracurricular activities, fewer test prep courses, lower test scores, and other limitations on the ability of talented students of color to showcase their academic prowess.<sup>14</sup> For many students of color, the primary impediment to educational and professional access is not related to innate talent, but the demonstration of it through a narrow lens of resume-ready credentials that overlook other indicia of competitive qualifications.

---

are-still-segregated-and-black-children-are-paying-a-price/.

<sup>12</sup> BILL HUSSAR, ET AL., U.S. DEP’T EDUC. INST. EDUC. SCI., *THE CONDITION OF EDUCATION 2020*, at iv (May 2020), <https://nces.ed.gov/pubs2020/2020144.pdf>.

<sup>13</sup> WILLIAM J. MATHIS, NAT’L EDUC. POL’Y CTR., *THE EFFECTIVENESS OF CLASS SIZE REDUCTION 3* (June 2016), <https://nepc.colorado.edu/sites/default/files/publications/Mathis%20RBOPM-9%20Class%20Size.pdf> (“class size reduction most benefits minority and disadvantaged students, and would be expected to narrow the racial achievement gap by about one-third”).

<sup>14</sup> *See, e.g.*, Kenneth A. Shores et al. *Categorical Inequality in Black and White: Linking Disproportionality across Multiple Educational Outcomes*, (Annenberg Inst. at Brown Univ., EdWorkingPaper No. 19-168 2019), <http://www.edworkingpapers.com/ai19-168>.

### **A. Students Of Color Are More Likely To Attend Underfunded And High-Poverty K-12 Schools.**

One of the largest drivers of racial disparity in educational quality is the \$23 billion funding gap between majority white and majority non-white schools, which translates to \$2,200 less spending per student in majority non-white schools.<sup>15</sup>

School funding is critical to student success, as demonstrated by a study of school finance reform measures which concluded that “a 20 percent increase in per-pupil spending each year for all 12 years of public school for children from poor families leads to about 0.9 more completed years of education, 25 percent higher earnings, and a 20 percentage-point reduction in the annual incidence of adult poverty.”<sup>16</sup> In simple terms, better funding means better schools, more course offerings, increased extracurriculars, and better outcomes for students following high school.

---

<sup>15</sup> 23 BILLION, EDBUILD, at 2 (Feb. 2019), <https://edbuild.org/content/23-billion/full-report.pdf>.

<sup>16</sup> C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 1, 3-5 (Nat'l Bureau Econ. Research, Working Paper No. 20118, 2014), [https://www.nber.org/system/files/working\\_papers/w20118/w20118.pdf](https://www.nber.org/system/files/working_papers/w20118/w20118.pdf).

## **B. School Segregation Reduces Access To Advanced Coursework, Extracurricular Activities, And Standardized Test Prep.**

School segregation also reduces opportunities for many students of color to distinguish themselves due to limited availability of rigorous classes, extracurricular activities, and standardized test preparation.<sup>17</sup> For instance, studies show that Black and AI/AN students “are overrepresented in schools with less access to [Advanced Placement (“AP”)] courses and underrepresented in schools with higher levels of access to AP coursework.”<sup>18</sup> The access gap is particularly stark for AI/AN students; nearly half attend a public high school with three or fewer AP course offerings, as compared to 23 percent of all students.<sup>19</sup>

Additional funding at schools is also linked to greater access to extracurricular opportunities, which in addition to being highly regarded by

---

<sup>17</sup> Don Hossler et. al, *A Study of the Use of Nonacademic Factors in Holistic Undergraduate Admissions Reviews*, 90 J. HIGHER EDUC. 833, 833 (2019).

<sup>18</sup> ROBY CHATTERJI ET AL., CTR. AM. PROGRESS, CLOSING ADVANCED COURSEWORK EQUITY GAPS FOR ALL STUDENTS, at 14 (June 30, 2021), <https://www.americanprogress.org/article/closing-advanced-coursework-equity-gaps-students/>.

<sup>19</sup> ROBY CHATTERJI ET AL., CTR. AM. PROGRESS, CLOSING ADVANCED COURSEWORK EQUITY GAPS FOR ALL STUDENTS, at 15 (June 30, 2021), <https://www.americanprogress.org/article/closing-advanced-coursework-equity-gaps-students/>.

selective colleges, are also “linked to a broad range of positive outcomes for youth[,]” including school performance, identity development, and self-esteem, among others.<sup>20</sup>

However, as with academic criteria, extracurricular metrics are “not ‘race-neutral[;]’ rather both . . . have historically and contemporarily been constructed to provide cumulative advantages to white and high-SES applicants.”<sup>21</sup> Indeed, Latinx participation in extracurricular activities continues to lag behind all other racial groups.<sup>22</sup> And while Black students participate in extracurricular sports as often as white youth, a 2018 study found that Black students had lower participation rates in other extracurricular activities, thereby depriving them of the “protective” effect of activities, which is the

---

<sup>20</sup> Ann Meier, *A Quarter Century of Participation in School-Based Extracurricular Activities: Inequalities by Race, Class, Gender, and Age?*, 47 *J. YOUTH & ADOLESCENCE* 1299, 1299 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6776430/pdf/nihms-1051832.pdf> (citations omitted).

<sup>21</sup> Uma Mazyck Jayakumar & Scott E. Page, *Cultural Capital and Opportunities for Exceptionalism: Bias in University Admissions*, 92 *J. HIGHER EDUC.* 1109, 1109-1139 (2021).

<sup>22</sup> Ann Meier, *A Quarter Century of Participation in School-Based Extracurricular Activities: Inequalities by Race, Class, Gender, and Age?*, 47 *J. YOUTH & ADOLESCENCE* 1299, 1307 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6776430/pdf/nihms-1051832.pdf>.

strongest predictor of positive outcomes “in terms of grades [and] college expectations.”<sup>23</sup>

Finally, standardized test scores, which are highly valued by selective schools,<sup>24</sup> are negatively impacted by school segregation. For example, the 3.1 percent of Black students who attend better-resourced, mostly white schools score an average of 20 points better on standardized math tests than the majority of Black students (60%) who attend less resourced, majority non-white schools.<sup>25</sup> And socioeconomic status alone cannot explain the entire achievement gap; significant SAT scoring disparities persist between Black and white students even in less-segregated schools.<sup>26</sup>

---

<sup>23</sup> *Id.* at 1313.

<sup>24</sup> MELISSA CLINEDINST, NAT’L ASS’N COLL. ADMISSION COUNSELING, 2019 STATE OF COLLEGE ADMISSION, at 17 (2019).

<sup>25</sup> Emma Garcia, *Schools Are Still Segregated, and Black Children are Paying a Price*, ECON. POLY INST. (Feb. 12, 2020) <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/>.

<sup>26</sup> David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap 19-20* (Nat’l Bureau of Econ. Rsch., Working Paper No. 12078, Mar. 2006), [https://www.nber.org/system/files/working\\_papers/w12078/w12078.pdf](https://www.nber.org/system/files/working_papers/w12078/w12078.pdf).

