NO. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF OKLAHOMA AND THIRTEEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

MIKE HUNTER
OKLAHOMA ATTORNEY GENERAL

MITHUN MANSINGHANI
SOLICITOR GENERAL
COUNSEL OF RECORD

OKLAHOMA OFFICE OF
THE ATTORNEY GENERAL
313 NE TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 521-3921
MITHUN.MANSINGHANI@OAG.OK.GOV

MARCH 31, 2021 *COUNSEL FOR AMICI CURIAE*

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QUESTIONS PRESENTED

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

2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

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INTERESTS OF AMICI CURIAE[1]

The *Amici* States are home to thousands of Asian-American students who are subject to the discriminatory policy challenged in this suit. It is important to *Amici* that their students have equal access to the Nation's educational institutions, including Harvard College. These students will be able to support their families in the *Amici* States and to bring back to the States the acquired skill, knowledge, and credentials that further enable them to be leaders of and economic contributors to our States.

For example, Oklahoma City is home to one of the country's largest Vietnamese-American communities. Meanwhile, Tulsa has the largest concentration of Burmese-Americans of Chin ethnicity.

Each of these ethnic groups have below-average educational attainment or economic privilege. More than a third of Burmese-Americans live below the poverty level—a rate higher than Black or Hispanic Americans.[2] In fact, while stereotypes portray Asian-Americans as broad group that is upwardly mobile, the reality is that Asian-Americans have the largest

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[1] Amici notified the parties of the intention to file this brief ten days in advance, and Amici submit this brief pursuant to Sup. Ct. Rule 37.4.

[2] Victoria Tran, *Asian Americans Are Falling Through the Cracks in Data Representation and Social Services*, The Urban Institute (June 19, 2018), https://www.urban.org/urban-wire/asian-americans-are-falling-through-cracks-data-representation-and-social-services.

and fastest growing intra-group income inequality in the country.[3] But because they are classified as "Asian," Americans from these less-privileged ethnic backgrounds have a lower chance of admission to Harvard than non-Asian minorities. These Americans face especially high hurdles because Harvard has rejected race-neutral alternatives that would seek to instead place greater focus on socioeconomic diversity. *See infra* 9-13.

Ending unequal treatment of our Asian-American citizens does not diminish equal opportunity for our other racial minority communities. As further explained below, some of *Amici* States have prohibited racial classifications in university admissions and yet successfully maintain diverse campuses that are inclusive and equally open to students of any race. Harvard's claim in this case that such diversity is impossible without engaging in racial discrimination is contradicted by the experience of our state and private universities that provide the highest quality education to all without regard to skin color or ethnicity.

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[3] Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, Pew Research Center (July 12, 2018), https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/.

SUMMARY OF THE ARGUMENT

I.

This case presents the Court a strong vehicle to examine a timely and important question: whether *Grutter*'s sanction of racial discrimination in university admissions should be reconsidered. In addition to the reasons offered by petitioner, reexamining *Grutter* is justified by several factors that weigh against *stare decisis*: *Grutter*'s inconsistency with related decisions, developments since the decision, and the workability of the rule *Grutter* established.

A.

While *Grutter* claimed fidelity to strict scrutiny, the deference it affords to university decisions to discriminate based on race is inconsistent with how the Court applies strict scrutiny in other contexts. The decision below highlights that inconsistency. Specifically, the First Circuit applied something markedly less than strict scrutiny's narrow tailoring when evaluating Harvard's need to engage in race-based evaluation of applicants. It rejected petitioner's race-neutral alternative for reasons that are not compelling enough to justify continued race-based decisionmaking, including: potential difficulties in attracting faculty, possible loss of donors, marginal decreases in some (but not other) academic averages, the chance that the distribution of student majors will be different, and attendant administrative costs. These would not pass strict scrutiny in any other area of law outside of *Grutter*'s outlier standard.

Harvard also complained that petitioner's race-neutral alternative would result in fewer African-Americans being admitted. Meanwhile, Asian and Hispanic admissions would increase. Here too Harvard has no compelling interest in maintaining its racial balancing without proving that each of those new Hispanic and Asian admittees *as individuals* would contribute less to diversity than their African-American peers. If any of Harvard's reasons for rejecting petitioner's race-neutral alternatives were enough to satisfy strict scrutiny, it is hard to see how any plaintiff would prevail when their individual rights have been violated. But this is precisely the sort of lax scrutiny *Grutter* permits.

B.

Data from the *Amici* states that have prohibited race-conscious admissions shows that universities can remain both diverse and academically competitive without resorting to racial discrimination. Nine states now prohibit racial distinctions in university admissions. The University of Oklahoma, for example, remains just as diverse today (if not more so) than it was when Oklahoma banned affirmative action in 2012. States like Oklahoma and Nebraska have similar Hispanic populations as Massachusetts and Maryland, and all four states' flagship public universities have similar Hispanic enrollment despite the former two states prohibiting race-consciousness and the latter two not doing so. The same is true of universities in states that have high Hispanic populations like Florida and Arizona, which have banned affirmative action, when compared with universities in states like Nevada and Colorado, which have not. Nor does the University of Oklahoma have a meaningfully lower African-

American student population than universities in comparable discriminating states like Massachusetts, Minnesota, and Wisconsin. These factual developments since *Grutter* justify reconsidering whether *Grutter* correctly decided there is no workable alternative to maintaining campus diversity other than open racial discrimination.

C.

