988 F.3d 150

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STUDENTS FOR EQUITY IN ADMISSIONS, INC., **Plaintiff - Appellant,** **v.** **TRUSTEES OF CONTINENTAL COLLEGE,** **Defendant - Appellee.**	**No. 21-2023** **October 28, 2021**

ORDER AND JUDGMENT

Before **SOLOWEY, SALCEDO**, and **SELDON**, Circuit Judges.

SOLOWEY, Circuit Judge:

Students for Equity in Admissions, Inc. ("SFEA") brought suit on September 25, 2020, against the Trustees of Continental College ("Continental"). The suit alleged that Continental's admittedly race-conscious undergraduate admissions process violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. ("Title VI") by discriminating against Asian American applicants in favor of white applicants.

SFEA asserts that Continental fails to meet the Supreme Court's standards for the use of race in admissions, which are asserted to be justified by diversity, in these ways: (1) it engages in racial balancing of its undergraduate class; (2) it impermissibly uses race as more than a "plus"

factor in admissions decisions; (3) it considers race in its process despite the existence of workable race-neutral alternatives; and (4) it intentionally discriminates against Asian American applicants. SFEA seeks a declaratory judgment, injunctive relief, attorneys' fees, and costs.

After a 15-day bench trial at which 40 witnesses testified, the district court issued a 180-page opinion. *See Students for Equity in Admissions, Inc. v. Trustees of Continental College*, 101 F. Supp. 5th 172, 174 (D. Ham. 2021) ("*SFEA*"). It made numerous factual findings, including as to competing expert witness testimony and witness credibility. *See id.* at 220-25 (summarizing findings). The district court held that Continental had met its burden of showing its admissions process did not violate Title VI, and that Continental did not engage in intentional discrimination. *See id.* It entered judgment for Continental on all counts. *See id.*

BACKGROUND

A. Students for Equity in Admissions.

SFEA is a 501(c)(3) nonprofit organization. Its bylaws state that it was formed to "defend human and civil rights secured by law, including the right of individuals to equal protection under the law, through litigation and any other lawful means." *SFEA*, 101 F. Supp. 5th at 173.

B. Continental's Approach to Admissions.

Continental is a college based in Dawn City, Hamilton. *Id.* at 174. Its admissions process is complex and highly competitive. Each year, Continental attempts to admit a class of roughly 1,500 students. For its class of 2019, Continental received around 50,000 applications. *See id.* at 175. Because of the size of the applicant pool relative to Continental's available slots, Continental cannot admit all applicants who would succeed academically. Continental has determined that academic excellence alone is not sufficient for admission. Rather, Continental seeks students who are not only academically excellent, but also compelling candidates on many dimensions. *See id.*

Continental's application process has six components: (1) pre-application recruitment efforts; (2) students' submission of applications; (3) "first read" of application materials; (4) admissions officer and alumni interviews; (5) subcommittee meetings of admissions officers to recommend applicants to the full admissions committee; and (6) full admissions committee meetings to make and communicate final decisions to applicants. *See id.* Continental also uses a system of "tips" for certain applicants. Tips may be considered during or after the third stage. *See id.*

SFEA's claims focus on Continental's use of tips that take race into account. Continental admits that race can be considered during its "first read" of application materials only when assigning an applicant's "overall rating." It also admits that an applicant's race can be considered in both subcommittee and full committee meetings. *See id.* Continental denies that race is considered in assigning an applicant's "personal rating" during the "first read." *Id.*

As part of the admissions process, Continental admissions officers periodically receive summaries containing demographic information. *See id.* at 176. These "one-pagers" provide a snapshot of various demographic characteristics of Continental's applicant pool and admitted class and compare them to the previous year. In addition to race, these sheets summarize the applicant pool on other dimensions (*e.g.*, gender, geographic region, intended concentration, legacy status, whether a student applied for financial aid, etc.). *Id.* Information from this sheet is periodically shared with the full admissions committee, and the committee uses this information in part to ensure that there is not a dramatic drop-off in applicants with certain characteristics—including race—from year to year. Continental keeps abreast of the racial makeup of its admitted class in part because doing so is necessary to forecast yield rates: the percent of admitted applicants who accept an offer of admission. *Id.* Empirically, Asian American and white students accept offers

of admission at higher rates than African American, Hispanic, Native American, and multiracial applicants. *See id.*