## **II. RACE AND ETHNICITY DISPROPORTIONATELY PREDICT STUDENT OUTCOMES, EVEN FOR STUDENTS OF COLOR WITH GREATER ACCESS.**

While economic disadvantage exacerbates obstacles to educational access for students of color, it does not provide the full picture. Even if students of color attend a well-resourced school or come from a middle-class family, racial bias in testing, discipline, and access to advanced coursework continues to impede their success. Statistical research shows that racial equity gaps between white students and students of color persist even outside of high-poverty or segregated neighborhoods and even when controlling for the influence of other variables (such as socioeconomic status and parental educational attainment).

For instance, a 2018 study examining census tract data concluded that “the vast majority of the black-white gap persists even among boys growing up in families with comparable incomes in the same neighborhood; differences in neighborhood quality explain at most 25% of the black-white gap.”<sup>27</sup> It also found that while Black students in “neighborhoods that are typically perceived to be ‘good’ areas” (*e.g.*, tracts with low poverty rates or high test scores) had

---

<sup>27</sup> RAJ CHETTY ET AL., U.S. CENSUS BUREAU, RACE AND ECONOMIC OPPORTUNITY IN THE UNITED STATES: AN INTERGENERATIONAL PERSPECTIVE 30 (Mar. 2018), [http://www.equality-of-opportunity.org/assets/documents/race\\_paper.pdf](http://www.equality-of-opportunity.org/assets/documents/race_paper.pdf).

greater rates of educational attainment, the Black-white achievement gap was even *larger* in those “good” neighborhoods.<sup>28</sup> Similarly, a 2021 study of baseline Education Longitudinal Study (ELS) data found that the racial educational achievement gap persisted, even for middle class Black students with highly educated parents.<sup>29</sup>

Additionally, the effects of racially biased student discipline remain even in schools that are majority white; in fact the association between racial bias and discipline disparities is strongest in counties with larger proportions of white students.<sup>30</sup> The persistence of these racial gaps defies the logic of predictable outcomes, as neighborhood quality, socioeconomic status, and parental education level are all seen as common predictors of student success. Yet, racial bias—as an illogical construct that pervades every part of our society, regardless of geography, socioeconomic class, and education

---

<sup>28</sup> RAJ CHETTY ET AL., U.S. CENSUS BUREAU, RACE AND ECONOMIC OPPORTUNITY IN THE UNITED STATES: AN INTERGENERATIONAL PERSPECTIVE 6, 31-32 (Mar. 2018), [http://www.equality-of-opportunity.org/assets/documents/race\\_paper.pdf](http://www.equality-of-opportunity.org/assets/documents/race_paper.pdf).

<sup>29</sup> See Shervin Assari et al., *Black-White Achievement Gap: Role of Race, School Urbanity, and Parental Education*, 12 PEDIATRIC HEALTH, MED. THERAPEUTICS 1, 7 (2021), <https://www.ncbi.nlm.nih.gov/apmc/articles/PMC7797342/>.

<sup>30</sup> Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions are Associated with County-Level Rates of Racial Bias*, 116 PNAS 8255, 8259 (2019), <https://www.pnas.org/doi/pdf/10.1073/pnas.1808307116>.

levels—continues to defy logic. Students of color in non-segregated, higher-resourced schools still experience racially biased obstacles to demonstrating their worth, including harmful stereotypes and bias, as well as less access to opportunities for higher test scores, grades, and advanced coursework.

**A. Studies Show That Grades And Standardized Test Scores Are Racially Biased And Reflect Historical Inequities.**

Critics of race-conscious admissions agree that grades and test scores are “objective” criteria for admission, but these criteria have been shown to reflect racial bias and historical inequities. For example, the College Board (which administers the SAT) found that students “whose SAT scores were significantly lower than their high school grades would have predicted, were twice as likely to be [B]lack as students in the inflated-SAT group . . . and almost three times as likely to be [Latinx].”<sup>31</sup>

One explanation for disparities in grading is explained by teachers’ racial biases, which a 2020 study shows is correlated with test score inequalities.<sup>32</sup> Teachers’ biases also influence the

---

<sup>31</sup> Paul Tough, *What College Admissions Offices Really Want*, N.Y. TIMES MAG., Sept. 10, 2019, <https://www.nytimes.com/interactive/2019/09/10/magazine/college-admissions-paul-tough.html>.

<sup>32</sup> See Mark J. Chin et al., *Bias in the Air: A Nationwide Exploration of Teachers’ Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, at 18-

likelihood and frequency students of color are disciplined, which can reduce instructional time and interrupt academic progress. “Black students are more than three times as likely to be suspended or expelled as their White peers,” a statistic that cannot be explained by differences in behavior.<sup>33</sup> A 2015 study also found that “not only were the infractions produced by a Black student treated as more extreme than the identical infractions produced by a White student, Black infractions were also viewed as more connected—one infraction informed how the next infraction should be regarded.”<sup>34</sup>

Disparate outcomes in discipline and academics are directly tied to the degree of racial bias. “[T]est score differences are larger in counties with stronger preference for Whites [as determined by aggregate scores on the Implicit Association Test (IAT)] . . . [and] Black students are suspended at higher rates than White students in counties with stronger preferences for Whites.”<sup>35</sup> “Overall, counties

---

19 (Annenberg Brown Univ., EdWorking Paper No. 20-205, Feb. 2020) <https://www.edworkingpapers.com/sites/default/files/ai20-205.pdf>.

<sup>33</sup> Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617, 617 (2015) <https://edens.berkeley.edu/PDF/2strikes.pdf>.

<sup>34</sup> *Id.* at 621-22.

<sup>35</sup> Mark J. Chin et al., *Bias in the Air: A Nationwide Exploration of Teachers’ Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, at 18-19 (Annenberg Brown Univ., EdWorking Paper No. 20-205, Feb. 2020). <https://www.edworkingpapers.com/sites/default/files/ai20-205.pdf>.

with higher aggregate levels of implicit and explicit bias tend to have larger adjusted White/Black test score inequalities and suspension disparities.”

In North Carolina, the U.S. Department of Education, Office of Civil Rights (the “Department”), recently concluded a five-year investigation of Durham Public Schools for racially biased enforcement of school discipline in violation of Title VI of the Civil Rights Act of 1964.<sup>36</sup> The Department’s investigation found that although Black students made up only 49.5% of students in the district, they represented 77.7% of those who received out-of-school suspensions (OSS).<sup>37</sup> By comparison, white students made up 18.9% of students but only 4.9% of suspended students, meaning Black students were 6.1 times more likely to receive OSS than white students.<sup>38</sup> As a result, Durham Public Schools entered into a voluntary resolution agreement wherein they were required to report data on school discipline; make changes to school discipline policies, training and administration; and involve community

---

<sup>36</sup> Letter from Kristi R. Harris, Supervisory Att’y, U.S. Dep’t Educ., Off. C.R., to Jennifer R. Story, Advoc. Child. Serv. at 1 (Feb. 12, 2018) (regarding OCR Complaint No. 11-13-1175), <https://www.legalaidnc.org/sites/default/files/2020-02/legal-aid-nc-ac-s-ucla-crp-complaint-against-dps-resolution-agreement.pdf>.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.*

members in helping to resolve these racially biased disparities.<sup>39</sup>

Another explanation for grade and test score disparities is that “grades and test scores systematically underestimate the intellectual ability of negatively stereotyped students.”<sup>40</sup> Non-white and non-Asian racial groups suffer negative stereotypes about their academic prowess, making them vulnerable to devaluing their own academic abilities.<sup>41</sup> The effect of negative intellectual stereotypes on the academic performance of students of color has been confirmed in numerous studies showing that students of color perform significantly worse on tests that trigger negative stereotypes regarding their intellectual ability.<sup>42</sup> Additionally, the adverse effect of intellectual stereotypes is often associated with high-stakes testing environments.<sup>43</sup>

---

<sup>39</sup> *Id.* at 12; Resolution Agreement, No. 11-13-1175 (U.S. Dep’t Educ., Off. C.R. Feb. 1, 2018).