Grutter should also be reconsidered because it has proven unworkable, as the decision below demonstrates. Harvard in this case is forced to take multiple contradictory positions because *Grutter* requires a delicate dance to justify engaging in some—but not too much—racial discrimination. Harvard, for example, makes the puzzling assertion that for many applicants its consideration of race is somehow "determinative" but not "decisive." Harvard also says it considers each applicant holistically and individually, yet carefully monitors its racial balance throughout its admissions process, takes race into account regardless if individually relevant, and rejects race-neutral alternatives that would change its current racial balance without first taking into account individualized considerations. Harvard also disclaims discriminating against Asian-Americans but adopts race-conscious policies and practices that undeniably suppress Asian admission rates. All of this is because *Grutter* allows Harvard to engage in racial discrimination to advance a "compelling" interest but then forces Harvard to pretend it's not actually divvying up students based on race at all. Finally, *Grutter*'s 25-year expiration date has proven unworkable since, short of this Court's intervention, there appears to be no voluntary end in sight for university race-based admission practices.

II.

Even if *Grutter* is not reconsidered, this case seriously presents the important question of whether Harvard—whose admissions policy was held up as a model for affirmative action in *Bakke* and *Grutter*—discriminates against Asian-Americans. The evidence here shows that Asian-Americans are not competing on a level playing field with African-American and Hispanic applicants. An Asian student with even the most stellar academic credentials is less likely to be admitted than an African-American with relatively middling grades. It is the functional equivalent of the quota invalidated in *Bakke*, or at least the point system struck down in *Gratz*.

The First Circuit's reasons for turning a blind eye towards this discrimination—Asians are still competitive with whites and their lower admissions may be explained by lower "personal ratings" caused by uncertain or unknowable factors—are inconsistent with the exacting scrutiny required for violations of equal protection and nondiscrimination laws. Accepting every nondiscriminatory explanation at face value, as the First Circuit does, whistles past the obvious discriminatory effect of explicitly race-conscious policies on Asian-Americans. This only incentivizes Harvard to make its admissions process more opaque to mask any discrimination while engaging in racial balancing. This Court should grant certiorari to ensure these practices end, at Harvard and everywhere else.

ARGUMENT

I. WHETHER TO OVERTURN *GRUTTER* IS AN IMPORTANT QUESTION OF FEDERAL LAW WORTHY OF CERTIORARI.

While *Grutter* claimed that affirmative action is subject to the same strict scrutiny given to other acts of *de jure* racial discrimination, both *Grutter* and the decision below show that its standard is strict in name only. *Grutter*'s attempt to craft a standard that is simultaneously "strict scrutiny" and deferential to a university's attempts at social engineering has also left the law completely unworkable.

Meanwhile, the experience in *Amici* States shows that racial discrimination is not strictly necessary to advance the interests *Grutter* endorsed. This confirms that the policies sanctioned in *Grutter* cannot survive the searching inquiry normally provided to racial distinctions. Because this case and our experience since *Grutter* shows *Grutter*'s inconsistency with strict scrutiny, its inability to be consistently applied, and the race-neutral alternatives available to universities, this Court should grant certiorari to reexamine *Grutter*.

A. The decision below shows the flaw in *Grutter*'s narrow tailoring approach.

The language of Title VI, "like that of the Equal Protection Clause, is majestic in its sweep." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 284 (1978). But the strict scrutiny applied under *Bakke* and *Grutter* fails to live up to that majesty.

In *Grutter*, the Court decided to "defer" to the university's judgment on the need for its race-conscious admissions practices, noting that "universities occupy a special niche in our constitutional tradition," and that despite making racial distinctions among applicants, "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" 539 U.S. at 328-29 (quoting *Bakke*, 438 U.S. at 318-19). Justice Powell's opinion in *Bakke*, which *Grutter* endorsed, similarly granted a "presumption of legality" to university admissions where race is taken into account. 438 U.S. at 319 n.53. Meanwhile, *Grutter* embraces the idea that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," but necessitates only "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339.

This deferential review is in stark contrast with how the Court approaches strict scrutiny in other contexts. *See Grutter*, 539 U.S. at 361-67 (Thomas, J., concurring in part); *id.* at 380 (Rehnquist, J., dissenting); *id.* at 387-89, 394 (Kennedy, J., dissenting). That "[in]consistency with related decisions" on strict scrutiny, which "sits uneasily" with this Court's other precedent on racial equality, warrants *Grutter*'s reconsideration. *See Ramos v. Louisiana*, 140 S.Ct. 1390, 1404-05 (2020).

1. Whether campus diversity is a compelling interest that justifies open racial discrimination has been dubious from the start. *See* Pet.23-24; *Grutter*, 539 U.S. at 347-48 (Scalia, J., concurring in part); *id.* at 351-61 (Thomas, J., concurring in part); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-

21 (1989) (Scalia, J., concurring). But perhaps most problematic is *Grutter*'s narrow tailoring *lite*. It looks nothing like how this Court has scrutinized impositions on free speech or free exercise of religion, or even how this Court has evaluated racial classifications in other contexts.

This is evident from the opinion below: while paying lip-service to strict scrutiny, Pet.App.61-63, the First Circuit gave Harvard deference and the benefit of the doubt at every turn. In showing Harvard's program is not narrowly tailored, petitioner proposed an alternative that would eliminate racial preferences, as well as preferences for children of donors, alumni, and faculty, while increasing preferences for those who are socioeconomically disadvantaged. *See* Pet. 17-19. But applying *Grutter*, the First Circuit accepted every excuse Harvard gave for rejecting this alternative, no matter how minor, because the proposed alternative would require some modifications in Harvard's operations. *See* Pet.App.75-77; *cf. Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting) (criticizing *Grutter*'s scrutiny as "nothing short of perfunctory").

True strict scrutiny would not permit racial discrimination merely because abandoning discrimination would require some attendant changes. There is no compelling interest in ensuring that everything else remains the same when giving up racial discrimination. *See Grutter*, 539 U.S. at 362 (Thomas, J., concurring in part). Indeed, in our Nation's history, ending racial discrimination has always been accompanied by adjustments some found difficult.