Continental also identifies low-income students and encourages them to apply with informational mailings highlighting Continental's financial aid program. *See id.* at 177. Continental's admissions process is need-blind, which means that an applicant's inability to pay tuition will not harm their chances of being admitted. *Id.* It sends representatives—admissions officers, undergraduates, and alumni—to conduct recruitment events throughout the United States, including at secondary schools and in regions that have not historically sent students to Continental. Continental also has created a "First Generation" program to encourage students who would be the first in their family to attend college to apply. As part of this program, it connects current first-generation Continental students with potential applicants to answer their questions. Continental also encourages racially diverse applicants to apply to the college. *See id.*

Once it has admitted diverse applicants, Continental encourages them to matriculate. *Id.* at 178. It provides admitted students with a price calculator so that they can determine if Continental is affordable. And it has worked to make Continental affordable. Since 2007, Continental has steadily reduced the effective tuition that low-income students pay. Since 2012, Continental has expected no parental contribution from families earning less than $65,000 a year and a parental contribution limited to 10% of family income for students from families earning less than $150,000 a year. It widely publicizes this information. *See id.*

Continental also provides tips to "ALDC" (recruited athletes, legacy applicants, applicants on the Dean's Interest List, and children of faculty or staff) applicants. *See id.* at 179. ALDC applicants make up less than 5% of applicants to Continental, but around 30% of the applicants admitted each year. *Id.* These applicants have a significantly higher chance of being admitted

than non-ALDC applicants. SFEA does not challenge the admission of this large group of applicants who can and do receive tips. *See id.* at 180.

C. The Wolfe Committee and Wolfe Report.

Over the years Continental has conducted various studies to review its admissions approach. We focus here on one, the Wolfe Committee, chaired by Rowan Wolfe, then the Dean of Continental's College of Engineering. *See id.* at 180. The Wolfe Committee issued the Wolfe Report in 2019, articulating Continental's reasons for accomplishing diversity: (1) training future leaders in the public and private sectors, as Continental's mission statement requires; (2) equipping its graduates and itself to adapt to an increasingly pluralistic society; (3) better educating its students through diversity; and (4) producing new knowledge stemming from diverse outlooks. *Id.*

The Wolfe Report also addressed six of SFEA's race-neutral proposals to increase diversity: (1) increasing efforts to recruit racially and socioeconomically diverse students; (2) expanding partnerships with schools or organizations that serve applicants of modest socioeconomic backgrounds; (3) increasing financial aid; (4) adopting place-based preferences; (5) increasing transfer admissions; and (6) increasing the weight for socioeconomic background. *Id.* at 181. The Wolfe Report concluded that each of these alternatives was unworkable because: Continental was (a) already maximizing its outreach and financial aid efforts; (b) place-based preferences were impracticable because Continental cannot admit a student from every ZIP code in the nation; and (c) other factors would result in lower academic excellence.

The Wolfe Committee also evaluated whether Continental should eliminate three of its core admissions practices: (1) "Early Action"; (2) deferred admission and tips for ALDC applicants; and (3) consideration of standardized test scores. *Id.* at 183. Continental already tried eliminating Early Action and found that doing so "reduced [its] ability to attract a broadly diverse

and academically excellent class." *Id.* The Wolfe Committee next concluded that eliminating ALDC tips and deferred admission would not be an adequate race-neutral alternative because it would result in negligible, and sometimes negative, changes to diversity. *Id.* Finally, the Wolfe Committee found that eliminating consideration of standardized test scores would come at a significant cost to Continental's other educational objectives. *Id.* Relative to Continental's current admitted classes, "the proportion of students with the highest academic ratings would decline by 17%, and the proportion of students with the highest extracurricular or personal ratings would decline by 7%." *Id.*

After considering all of the race-neutral alternatives proposed by SFEA, the Wolfe Committee concluded that "they will not work at Continental [ ] at this time." *Id.* The Wolfe Committee recommended that Continental revisit race-neutral alternatives in 2024. *See id.*

D. Procedural History and the District Court's Rulings.

SFEA brought suit against Continental on September 25, 2020. *See SFEA*, 101 F. Supp. 5th at 172. The district court conducted a 15-day bench trial from July 15, 2021 to August 1, 2021. Below, we describe the district court's rulings. As to all of its conclusions, we provide further descriptions in our legal analysis below.