<sup>40</sup> Gregory M. Walton & Steven J. Spencer, *Latent Ability*, 20 PSYCH. SCI. 1132, 1132 (2009).

<sup>41</sup> *Id.* at 1132-33.

<sup>42</sup> *See, e.g.*, Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797 (1995).

<sup>43</sup> *See, e.g.*, SEAN F. REARDON & MICHAL KURLAENDER, POL’Y ANALYSIS FOR CAL. EDUC., EFFECTS OF THE CALIFORNIA HIGH SCHOOL EXIT EXAM ON STUDENT PERSISTENCE, ACHIEVEMENT, AND GRADUATION, at 5 (Policy Br. 09-3, Aug. 2009) (eleventh-grade California high school exit exam had disproportionately negative effects on graduation rates of non-white students attending same schools as white students, even when

A 2009 meta-analysis of the effect of such biases was quantifiable “at just under one fifth of a standard deviation,” suggesting that the combined reading and math SAT scores of Black and Latinx students underestimated their intellectual abilities by “199 and 148 points, respectively.”<sup>44</sup>

Standardized testing also continues to favor high-income, white students regardless of intellectual ability because of resource disparities and biased cultural and language norms.<sup>45</sup> First, more white students can afford expensive tutoring, test preparation programs, and registration fees to take the test multiple times.<sup>46</sup> Standardized tests are also culturally biased because “most tests are normed using the scores of majority group

---

controlling for prior academic achievement in eighth, ninth, and tenth grades).

<sup>44</sup> Gregory M. Walton & Steven J. Spencer, *Latent Ability*, 20 PSYCH. SCI. 1132, 1137 (2009).

<sup>45</sup> See LDF Amicus Brief at 12-13, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass. 2008), <https://www.naacpldf.org/wp-content/uploads/ECF-No.-504-Amicus-Br.-in-oppn-to-SFFAs-Mot.-for-Summ.-J.-1.pdf>.

<sup>46</sup> See, e.g., Andre M. Perry, *Students Need More Than an SAT Adversity Score, They Need a Boost In Wealth*, BROOKINGS INST. (May 17, 2019), <https://www.brookings.edu/blog/the-avenue/2019/05/17/students-need-more-than-an-sat-adversity-score-they-need-a-boost-in-wealth/>.

populations,” so they are likely to reflect the cultural knowledge base of that dominant group.<sup>47</sup>

Finally, linguistic barriers are yet another obstacle to success on these exams. For example, Latinx students whose preferred language is not English do worse on the SAT than would be predicted by their high school GPAs.<sup>48</sup> Given that non-white students comprise the vast majority of limited English proficient students, the negative impacts of these tests falls disproportionately on people of color.<sup>49</sup>

Indeed, in recognition of these factors resulting in racial disparities, 1,500 schools have suspended or moved away from using SAT or ACT

---

<sup>47</sup> Kyung Hee Kim et al., *Cultural Bias in Assessment: Can Creativity Assessment Help?*, 6 INT'L J. CRITICAL PEDAGOGY 129-130 (2019), <https://uscseps.org/wp-content/uploads/2020/07/standardized-testing.pdf> (citing example when SAT had “an analogy with the word ‘regatta’ that few African American students knew while many Caucasian counterparts were familiar with the word”).

<sup>48</sup> Oren R. Shewach, *Differential Prediction in the Use of the SAT and High School Grades in Predicting College Performance: Joint Effects of Race and Language*, 36 EDUC. MEASUREMENT ISSUES & PRAC. 46, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/emip.12150>.

<sup>49</sup> Jeanne Batalova & Jie Zong, *Language Diversity and English Proficiency in the United States*, MIGRATION POL'Y INST. (2016), <https://www.migrationpolicy.org/article/language-diversity-and-english-proficiency-united-states-2015>.

scores in undergraduate admission decisions, including many highly selective institutions that encompass all eight Ivy League schools and the University of California system.<sup>50</sup> Despite some colleges' abandonment of test score requirements in their applications, many others continue to unduly weigh this biased metric.

### **B. Racial Disparities In Access To Advanced Coursework Persist In More Resourced Schools.**

Even at more resourced schools, students of color have less access to advanced courses and honors. For example, Black students are less likely to be referred to gifted programs (particularly in reading and in classrooms with non-Black teachers), even when controlling for test scores, health, socioeconomic status, and classroom/school characteristics.<sup>51</sup> Likewise, a 2021 study of Virginia public schools found that racial disparities in enrollment in AP courses persisted even at

---

<sup>50</sup> Michael T. Nietzel, *Yale and Princeton Will Extend Test-Optional Admissions for Another Year*, FORBES (Feb. 16, 2022, 2:26 PM ET), <https://www.forbes.com/sites/michaelt Nietzel/2022/02/16/yale-and-princeton-will-extend-test-optional-admissions-for-another-year/>; Shawn Hubler, *University of California Will End Use of SAT and ACT in Admissions*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/us/university-california-sat-act.html>.

<sup>51</sup> See Jason A. Grissom & Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Student of Color in Gifted Programs*, 2 AERA OPEN 1, 1 (2016).

“overwhelmingly white and Asian schools of concentrated affluence,” with approximately 30% of white students enrolled in AP courses at these schools compared to about 15% of Black students.<sup>52</sup>

**III. COLLEGES MUST HAVE THE ABILITY TO CONSIDER APPLICANT RACIAL AND ETHNIC IDENTITY IN ASSESSING THE FULL PANOPLY OF INDICIA OF MERIT AND SELECT THE MOST COMPETITIVE CANDIDATES.**

The key criteria for post-secondary admissions are: (1) mission alignment; (2) the applicant’s likely success and contribution to school community; and (3) the context in which that applicant’s achievement has taken place.<sup>53</sup> Admissions at Harvard and UNC follow these general principles.<sup>54</sup>

---

<sup>52</sup> GENEVIEVE SIEGEL-HAWLEY ET AL., PENNSTATE COLL. EDUC., CTR. FOR EDUC. & C.R., SEGREGATION WITHIN SCHOOLS: UNEQUAL ACCESS TO AP COURSES BY RACE AND ECONOMIC STATUS IN VIRGINIA 3 (2021), [https://cecr.ed.psu.edu/sites/default/files/Segregation\\_within\\_Schools\\_Unequal\\_Access\\_Virginia\\_2021.pdf](https://cecr.ed.psu.edu/sites/default/files/Segregation_within_Schools_Unequal_Access_Virginia_2021.pdf).