If institutions were able to avoid such changes, the narrow tailoring requirement would become dead-letter because *any* race-neutral alternative will

inevitably have ripple effects. Instead, strict scrutiny requires the university to prove that it has a compelling interest in avoiding the changes that it believes make the alternative to racial discrimination infeasible. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279 (1986); *J.A. Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part).

2. For example, Harvard bemoans that giving up preferences to children of donors, alumni, and faculty might impact its ability to draw top faculty and high-dollar donations. Pet.App.76-77. But beyond conclusory testimony that is insufficient for strict scrutiny,[4] which specific faculty member would have refused a professorship at Harvard because his daughter might have to attend Cornell instead? How many such professors are there? And by how much would Harvard's $37 billion endowment decrease because it no longer gave preferences to the privileged kids of wealthy donors? This is the sort of "skepticism" and "most searching examination" that true strict scrutiny requires, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995) (citation omitted), but the First Circuit believed *Grutter* does not demand. Regardless, these interests fall woefully short of compelling enough to justify racial discrimination. In no other field would decreased revenue or ability to attract employees be sufficient to meet the demanding standard of strict scrutiny. *See Fisher v. Univ. of Texas at Austin* ("*Fisher I*"), 570 U.S. 297, 320-22 (2013) (Thomas, J., concurring); *Grutter*, 539 U.S. at 366 (Thomas, J., concurring in part) (citing *United States v. Virginia*,

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[4] *Cf. J.A. Croson*, 488 U.S. at 500-01; *see also Fisher v. Univ. of Texas at Austin* ("*Fisher II*"), 136 S.Ct. 2198, 2223 (2016) (Alito, J., dissenting).

518 U.S. 515 (1996)). That the First Circuit held these excuses satisfy *Grutter* shows just how wrong *Grutter* is.

Harvard's other reasons for rejecting the alternatives to race-based admissions are similarly uncompelling. Fewer students interested in intermural sports or that score high on the problematic "personal rating" cannot be sufficient to compel racial discrimination. Pet.App.76. And the fact that ending discrimination against Asian-Americans would mean a few more students major in electrical engineering rather than creative writing hardly justifies race-based decision-making, *see* Pet.App.77, especially because Harvard's desire for fewer engineers could be a proxy for excluding Asian-Americans.[5] Nor can "administrative expenses" from such academic shifts, Pet.App.77, satisfy the sort of strict scrutiny this Court regularly imposes on burdens to fundamental rights. *See Gratz*, 539 U.S. at 275 (presence of "administrative challenges does not render constitutional an otherwise problematic system"); *J.A. Croson*, 488 U.S. at 508 ("administrative convenience" and "avoiding the bureaucratic effort necessary" to implement race-neutral alternative does not pass strict scrutiny).

Harvard also notes that petitioner's alternative would lead to a 2.9% decline in average SAT scores

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[5] *See* Peter L. Hinrichs, *Racial and Ethnic Differences in College Major Choice*, Federal Reserve Bank of Cleveland (Mar. 31, 2015), https://www.clevelandfed.org/newsroom-and-events/publications/economic-trends/2015-economic-trends/et-20150331-racial-and-ethnic-differences-in-college-major-choice.aspx (showing while "about 16 percent of white bachelor's degree recipients had a major in a STEM subject, . . . over 30 percent of Asian students did").

(with no change in average high school GPA). Pet. App.76. But the court below never seriously examined whether such modest decreases satisfy strict scrutiny—it is hardly a "dramatic sacrifice of . . . the academic quality of all admitted students" that would force Harvard "to abandon [its] academic selectivity." *Grutter*, 539 U.S. at 340. Nor did the First Circuit ask what effects on academic excellence are imposed by Harvard's race-conscious policy given "Asian American applicants' stronger academic ratings" in general and higher test scores in particular. Pet.App.68-69, 172. In other words, Harvard is willing to make academic sacrifices for the sake of racial discrimination, but not for the sake of racial neutrality. This is precisely the opposite of what our antidiscrimination law requires.

Finally, Harvard points to the estimation that under one of petitioner's alternatives, the African-American student population would be expected to drop by four percentage points, while the proportion of Asian-American and Hispanic students would rise by seven and five percentage points, respectively. Pet.App.75, 77-79; Pet.18. The share of white students would drop by seven percentage points under this alternative. *Id.* But if Harvard is truly committed to an *individualized* diversity focusing on *holistic* measures —and not raw quotas or racial balancing—how does it know that the increased Hispanic and Asian-American students will not *as individuals* "have greater potential to enhance student body diversity over" their white and African-American peers? *Grutter*, 539 U.S. at 341. Refusing this alternative because it would fail "to assure within its student body some specified percentage of a particular group" can only be called "racial balancing, which is patently uncon-

stitutional." *Grutter*, 539 U.S. at 329-30 (quoting *Bakke*, 438 U.S. at 307). This shunning of nondiscriminatory options without individualized consideration thereby impermissibly deems the "single characteristic" of race as "automatically ensur[ing] a specific and identifiable contribution to a university's diversity." *Gratz*, 539 U.S. at 271. Even under *Grutter*, that is unlawful.

3. In short, Harvard's rejection of race-neutral alternatives based on racial bean-counting fails strict scrutiny and reveals where its commitments lie. Those commitments are inconsistent with our laws and Constitution. To the extent Harvard's practices are consistent with *Grutter*, *Grutter* should be overruled.

B. The experience of states that have prohibited racial discrimination in admissions demonstrates *Grutter*'s erroneous assumptions about the lack of alternatives to race-based policies.