<sup>53</sup> Arthur L. Coleman & Jamie Lewis Keith, *Understanding Holistic Review in Higher Education Admissions: Guiding Principles and Model Illustrations* 5-7 (2018), <https://professionals.collegeboard.org/pdf/understanding-holistic-review-he-admissions.pdf>.

<sup>54</sup> *What We Look For*, HARVARD COLL., <https://college.harvard.edu/admissions/apply/what-we-look> (describing factors such as “Growth and Potential,” “Interests and Activities,” “Personal Character,” and “Contribution to the Harvard Community”); *Becoming a*

However, in assessing applicant qualifications, many colleges continue to ignore well-known racial biases limiting the opportunity to attain certain historical indicia of achievement. Indeed, a 2019 report by the National Association for College Admission Counseling notes that 73% of colleges rated grades in college prep courses as “considerably important;” over 60% of colleges rated strength of curriculum as “considerably important;” and almost 50% of colleges gave ACT/SAT scores “considerable weight.”<sup>55</sup>

Additionally, elite schools place even greater emphasis on strength of curriculum and grades in college prep courses, as well as on essays, counselor and teacher recommendations, extracurricular activities, and work.<sup>56</sup> While not an issue at all schools, many colleges consider an applicant’s ability

---

*Tar Heel*, UNIV. N.C., <https://admissions.unc.edu/prepare/becoming-a-tar-heel/> (“Your unique contributions to Carolina, your skills and perspectives, will enrich our student body and become part of an undeniable energy you’ll feel wherever you go. What makes **YOU** a Tar Heel?” (emphasis in original)).

<sup>55</sup> MELISSA CLINEDINST, NAT’L ASS’N COLL. ADMISSION COUNSELING, 2019 STATE OF COLLEGE ADMISSION, at 4, 14 (2019); *see also* Leslie Killgore, *Merit and Competition in Selective College Admissions*, 32 REV. HIGHER EDUC. 469, 469-88 (2009); Don Hossler, et. al, *A Study of the Use of Nonacademic Factors in Holistic Undergraduate Admissions Reviews*, 90 J. HIGHER EDUC. 833, 833 (2019).

<sup>56</sup> MELISSA CLINEDINST, NAT’L ASS’N COLL. ADMISSION COUNSELING, 2019 STATE OF COLLEGE ADMISSION, at 17 (2019).

to pay in deciding who to admit, making it harder for students with financial need to compete.<sup>57</sup>

However, as Dr. Zwick, author, professor emeritus at the University of California at Santa Barbara, and longtime researcher at the Educational Testing Service (which operates the SAT) notes in her book, there is no universal definition of merit or blanket entitlement to attend college.<sup>58</sup> Indeed, the predictive power of many traditional indicia of merit in demonstrating a student's ability to succeed has often been questioned,<sup>59</sup> and colleges know that

---

<sup>57</sup> See, e.g., Ron Lieber, *Another Admissions Advantage for the Affluent: Just Pay Full Price*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/your-money/college-admissions-wealth.html>; KENNETH C. GREEN, INSIDE HIGHER ED, THE 2011 INSIDE HIGHER ED SURVEY OF COLLEGE & UNIVERSITY ADMISSIONS DIRECTORS 5 (2011) (10% of four-year colleges surveyed report admitted full-pay students have lower grades and test scores than other admitted applicants); Rachel Rubin, *Who Gets In and Why? An Examination of Admissions to America's Most Selective Colleges and Universities*, 2 INT'L ECON. REV. 1, 11 (2014).

<sup>58</sup> Eric Hoover, *What Colleges Want in an Applicant (Everything)*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/education/edlife/what-college-admissions-wants.html>.

<sup>59</sup> See, e.g., Jay P. Greene, *The Weak Predictive Power of Test Scores*, EDUC. NEXT (May 3, 2016), <https://www.educationnext.org/the-weak-predictive-power-of-test-scores/> (“The fact that math and reading achievement results are overly narrow and easily distorted makes them particularly poor indicators of quality and weak predictors of later-life outcomes.”); see

success as an adult requires a host of personal qualities beyond simple testing ability, including: “maturity, intellectual curiosity, honesty, and motivation.”<sup>60</sup> Colleges searching for candidates who are likely to succeed and contribute to the school community need to identify students with these qualities. In the absence of a holistic consideration of the applicant’s whole identity, admissions officers may be left solely with incomplete records of achievement, *e.g.*, school activities that are not available to otherwise competitive candidates at less-resourced schools or that are demonstrated primarily through community work that is inextricably tied to the candidate’s racial or ethnic identity.

---

*also* Rachel Rubin, *Who Gets In and Why? An Examination of Admissions to America’s Most Selective Colleges and Universities*, 2 INT’L EDUC. RSCH. 1, 13 (2014) (“some Deans question the extent to which students will succeed in college simply because they have sufficient Academic Merit”).

<sup>60</sup> GRETCHEN W. RIGOL, COLL. BD., ADMISSIONS DECISION-MAKING MODELS: HOW U.S. INSTITUTIONS OF HIGHER EDUCATION SELECT UNDERGRADUATE STUDENTS, at 13-14 (2003); *see also, e.g., How to Write a Personal Statement*, MICH. STATE UNIV., <https://jmc.msu.edu/current-students/academics/writing-consultancy/personal-statements.html>; *Strong Personal Statements, Part 3: Showcasing Your Passion*, EMORY UNIV. (Oct. 12, 2016), <https://blog.emoryadmission.com/2016/10/strong-personal-statements-part-3-showcasing-your-passion/>.

**A. Many Non-Traditional Indicia Of Merit Are Important Predictors Of Success.**

Common sense and research demonstrate that non-academic skills and personality traits such as high self-esteem, perseverance, motivation, grit, charm, and conscientiousness, are important predictors for success in college and beyond.<sup>61</sup>

“[A] growing body of research” recognizes that assembling the most highly qualified group of candidates requires consideration of “a broader array of [noncognitive] criteria,” which “play an important role in college student success.”<sup>62</sup> “Yet, many colleges and universities do not take these factors into account in the admissions process, which is supposed to identify students who will be successful at the institution. Instead, admission offices have historically prioritized high school grades,

---

<sup>61</sup> See, e.g., Jay P. Greene, *The Weak Predictive Power of Test Scores*, EDUC. NEXT (May 3, 2016), <https://www.educationnext.org/the-weak-predictive-power-of-test-scores/>; James J. Heckman et al., *The Effects of Cognitive and Noncognitive Abilities on Labor Market Outcomes and Social Behavior*, 24 J. LABOR ECON. 411, 412 (2006), [http://jenni.uchicago.edu/papers/Heckman-Stixrud-Urzua\\_JOLE\\_v24n3\\_2006.pdf](http://jenni.uchicago.edu/papers/Heckman-Stixrud-Urzua_JOLE_v24n3_2006.pdf); Nancy R. Whitesell et al., *A Longitudinal Study of Self-Esteem, Cultural Identity, and Academic Success Among American Indian Adolescents*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 38 (Jan. 2009).

<sup>62</sup> Susan P. Farrugia et al., *Noncognitive Factors and College Student Success*, 20 J. COLL. STUDENT RETENTION 308, 321 (2018).

standardized test scores, such as SAT and ACT, and AP credits.”<sup>63</sup> To that end, there is “a national trend where colleges and universities are increasingly using a more holistic decision-making process” in admissions that emphasizes non-cognitive factors, “such as . . . thriving, goals, and personal challenges.”<sup>64</sup>

While applicants of color, like white students, may have these skill sets and traits predictive of success in post-secondary education and professionally, colleges will be unable to fairly recognize them if prevented from considering ethnic or racial identity.

**B. Many Students Of Color Develop Skills Such As Problem-Solving, Communication, And Self-Reliance Because Of Experiences Related To Their Ethnic Or Racial Identities.**

The Stanford Social Innovation Review article *What Everyone Can Learn From Leaders of Color* states: “[T]he ways people of color have experienced the world up to this point can affect how they lead. This goes beyond experiences of oppression or historic marginalization to include the connection, meaning, and joy these leaders can draw on from their respective cultures and communities. As a result, there are assets and skills many leaders of

---

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* 321-22.

color develop and excel at because of the experiences and perspective their identity brings.”<sup>65</sup>

For example, students from under-resourced schools may not be able to show merit through working on the school newspaper, since no such paper exists at their schools, but instead demonstrate problem-solving, leadership, and communication skills by helping their limited English proficient parents navigate all variety of social and system interactions that require English fluency. Likewise, students of color in predominantly-white and more well-funded schools may have access to more traditional extracurricular opportunities, but demonstrate leadership by organizing projects that help students of color overcome isolation in their school.

For students from lower-income backgrounds, who are disproportionately Black and Latinx, extracurricular activities, even if available at their school, are often unattainable as a practical matter. Such students often have to “work for pay, care for themselves and/or others, and do other activities that, while certainly demonstrative of exceptional character, leadership, and responsibility, do not typically ‘count’ as evidence of merit to admissions

---

<sup>65</sup> Darren Isom, et al., *What Everyone Can Learn From Leaders of Color*, STAN. SOC. INNOVATION REV. (Jun. 28, 2022) [https://ssir.org/articles/entry/what\\_everyone\\_can\\_learn\\_from\\_leaders\\_of\\_color](https://ssir.org/articles/entry/what_everyone_can_learn_from_leaders_of_color).

officers who are themselves often from traditional ‘meritocratic’ backgrounds.”<sup>66</sup>

As Laura Ornelas, a first-generation student who attended UNC, testified: Although her grades and test scores were “fairly average” compared with her peers, she said there were “so many experiences and so many different factors of me that I wanted to present to the university and I think were important in considering who I was.”<sup>67</sup> She recalled that while many of her white peers in high school worked part-time jobs to fund their own recreation, she worked 10 hours a week when she was not in school at her family restaurant in order to “pay for all the tests and applications that I knew were upcoming.”<sup>68</sup> As a result, instead of participating in extracurricular activities Ornelas “was primarily helping out at the family business . . . and spending a lot of time in that activity.”<sup>69</sup> She also testified that because of her limited finances, she “did not always have the funds” to access SAT and AP exam test preparation material

---

<sup>66</sup> Lily Lamboy, *Democratizing Success: Why We Need to Change Who Defines Merit in College Admissions*, MEDIUM (Mar. 17, 2019), <https://medium.com/age-of-awareness/democratizing-success-why-we-need-to-change-who-defines-merit-in-college-admissions-367d5da82a0f/>.

<sup>67</sup> Trial Tr., at 1280-81, *Students for Fair Admissions, Inc., vs. Univ. N.C. et al.*, No. 1:14-cv-954 (M.D. N.C. 2020) [hereinafter UNC Trial Tr.].

<sup>68</sup> *Id.* at 1279-80.

<sup>69</sup> *Id.* at 1277-78.

and had to rely on resources her peers and friends shared with her.<sup>70</sup>

Cecilia Polanco, a graduate from UNC and Durham Public Schools who received a full-merit scholarship, wrote about her experiences as a Salvadorean American “a lot” in her application.<sup>71</sup> For Polanco, her ethnic identity “played a big part . . . in [her] formation of [self]” including the “challenges, benefits and disadvantages and advantages.”<sup>72</sup> She specifically recalled learning to become an advocate for others because she was asked to interpret and translate for her parents as they navigated systems like healthcare in America.<sup>73</sup>

Luis Acosta, a Mexican American graduate from UNC, was the first in his extended family to attend college. Since English was not his parents’ first language and they had only attained a middle school education in Mexico, they could not assist Acosta with his application; he “had to research and do it all on [his] own.”<sup>74</sup> Acosta recalled the stress and isolation he felt during the “very difficult” admissions process, as there were “[j]ust a lot of questions, a lot for a 16-, 17-year-old kid that didn’t know what to put and didn’t want to put the wrong thing.”<sup>75</sup> Though he and another student of color spoke about “want[ing] to give up, like maybe we shouldn’t go to college,”

---

<sup>70</sup> *Id.* at 1278.

<sup>71</sup> *Id.* at 871-72, 876.

<sup>72</sup> *Id.* at 875.

<sup>73</sup> *Id.* at 875-76.

<sup>74</sup> *Id.* at 1347-48.

<sup>75</sup> *Id.*

they were able to “talk[] each other into finishing it out.”<sup>76</sup>

Students of color must be able to reference their racial or ethnic identity in their applications for colleges to make a full assessment of merit.

**C. Omitting Race And Ethnicity  
Deprives Colleges Of The Ability To  
Assess Applicants’ Maturity and  
Perspective Across Life Experiences.**

For students of color, racial and ethnic identity is a primary lens through which they view and are treated by the world. According to Pew Research, more than three-quarters of Black adults and more than half of Hispanic and Asian adults say their race or ethnicity is extremely or very important to how they think of themselves; by contrast, only 15 percent of white adults feel similarly.<sup>77</sup>

---

<sup>76</sup> *Id.*

<sup>77</sup> JULIANA M. HOROWITZ, ANNA BROWN, & KIANA COX, PEW RSCH. CTR., RACE IN AMERICA 2019, at 13 (2019), [https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2019/04/Race-report\\_updated-4.29.19.pdf](https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2019/04/Race-report_updated-4.29.19.pdf); see also Andrew J. Fuligni et al., *Ethnic Identity and the Academic Adjustment of Adolescents From Mexican, Chinese, and European Backgrounds*, 41 DEV. PSYCHOL. at 799 (2005) (“The development of ethnic identity is particularly significant for youth from minority backgrounds because their minority status makes their ethnicity more salient in the eyes of the larger society.” (citation omitted)).