Nine states have resisted the temptations of race-based admissions and, often by popular referendum, legally barred universities in their state from engaging in such discrimination.[6] Data from these states, many of which banned affirmative action after *Grutter* was decided, challenges *Grutter*'s claim that diversity cannot be achieved by any other means. Because the experiences in these states have undermined the

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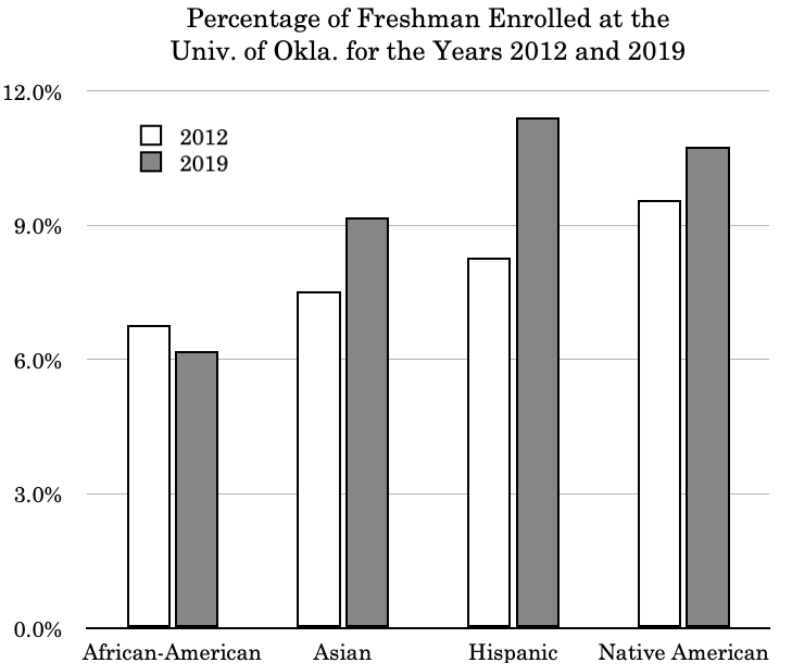
6 *See* Idaho Code Ann. § 67-5909A (2020); Okla. Const. art. II, § 36A (2012); N.H. Rev. Stat. Ann. § 187-A:16-a (2012); Ariz. Const. art. II, § 36 (2010); Neb. Const. art. I, § 30 (2008); MI Const. art. 1, § 26 (2006); Fla. Executive Order 99-281 (1999); Wash. Rev. Code Ann. § 49.60.400 (1998); Cal. Const. art. I, § 31 (1996).

factual assumptions that led the court in *Grutter* to (temporarily) endorse race-conscious admissions, such developments counsel in favor of reconsidering *Grutter*. *See Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S.Ct. 2448, 2482-83 (2018); *S. Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2096-98 (2018).

The voters of *Amicus* Oklahoma, for example, amended their Constitution via referendum in November 2012 to say: "The state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education or public contracting." Okla. Const. art. II, § 36A. Since that time, there has been no long-term severe decline in minority admissions at the University of Oklahoma:[7]

[7] University of Oklahoma, Institutional Research and Reporting, *Annual Reports: First-Time Freshman Analysis*, https://www.ou.edu/irr/data-center/annual-reports. Students that enrolled in 2012 were the last cohort to have been admitted under race-conscious policies. This data reflects self-identified race that includes students that identify with the listed race alone or in combination with one or more other race.



The flagship public universities of states that have banned consideration of race in university admissions are no less diverse than comparable universities in states that still permit such discrimination. For example, the Hispanic population in Oklahoma (11.1%) and Nebraska (11.3%)—states that have banned race-based admissions—is similar to that of Maryland (10.6%) and Massachusetts (12.4%), and the share of first-time freshman Hispanic students in each of those state's flagship public universities is also similar:[8]