One study notes that “[k]nowing who one is and how one feels about one’s ethnic and cultural background likely give meaning to adolescents’ goals and motivations.”<sup>78</sup> With respect to young Black men applying to college, associate professor and pre-K-12 scholar Brian Wright notes, “African American youth who are successful cannot simply ignore or discount their racial-ethnic identity in negotiating and navigating their educational experience. The racial-ethnic identities of African American youth are made integral to every aspect of their being by a society in which white, middle-class, Western perspectives are imposed on them. Despite the fact that their identities are still developing, these young men already have multiple astute perspectives on ‘reading the word and the world.’”<sup>79</sup>

In the *Harvard* case, the First Circuit found relevant Harvard’s experience that “applicants do choose to write about how ‘their racial identities have shaped their pre-college experiences’ and admissions officers [have] read these essays as evidence of an applicant’s ‘abilit[y] to overcome obstacles’ and therefore infer their ‘leadership ability or other

---

<sup>78</sup> See Andrew J. Fuligni et al., *Ethnic Identity and the Academic Adjustment of Adolescents From Mexican, Chinese, and European Backgrounds*, 41 DEVELOPMENTAL PSYCH. 799, 809 (2005).

<sup>79</sup> Brian L. Wright, *I Know Who I Am, Do You? Identity and Academic Achievement of Successful African American Male Adolescents in an Urban Pilot High School in the United States*, 46 URBAN EDUC. 611, 613 (2011) (citation omitted).

personal strengths.”<sup>80</sup> For example, children who grew up coping with racial trauma can be uniquely resilient, and may have learned coping mechanisms and protective habits that make them particularly capable of enduring hardship and stress in college and beyond.<sup>81</sup>

Itzel Vasquez-Rodriguez, who graduated from Harvard College *cum laude* with highest honors in Sociology, is one such example. For Vasquez-Rodriguez, it was impossible to explain her motivations for attending college without discussing her ethnic identity as an “indigenous Mexican-American or Chicana.”<sup>82</sup> From an early age, Vasquez-Rodriguez knew that she would be treated differently than others because of her race and ethnicity, both

---

<sup>80</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 200–01 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (citations omitted).

<sup>81</sup> See, e.g., R.E. Anderson & H.C. Stevenson, *RECASTing Racial Stress and Trauma: Theorizing the Healing Potential of Racial Socialization in Families*, 74 AM. PSYCH. 63, 63-75 (2019), <https://pubmed.ncbi.nlm.nih.gov/30652900/>; see also C. Dominik Güss, *The Brain and Thinking Across Cultures*, FRONTIERS FOR YOUNG MINDS (Aug. 24, 2015), <https://kids.frontiersin.org/articles/10.3389/frym.2015.00012> (“Not only is perception influenced by culture but also more complex thought processes, such as problem solving and making dynamic decisions.”).

<sup>82</sup> Tr. of Bench Trial – Day 11, at 9, *Students for Fair Admissions, Inc., v. President & Fellows of Harv. Coll. et al.*, No. 14-14176 (D. Mass. Oct. 29, 2018) [hereinafter Harvard Day 11 Tr.].

within and outside her community. Members of Vasquez-Rodriguez' community called her a "coconut" because her advanced vocabulary made her "brown on the outside and white on the inside."<sup>83</sup> On the other hand, white students in her AP and honors courses would frequently underestimate her intellectual ability and make statements like, "Oh, Itzel, I didn't know you were smart."<sup>84</sup>

In her application, Vasquez-Rodriguez submitted an essay entitled "Different" about her "experiences as a young Chicana in southern California," in which, she wrote, "I discovered my life's ambition. I want to represent my heritage and inspire my fellow Latinos to embrace our culture."<sup>85</sup> When asked if she could have written such an essay in a race-blind manner, she testified that she could not, as "[a]ll of my life's ambitions revolve around communities of color and my ethnoracial identity."<sup>86</sup> Furthermore, Vasquez-Rodriguez wanted to write about her heritage because she "felt like it was something important and something of value that [she] could bring to a school like Harvard."<sup>87</sup>

Even for students of color from ethnic groups with historically higher levels of educational attainment, their race and ethnicity may be central

---

<sup>83</sup> *Id.* at 9-10.

<sup>84</sup> *Id.* at 10.

<sup>85</sup> *Id.* at 13.

<sup>86</sup> *Id.* at 13.

<sup>87</sup> *Id.* at 13.

to their life stories.<sup>88</sup> For example, Sally Chen, a Harvard senior at the time of her testimony, focused her application essay on her experience as the daughter of working class Chinese immigrants, despite being advised not to by her college counselor, because Asian American immigrant stories were “overdone” and “would ultimately hurt [Asian American students’] admissions.”<sup>89</sup> But as Chen explained, being Chinese-American and facing cultural-linguistic barriers “was really fundamental to explaining who I am” and she did not “think there was any way I could authentically get across my motivations, my story, my inspirations, my academic kind of curiosities without really explaining and talking about the significance of how I grew up.”<sup>90</sup>

Sally Chen also recounted her experiences problem-solving for her non-English speaking parents as motivating her desire to become an advocate in her application: “I wrote very directly about how being the daughter of Chinese immigrants and being a kind of translator and advocate for them . . . really shaped my views on social responsibility,

---

<sup>88</sup> See Andrew J. Fuligni et al., *Ethnic Identity and the Academic Adjustment of Adolescents from Mexican, Chinese, and European Backgrounds*, 41 DEVELOPMENTAL PSYCH. 799, 809 (2005) (“Similar findings have been observed for the sense of family obligation among Mexican and Chinese students, which also accounts for a significant portion of their extra motivation to succeed.”).

<sup>89</sup> Harvard Day 11 Tr., at 195, 199-200.

<sup>90</sup> *Id.* at 195, 199-200, 202.

on my dedication to being an advocate for . . . different communities.”<sup>91</sup>

It is not hard to see how these concerns could also arise if colleges were not permitted to consider religious identity as part of an applicant’s overall application. For example, in her 2003 dissertation on the effect of Orthodox Jewish education on adolescent identity, Colleen Hensman notes that her study indicated that Orthodox Jewish adolescents’ “identity development is dominated by their religious psychosocial world[.]”<sup>92</sup> Ignoring the religious aspect of one’s Orthodox practice would cause an admissions officer to fail to understand the absence of extracurriculars on Saturday, or the critical thinking and independence required of an Orthodox student negotiating disparate cultural norms of adolescent life. Similarly, how would admissions officers be expected to understand the maturity or leadership of teenage Mormons or evangelical Christians on their faith missions, or of Muslim children bringing their grandparents to Mecca for Hajj, without also considering the relationship of these students’ religious identities to their activities? Without considering identity, would the experiences above simply appear to be vacations abroad?

---

<sup>91</sup> *Id.* at 195, 199-200.

<sup>92</sup> Colleen R. Hensman, *The Effect of Orthodox Jewish Education on Adolescent Identity* (Jan. 2003) (M.Ed. thesis, University of South Africa), <https://uir.unisa.ac.za/bitstream/handle/10500/1030/dissertation.pdf?sequence=1&isAllowed=y>.