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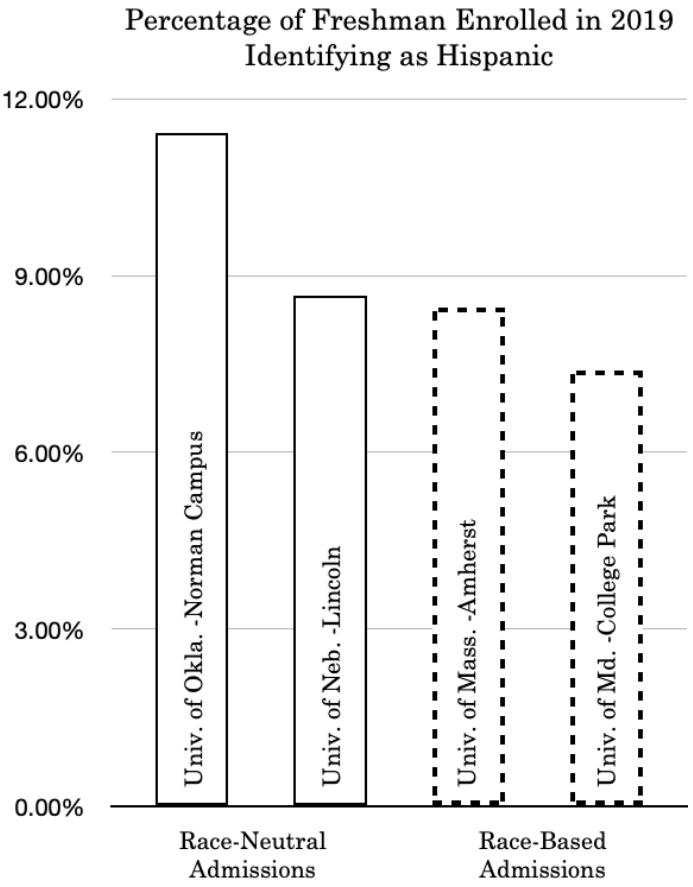
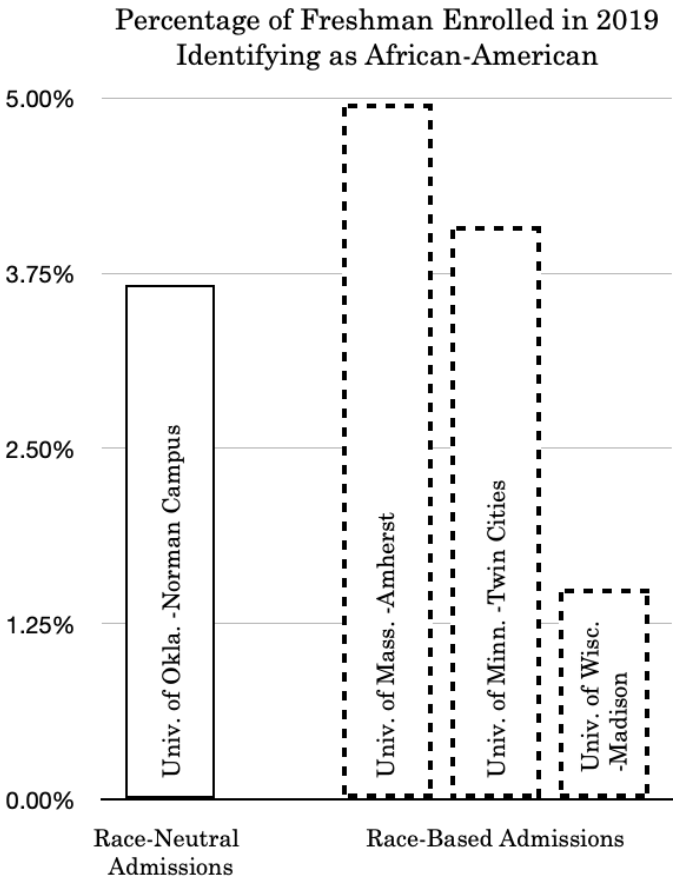
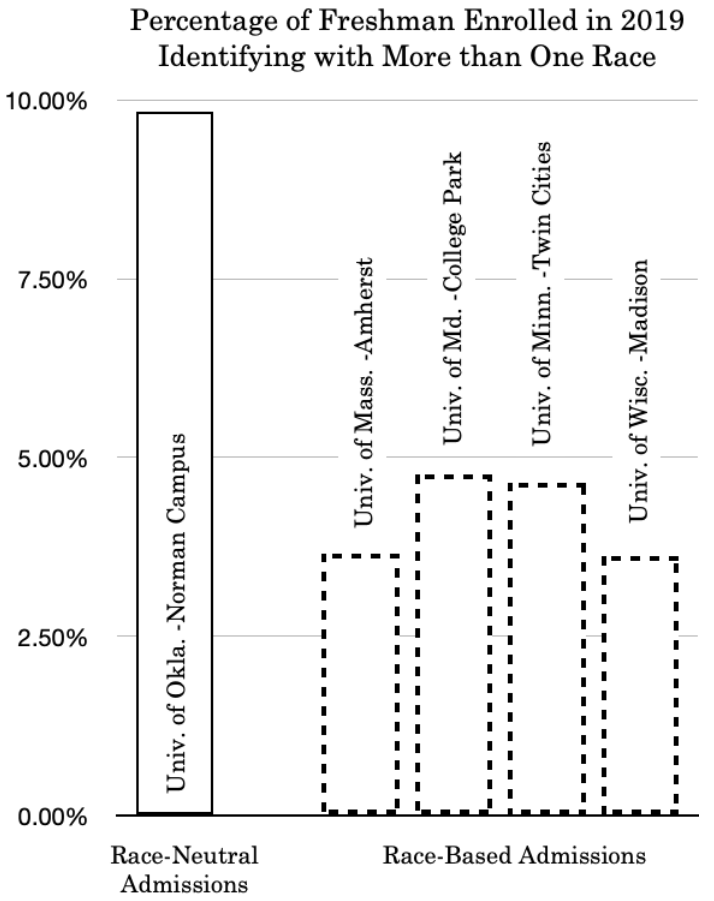
[8] Unless otherwise noted, data for university admissions for a state's flagship university was obtained from the Integrated Postsecondary Education Data System. https://nces.ed.gov/ipeds/. Data for a state's total population demographics was derived from U.S. Census 2019 American Community Survey, 1-year Estimates.



States with similar African-American populations as Oklahoma (6.9%) that have not prohibited race-conscious admissions, like Massachusetts (7%), Minnesota (6.4%), and Wisconsin (6.2%), do not admit substantially more African-American students:



Notably, this data underreports representation at the University of Oklahoma because OU has a high number of students reporting more than one race:



Thus, when African-Americans who report two or more races are included, the share of 2019 freshman enrollment identifying as African-American at the University of Oklahoma increases to 6.2%.[9]