Colleges must be able consider racial identity to allow applicants to fully explain the many experiences they have had demonstrating the traits they possess that will enable them to thrive at the next stages of their lives.

**IV. ELIMINATION OF RACE-CONSCIOUS ADMISSIONS COMPROMISES COMPETITION FOR TALENT AND ARTIFICIALLY EXCLUDES HIGHLY QUALIFIED APPLICANTS OF COLOR FROM ACCURATE ASSESSMENT FOR COLLEGE ADMISSIONS.**

If post-secondary schools do not consider race in their applications, admissions of talented, qualified students of color will be artificially depressed because those students will not be able to properly contextualize the non-traditional indicia of merit they possess as a result of their racial and ethnic identities.

**A. The Number Of Underrepresented Minorities Will Drop Even Further If Schools Are Unable To Consider Race.**

Even with race-conscious admissions policies in place, Black and Hispanic enrollment at post-secondary institutions is low: the average more elite U.S. public college is 5.6% Black and 11.4% Hispanic.<sup>93</sup> If consideration of race is removed, these

---

<sup>93</sup> TOMAS MONARREZ & KELIA WASHINGTON, URBAN INST., RACE AND ETHNIC REPRESENTATION IN POSTSECONDARY EDUCATION 15 (June 2020), <https://>

already low numbers will drop significantly more. For example, the first year the University of California-Berkeley eliminated race as a factor in its application decisions, the admissions rates for Black and Latinx students dropped from 50% to 20% and 45% to 21%, respectively.<sup>94</sup> Other so-called “race-blind” measures such as percent plans, socioeconomic-based affirmative action,<sup>95</sup> or random lotteries<sup>96</sup> would also fail. Allowing consideration of race is critical because it enables applicants to

---

[www.urban.org/sites/default/files/publication/102375/racial-and-ethnic-representation-in-postsecondary-education\\_1.pdf](http://www.urban.org/sites/default/files/publication/102375/racial-and-ethnic-representation-in-postsecondary-education_1.pdf).

<sup>94</sup> Deborah Archer, *Race-Conscious Admissions Policies Are Crucial to an Equitable Society*, BLOOMBERG L. (Feb. 1, 2022), <https://news.bloomberglaw.com/us-law-week/race-conscious-admissions-policies-are-crucial-to-an-equitable-society>; pull source info.

<sup>95</sup> Sean F. Reardon, et al., *What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action? Evidence from a Simulation Model*, 37 J. POL'Y ANALYSIS & MGMT. 630, 633, 650 (2018) (“[N]either SES-based affirmative action nor race-based recruiting policies on their own produce high levels of racial diversity relative to that achieved by race-based affirmative action.”).

<sup>96</sup> Dominique J. Baker & Michael N. Bastedo, *What If We Leave It Up to Chance? Admissions Lotteries and Equitable Access at Selective Colleges*, 51 EDUC. RESEARCHER 134, 144 (2022) (“We do not find evidence that admissions lotteries would create a more equitable entering class at selective institutions with regard to race or income.”).

highlight more of their life experiences and the unique non-traditional indicia of merit they possess.

**B. Many Highly Qualified Students  
Would Choose Not To Attend  
Selective Colleges If They Did Not Use  
Race-Consciousness In Admissions.**

Many highly qualified students also view a lack of race-conscious admissions as a deterrent to application.<sup>97</sup> For example, Vasquez-Rodriguez—who ranked first in her high school and graduated with a 4.5 GPA—testified, “Honestly, I probably would not have applied to Harvard if they didn’t take race into account.”<sup>98</sup> She explained: “I felt like so much of my experience and so much of my perspective and world view has been colored by my ethnoracial identity and I wanted a school that took

---

<sup>97</sup> John M. Carey et al., *It’s College Admissions Season, and Students Are Looking For Diverse Campuses*, WASH. POST (Apr. 14, 2022, 7:00 AM ET), <https://www.washingtonpost.com/politics/2020/04/14/its-college-admissions-season-students-are-looking-diverse-campuses/> (A study asking 8,000 undergraduate students, including some from UNC, to play the role of admissions officer found that “respondents consistently favored student applicants from groups that have traditionally been underrepresented in American higher education. All else equal, they were more likely to select racial and ethnic minorities than whites, women than men, and the socioeconomically disadvantaged than the wealthy.”).

<sup>98</sup> Harvard Day 11 Tr., at 12, 16.

that into consideration and that valued . . . that part of myself.”<sup>99</sup>

Other eminently qualified candidates at Harvard shared the same sentiments. Sarah Cole, who holds undergraduate and graduate degrees from Harvard and received an academic scholarship to attend a private college prep school where she earned “straight As and A pluses,” stated her belief that if race-conscious admissions were eliminated, “fewer students of color would apply,” because “[i]f Harvard adopted race-blind admissions, that would signal to students of color that Harvard was disinterested in us. Race-blind admissions is an active erasure.”<sup>100</sup>

Stories from UNC students demonstrate many of them feel similarly, as well.<sup>101</sup> Hanna Watson, who identifies as “[B]lack/African American” applied to UNC with a 3.93 GPA, was among the top 10 percent of her class, and had SAT scores exceeding the 75<sup>th</sup> percentile of the 2016.<sup>102</sup> Watson testified that she viewed race-conscious admissions as “the norm” when she applied, “[s]o it would have seemed very strange to me if UNC did not consider race or

---

<sup>99</sup> *Id.* at 16.

<sup>100</sup> *Id.* at 61-62, 65, 84.

<sup>101</sup> *See also, e.g.* UNC Trial Tr., at 1259 (“I thought it was important that race be used [in the admissions process], and I do think that UNC should kind of continue it in a similar way.”).

<sup>102</sup> *See id.* at 1312, 1316; UNIV. N.C. CHAPEL HILL, *2016 Entering Class Profile First-Year Students*, <https://admissions.unc.edu/wp-content/uploads/sites/1130/2020/11/2016-Class-Profile.pdf> (last visited July 13, 2022).

ethnicity.”<sup>103</sup> She would have found the elimination of race-conscious admissions “off-putting in that I think I would have felt like they didn’t care, and I would have assumed that there was some sort of . . . racist agenda behind it that would have made me feel unwelcome at the university.”<sup>104</sup>

## CONCLUSION

In order to protect the opportunity for a level playing field, colleges must be able to consider and value racial and ethnic identity when evaluating applications. *Amici* therefore respectfully urge the Court to affirm the decision of the First Circuit that Harvard’s race-conscious admissions program meets strict scrutiny, and also affirm the decision of the Middle District of North Carolina that the University of North Carolina’s race-conscious admissions program meets strict scrutiny.

---

<sup>103</sup> UNC Trial Tr., at 1315.

<sup>104</sup> *Id.* at 1316.