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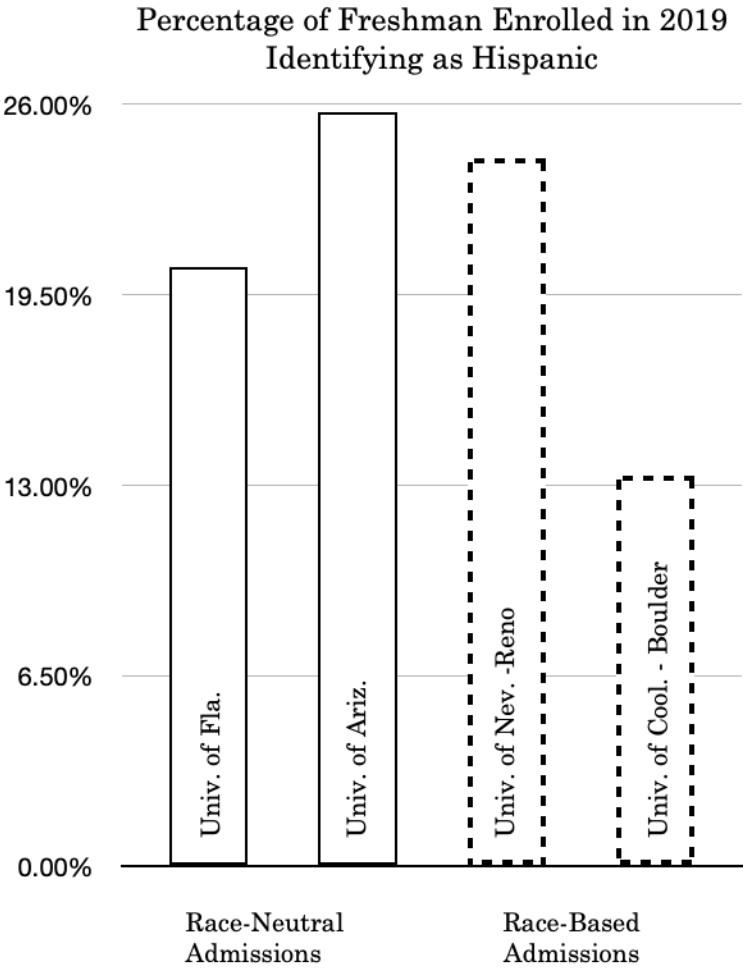
[9] University of Oklahoma, Institutional Research and Reporting, *First-Time Freshman Analysis Fall 2019*, https://www.ou.edu/content/dam/irr/docs/Annual%20Reports/First%20Time%20Freshmen/FTF_Analysis_Fall_2019_revised%2010-15-20.pdf.

The same ability to maintain diversity shows when looking at states with very high Hispanic populations, *e.g.* comparing Florida (26.6%) and Arizona (31.8%), which have prohibited affirmative action, with Nevada (29.3%) and Colorado (21.8%), which have not:



In all, the data shows that universities are no less capable of maintaining and growing diverse student

bodies when they give up race-conscious admissions and instead adopt race-neutral alternatives.

Even elite universities need not sacrifice academic excellence when giving up race-based policies. As Justice Thomas noted, the University of California at Berkeley has not lost its luster after it was prohibited from considering race in admissions by the voters. *See Grutter*, 539 U.S. at 367 (Thomas, J., concurring in part). In *Grutter*, the University of Michigan Law School entering class of 2000 was 14.5% "under-represented minority," 539 U.S. at 320; today, after Michigan voters outlawed race-based admissions, underrepresented minorities are 18% of the law school's class of 2023.[10] Yet Michigan Law has somehow managed to remain one of the best law schools in the country without indulging in racial discrimination.

The experience in *Amici* States that have banned affirmative action in university admissions show academic institutions need not evaluate their applicants based on race in order to thrive. *Grutter* itself pointed to three states "where racial preferences in admissions are prohibited by state law" in which universities "are currently engaged in experimenting with a wide variety of alternative approaches." 539 U.S. at 342. Since then, six more states have been added to the list, each with their own race-neutral approaches and degree of on-campus diversity. Under *Grutter*, such developments end the need for affirmative action because "[u]niversities in other States can and should draw on the most promising aspects of these

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[10] Michigan Law, *2023 Class Profile*, https://www.law.umich.edu/prospectivestudents/Pages/classstatistics.aspx.

race-neutral alternatives as they develop." *Id.* That race-neutral alternatives have now been demonstrated to be available and workable provides this Court yet another reason to grant certiorari to rule the Constitution and Title VI can no longer abide by racial discrimination in university admissions.

C. This case confirms *Grutter* is unworkable.

Certiorari is also warranted to reconsider *Grutter* because it has proven unworkable, as demonstrated by this case. *See Janus*, 138 S.Ct. at 2481-82; *Knick v. Township of Scott*, 139 S.Ct. 2162, 2178-79 (2019). The First Circuit acknowledged the "tension" in *Grutter*'s demand that consideration of race not be "too extensive," and instead be only a "'factor of a factor of a factor' in the holistic review process," while also requiring that such consideration significantly advance the diversity goals. Pet.App.62 n.27 (citations omitted). So the court below was forced to find that race is not "decisive in practice," Pet.App.68, while also finding race "determinative" for nearly *half* of African American and Hispanic admittees, Pet.App.46. Perhaps some convoluted reasoning can explain how race is "determinative" without being "decisive."[11] Or perhaps *Grutter*'s standard is a hopeless contradiction. *See Grutter*, 539 U.S. at 348-49 (Scalia, J., concurring in part).

Examples of this paradox abound. Harvard stresses that each applicant is evaluated holistically as an individual rather than as a means to achieve a

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11 *But See* ROGET'S 21ST CENTURY THESAURUS, "determinative" (3d. ed. 2013) (listing "decisive" as a synonym).

racial quota, but also Harvard: (1) rejects proposed race-neutral alternatives because of their effects on the racial balance at Harvard without any evaluation about how the individuals who would and would not be admitted in the proposed alternatives would contribute to Harvard's community, *see supra* 12-13; (2) gives "additional attention" to certain groups "if at some point in the admissions process it appears that a group is notably underrepresented," Pet.App.136-137; and (3) takes "race into account, regardless of whether applicants write about that aspect of their backgrounds or otherwise indicate that it is an important component of who they are." Pet.App.116. This is likely because *Grutter* allows Harvard to engage in racial discrimination to achieve a "critical mass," but paradoxically forbids Harvard from using racial quotas or balancing. *See Grutter*, 539 U.S. at 354-55 (Thomas, J., concurring in part).

These contradictions only compound when looking beyond who Harvard's policy purports to help and examining who it hurts. Harvard disclaims treating Asian-American race negatively but admits that, without taking race into account, Asian-American admissions would increase. *See* Pet.App.210 n.51. Harvard says it does not believe that Asian-Americans are less personable, Pet.App.83-84, but Asian-American admissions are suppressed, at least in part, because that race is given the lowest "personal ratings" year after year, Pet.15-16. Harvard rejects race-neutral alternatives because they might decrease average test scores, *supra* 11-12, but claims elsewhere that test scores are not all that important—as a means to explain why high-testing Asians are admitted at lower rates, Pet.App.68-69.

On a more conceptual level, *Grutter* somehow simultaneously claims "diversity" is an interest of the highest order and yet also categorically limits the means by which that interest can be pursued. That is, *Grutter* forbids universities from pursuing diversity through quotas, racial balancing, and other systems of mechanical, non-individualized treatment. But if diversity was truly compelling, and a university could show that adequate diversity can only be achieved by these means (*e.g.* a quota), why would strict scrutiny nonetheless disallow such practices?[12] That's not how strict scrutiny normally works. This tension in *Grutter*, like so many others, is not easily resolved.

Finally, *Grutter*'s unworkability is perhaps most obviously revealed by its hope that race-conscious admissions will soon fade away. *Grutter*, 539 U.S. at 342-43. Our national experience has since proven *Grutter*'s optimism grievously wrong. As we near *Grutter*'s 25-year expiration date, any honest observer will acknowledge there is no prospect that universities will voluntarily give up racial discrimination in admissions. Affirmative action programs, in other words, have failed "the acid test of their justification," which is "their efficacy in eliminating the need for any racial or ethnic preferences at all." *Id.* at 343 (citation omitted).

Indeed, while the University of Michigan at least feigned that its race-based program was temporary, *id.*, Harvard gives up any pretense that it has a sunset

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[12] Indeed, Harvard admits that even its current aggressive efforts are insufficient to meet its diversity goals, since "alienation and isolation is already a problem among African American students at Harvard." Pet.App.77 n.32.

provision, a termination date, or any other concrete plans to eliminate it, Pet.App.72-73. Racial classifications have cemented as a chronic feature of our academic system, without "logical stopping point." *Wygant*, 476 U.S. at 275. As a result of a "deferential" and "watered-down version of equal protection review," *Grutter* "effectively assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decision-making such irrelevant factors as a human being's race will never be achieved." *J.A. Croson*, 488 U.S. at 495 (cleaned up); *Adarand Constructors*, 515 U.S. at 229.

So it will remain until this Court intervenes. *See Grutter*, 539 U.S. at 394-95 (Kennedy, J., dissenting). To the extent that our laws and Constitution tolerate a timeline for considering race in education, it is this: such considerations must end with "all deliberate speed." *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 301 (1955). History teaches us even that is not fast enough.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE IMPORTANT QUESTION OF WHETHER HARVARD IS VIOLATING TITLE VI.

Regardless of whether *Grutter* is reconsidered, this Court should not refuse to undertake full review of Asian-American discrimination in Harvard's admissions program. The myth that Harvard's program is benignly individualized has undergirded this Court's precedent. *See Bakke*, 438 U.S. at 316-18; *see also Gratz*, 539 U.S. at 272-73; *Grutter*, 539 U.S. at 335, 337. This case presents the Court with the opportunity to review whether that foundational assumption was

well-taken. Review is also needed to bring clarity to the Court's disparate decisions in *Gratz*, *Grutter*, *Fisher I*, and *Fisher II*. Universities must know that, even if *Grutter* remains, the judicial inquiry into any race-based policy will be searching.

That Harvard engages in unlawful discrimination is shown by (1) its admitted consideration of race in admissions and (2) the negative effects of such consideration on Asian-American admission. It is hard to see how the courts below could avoid the conclusion that Asian-Americans are discriminated against when it is uncontested that, at the very least, Harvard's race-conscious policies benefit African-American and Hispanic students, and do so at the expense of admission for Asian (and white) students. "It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Adarand Constructors*, 515 U.S. at 241 n.* (Thomas, J., concurring in part); *see also Fisher II*, 136 S.Ct. at 2227 n.4 (Alito, J., dissenting).

The effects on Asian-American students is almost indistinguishable from the results seen in the racial quotas invalidated in *Bakke* and the point system struck down in *Gratz*. Take a look at the chart petitioner's present (at Pet.11) showing admission rates for various racial groups with the same academic ratings:

ADMIT RATES BY RACE/ETHNICITY AND ACADEMIC DECILE

Academic Decile	White	Asian American	African American	Hispanic	All Applicants
10	15.3%	12.7%	56.1%	31.3%	14.6%
9	10.8%	7.6%	54.6%	26.2%	10.4%
8	7.5%	5.1%	44.5%	22.9%	8.2%
7	4.8%	4.0%	41.1%	17.3%	6.6%
6	4.2%	2.5%	29.7%	13.7%	5.6%
5	2.6%	1.9%	22.4%	9.1%	4.4%
4	1.8%	0.9%	12.8%	5.5%	3.3%
3	0.6%	0.6%	5.2%	2.0%	1.7%
2	0.4%	0.2%	1.0%	0.3%	0.5%
1	0.0%	0.0%	0.0%	0.0%	0.0%

An Asian student in the bottom half of applicants for academics has a barely 2% chance of admission, while an African American student in the same position has a nearly one in four chance—almost twice as high as even the *top 10%* of Asian-American applicants. At the fourth-to-lowest decile, an African-American is *fourteen times* more likely to be admitted than an Asian-American; even similar white students are twice as likely to be admitted than their Asian peers.