August 1, 2022

RESPECTFULLY SUBMITTED,

KELLY M. DERMODY\*  
NIGAR A. SHAIKH  
NICHOLAS W. LEE  
LIEFF CABRASER HEIMANN  
& BERNSTEIN, LLP  
275 Battery Street, 29<sup>th</sup> Floor  
San Francisco, CA 94111  
(415) 956-1000

MIRIAM ROLLIN  
EDUCATION CIVIL RIGHTS  
ALLIANCE  
NATIONAL CENTER FOR YOUTH  
LAW  
1212 BROADWAY, SUITE 600  
OAKLAND, CA 94612  
(510) 835-8090

*\*Counsel of Record*

*Counsel for Amici Curiae Youth  
Advocates and Experts on  
Educational Access*

## **APPENDIX**

**AMICI**

The **Civitas ChildLaw Center** is a nationally recognized program of the Loyola University Chicago School of Law. Founded in 1993, the Civitas ChildLaw Center's mission is to prepare law students and lawyers to be ethical and effective advocates for children, their families, and communities through interdisciplinary teaching, scholarship, and service. One of the components of the Civitas ChildLaw Center is the Education Law and Policy Institute, which offers a specialized curriculum, advocacy resources, and research related to education law and policy. Through direct representation and policy advocacy, the Institute seeks to address and remedy barriers to educational opportunity. Given the continued impact of race and ethnicity on the life experiences and outcomes of children and families, the Civitas ChildLaw Center has a strong interest in ensuring that higher education institutions are preparing a diverse pool of graduates to become attorneys and advocates in the field of children's law and policy.

The **Clearinghouse on Women's Issues (CWI)** was established in 1974 to improve the status of women and girls, nationally and internationally. CWI addresses economic, social, political, and legal issues facing women and girls and works to eliminate discrimination, including discrimination based on sex, age, ethnicity, or marital status. CWI signs on or sponsors amicus briefs in legal actions to further our purpose.

The **Feminist Majority Foundation (FMF)**, a 501(c)(3) nonprofit organization founded in 1987, is dedicated to the pursuit of women's equality, using research and action to empower women economically, socially, and politically. FMF actively supports diversity in public education, including at the university level, which helps to reduce stereotypes and enriches the educational experience for all students.

The **Intercultural Development Research Association (IDRA)** is an independent, non-profit organization dedicated to achieving equal educational opportunity for every child through strong public schools that prepare all students to access and succeed in college. IDRA develops innovative research- and experience-based solutions to ensure that all students have access to and succeed in high-quality schools. Since its founding in 1973, IDRA has also engaged in substantial preK-12 policy work both at the state and federal levels, advocating for education policies that prepare students, especially students of color and students in families with low incomes, to graduate college- and career-ready. IDRA champions equitable channels that enable all students to overcome systemic barriers and enter the preK-12 pipeline to higher education.

The **National Center for Youth Law (NCYL)** is a non-profit organization that works to build a future in which every child thrives and has a full and fair opportunity to achieve the future they envision for themselves. For five decades, NCYL has worked to protect the rights of marginalized and low-income children and to ensure that they have the resources,

support, and opportunities they need. One of NCYL's priorities is to ensure youth of color have access to equitable education opportunities in public schools and beyond. NCYL provides representation to children and youth in cases that have broad impact, and has represented many students in individual and class litigation and administrative complaints to ensure their access to adequate, appropriate, and non-discriminatory services. NCYL currently represents students of color in impact litigation challenging the deeply entrenched unequal distribution of educational resources in this country.

The **National Immigration Law Center (NILC)** is a national organization exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families, including with respect to access to higher education.

The **Native American Disability Law Center (NADLC)** is a non-profit 501(c)(3) entity located in Arizona and New Mexico. It is the American Indian Consortium of the protection and advocacy (P&A) system designated by the Navajo and Hopi Nations and serving Native American communities across the Four Corners region of the Southwest. The NADLC provides individual and systemic advocacy for Native American children receiving special education services across multiple educational entities, including the Bureau of Indian Education. Education cases comprise a significant portion of the NADLC's individual cases, with those cases primarily brought pursuant to the Individuals with Disabilities Education Act.

The **Peer Defense Project** works with youth leaders to design legal tools, networks, and knowledge to build youth power and dignity in schools, courts, and government. The Peer Defense Project builds legal tools to support youth leaders to dismantle school segregation and racial inequities in K-12 education.

**Public Counsel** has worked with communities and clients for over fifty years to create a more just society through legal services, advocacy, and civil rights litigation. Too often, the current U.S. education system works to reinforce existing inequities, biases, and segregation. Public Counsel aims to ensure that public schools are engines of equality and opportunity and that all children have equal access to education.

The **Shriver Center on Poverty Law (Shriver Center)** has a vision of a nation free from poverty with justice, equity, and opportunity for all. The Shriver Center provides national leadership to promote justice and improve the lives and opportunities of low-income people by advancing laws and policies through litigation, as well as legislative and administrative advocacy. The Shriver Center is committed to economic and racial justice, which includes pursuing economic and racial justice in education.

The **Society for the Study of Psychiatry and Culture (SSPC)** is a nonprofit, interdisciplinary organization devoted to furthering research, clinical

care, and education in cultural aspects of mental health and illness. Founded in 1980, it aims to promote cultural psychiatry in North American professional groups and to collaborate with national and international organizations in the development of policy and practice. Primarily rooted in North America, SSPC provides an interface for domestic and international interests of cultural psychiatry and mental health, and has a diverse international membership of professionals and students from psychiatry, psychology, nursing, and the social sciences who are at various stages of practice, teaching, or training. SSPC focuses attention on the importance of cultural factors including diversity, inclusion, and equity in psychiatric care, education, and research through group and individual efforts.

The **Southern Coalition for Social Justice (SCSJ)** is a 501(c)(3) nonprofit public interest law organization founded in 2007 in Durham, North Carolina. SCSJ partners with communities of color and economically disadvantaged communities in the South to defend and advance their political, social, and economic rights through legal advocacy, research, organizing, and communications. One of SCSJ's primary practice areas is youth advocacy under the umbrella of our Youth Justice Project. SCSJ works with youth in underfunded high schools across North Carolina and issues yearly Racial Equity Report Cards, rating school systems across the state on how their programs and practices are meeting children of color's needs.

**Teach For America's** mission is to enlist, develop, and mobilize a group of our nation's most promising

future leaders to grow and strengthen the movement for educational equity. As one of our nation's leading recruiters of teachers of color for public schools, Teach For America has a vested interest in our country's institutions of higher education producing outstanding, engaged cohorts of racially and socio-economically diverse graduates. Teach For America engages in nationwide efforts towards equity and excellence in P-12 education by recruiting and training a diverse and talented corps of teachers and education leaders. Ultimately, Teach For America believes that a diverse educator workforce will positively impact the educational experience for all students.

**The Washington Lawyers' Committee (Committee)** for Civil Rights and Urban Affairs is a nonprofit organization that works to create legal, economic, and social equity through litigation, client and public education and public policy advocacy. The Committee recognizes the central role that current and historic race discrimination plays in sustaining inequity and recognizes the critical importance of identifying, exposing, combating, and dismantling the systems that sustain racial oppression. For the last 50 years, the Committee has been on the cutting edge of civil rights advocacy, bringing precedent setting litigation to address discrimination, including education discrimination, and advocating for equal educational opportunity for all students.