Such an Asian student applies to Harvard knowing his chance of admission is one in a hundred but a similarly-situated peer has a one in eight chance because he is of a different race. This system is not meaningfully different from a quota or point system that makes it near-impossible for Asians to compete with those of other races for spots given to students with relatively lower academic scores. In *Gratz*, for example, the Court condemned the fact that "extraordinary artistic talent" did not increase chances of admission more than being of the preferred race. 539 U.S. at 272-73. Here, the chart above shows that even extraordinary *academic* talent does not give an Asian student a greater chance of admission than if she was from a different race. *See also id.* at 279 (O'Connor, J., concurring); *Bakke*, 438 U.S. at 318-19 & n.53 (although court would not presume that an individualized policy "would operate [] as a cover for the functional equivalent of a quota system," this could be overcome by showing that "a systematic exclusion of certain groups results").

The First Circuit found this reality uncompelling because, relying on a model that held other variables as a constant (including an applicant's "personal rating"),

it found that "an Asian American student has a .08% lower chance of admission to Harvard than a similarly situated white student and that this effect is statistically insignificantly different from zero." Pet.App.95. But this is problematic on several levels.

First, it assumes that the appropriate comparator to Asian students is white students, while ignoring whether Asian-American race statistically decreases chances of admission as compared to other minority races, such as African-American. Nowhere in the text of our equal protection laws do we countenance the concept that minorities are only due the same treatment as whites, but can be discriminated against in favor of other non-white races.

Second, the courts below relied on a statistical model that held the "personal rating" as constant, thereby adopting an approach that guaranteed racial discrimination would not be discovered if the negative effects of Asian-American race were imposed on applicants through their personal rating. To start, it is unclear where else Harvard would in its quantitative processes take into account race other than in the personal rating (academic rating? athletic rating?). So by putting aside race's effect on the personal rating, the First Circuit likely adopted a method calculated to obscure any discrimination.

Moreover, the First Circuit's reasons for doing so are uncompelling. The courts below acknowledged that being Asian is correlated with receiving a lower "personal rating" from Harvard's admissions officers. *See* Pet.App.89. But they held that such correlation does not imply racial discrimination because there may be other factors that influence personal rating. For example, Harvard suggested that maybe Asians

just write worse personal essays than their peers. Pet.App.90. But are we really to believe that Asians as a class write essays that are fourteen times worse than their African-American counterparts having the same academic scores? The First Circuit obliquely suggests that perhaps differences in personal essay scores are because of how applicants write about race, Pet.App.91, but that either means Asian students don't face "obstacles" in their life because of their race, *cf.* Pet.App.91 & n.40, or—more believable—that reviewers don't find such obstacles as compelling for Asians as they do for other races.

The courts below also propose that the lower personal rating given to Asians is because teacher and guidance counselor recommendations "seemingly presented Asian Americans as having less favorable personal characteristics than similarly situated non-Asian American applicants" as a result of Asians coming from less privileged backgrounds than whites. Pet.App.91-92. But that would not explain why Asian students have a lower personal rating than Hispanic or African-American students, *see* Pet.16, who presumably come from as underprivileged (if not more underprivileged) backgrounds as the average Asian-American pupil. Again, the First Circuit just assumed that whites were the only proper comparator. In short, the courts below found Harvard's various explanations reasonable enough, and moved on. That is not strict scrutiny, *see Wygant*, 476 U.S. at 279, which instead seeks "to 'smoke out' illegitimate uses of race" by a test that requires Harvard to show "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype," *J.A. Croson Co.*, 488 U.S. at 493.

More broadly, requiring petitioners to disprove every conceivable nondiscriminatory reason why Asians are consistently rated less personable and consistently less likely to be admitted—in a system that openly considers race throughout—allows Harvard to obscure discrimination by having a convoluted and opaque admissions process. Justices Souter and Ginsburg noted the dangers of allowing universities to "resort to camouflage" via "winks, nods, and disguises" and pursue race-based ends "without saying directly what they are doing or why they are doing it." *Gratz*, 539 U.S. at 298 (Souter, J., dissenting); *id.* at 304-05 (Ginsburg, J., dissenting). If the Court were to allow lax scrutiny to persist, rather than placing the burden of proving nondiscrimination on institutions that are explicitly making racial distinctions, Title VI and the Fourteenth Amendment would be far too easy to circumvent. Certiorari is warranted to ensure this does not continue to occur.

CONCLUSION

For the reasons stated, this Court should grant petitioner the writ of certiorari.

Respectfully submitted,

MIKE HUNTER
OKLAHOMA ATTORNEY GENERAL
MITHUN MANSINGHANI
SOLICITOR GENERAL
COUNSEL OF RECORD
OKLAHOMA OFFICE OF
THE ATTORNEY GENERAL
313 NE TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 521-3921
MITHUN.MANSINGHANI@OAG.OK.GOV

STEVE MARSHALL
ALABAMA ATTY. GENERAL
LESLIE RUTLEDGE
ARKANSAS ATTY. GENERAL
MARK BRNOVICH
ARIZONA ATTY. GENERAL
ASHLEY MOODY
FLORIDA ATTY. GENERAL
DANIEL CAMERON
KENTUCKY ATTY. GENERAL
JEFF LANDRY
LOUISIANA ATTY. GENERAL
LYNN FITCH
MISSISSIPPI ATTY. GENERAL
ERIC SCHMITT
MISSOURI ATTY. GENERAL
AUSTIN KNUDSEN
MONTANA ATTY. GENERAL
DOUGLAS J. PETERSON
NEBRASKA ATTY. GENERAL
DAVE YOST
OHIO ATTY. GENERAL
SEAN REYES
UTAH ATTY. GEN.
PATRICK MORRISEY
WEST VIRGINIA ATTY. GENERAL

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