First, the district court held that SFEA had associational standing to sue Continental under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). *See SFEA*, 101 F. Supp. 5th at 186. The parties do not challenge this holding on appeal, so we will not dwell on it.

Second, the district court utilized Supreme Court precedent to evaluate Continental's race-conscious admissions program. *Id.* at 187-95 (citing, *inter alia*, *Fisher v. University of Texas at Austin* ("*Fisher II*"), 136 S. Ct. 2198 (2016); *Fisher v. University of Texas at Austin* ("*Fisher I*"), 570 U.S. 297 (2013); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551

U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)). Applying the requirements set forth in those cases, the district court held that Continental had a compelling interest in student body diversity that was sufficiently precise to permit judicial scrutiny. *SFEA*, 101 F. Supp. 5th at 187-95. It credited the Wolfe Report and the trial testimony. *See id.* The district court further held that Continental met its burden under strict scrutiny to show its use of race in admissions was narrowly tailored. *Id.* at 196-201. It found that Continental did not engage in racial balancing, did not use race as a mechanical plus factor, and did not have workable race-neutral alternatives. *See id.*

Third, the district court found that Continental did not engage in intentional discrimination. At trial, the parties presented non-statistical and statistical evidence on whether Continental intentionally discriminated against Asian American applicants. *See id.* at 201-19. Addressing the non-statistical evidence, the court found that Continental's pre-application search list was primarily a marketing tool and that the trial testimony showed that Continental's admissions officers were not biased and did not stereotype Asian Americans. *Id.* at 201-07.

The district court found the extensive statistical evidence presented at trial "inconclusive," holding that it did "not demonstrate any intent by admissions officers to discriminate based on racial identity." *Id.* at 217-18. Based on the non-statistical and statistical evidence, the district court held that there was no intentional discrimination. *See id.* at 218-19.

SFEA timely appealed the district court's decision.

DISCUSSION

I. CONTINENTAL'S LIMITED USE OF RACE IN ITS ADMISSIONS PROGRAMS SURVIVES STRICT SCRUTINY

We review *de novo* the district court's conclusions of law. *See, e.g.*, *AcBel Polytech, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 928 F.3d 110, 116 (1st Cir. 2019). We first consider whether the district court properly concluded that Continental's admissions process survives strict scrutiny.

Because Continental accepts federal funds, it is subject to Title VI. 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Title VI's protections are coextensive with the Equal Protection Clause of the Fourteenth Amendment. *See Bakke*, 438 U.S. at 287.

When Title VI applies, a university is prohibited from considering race in its admission process "unless the admissions process can withstand strict scrutiny." *Fisher I*, 570 U.S. at 309. Strict scrutiny requires that the university's use of race must further a compelling interest and that the means utilized to further that interest are narrowly tailored. *See Grutter*, 539 U.S. at 326; *Fisher I*, 570 U.S. at 310. Here, SFEA does not argue on appeal that Continental lacks a compelling interest. Our *de novo* review satisfies us that Continental, in fact, has a compelling interest, as articulated by, *inter alia*, the Wolfe Report.

Accordingly, we turn to the heart of SFEA's challenge. To survive strict scrutiny, Continental's use of race must also be narrowly tailored and consistent with Supreme Court precedent. Narrow tailoring requires that "[t]he means chosen to accomplish the [university's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Fisher I*, 570 U.S. at 311. A university's admissions program cannot be narrowly tailored if it (1) involves

racial balancing or quotas, *see id.*; (2) uses race as a mechanical plus factor, *see id.* at 312; or (3) workable race-neutral alternatives exist, *see Fisher II*, 136 S. Ct. at 2208.

A. The District Court Did Not Err in Holding That Continental Did Not Engage in Racial Balancing.

SFEA first argues that Continental's admissions policy is not narrowly tailored because Continental engages in racial balancing. A university "is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" *Fisher I*, 570 U.S. at 311. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Parents Involved*, 551 U.S. at 732.

SFEA argues that racial balancing is evident because, focusing on the classes of 2009 to 2018, "the percentage of [Continental's] class by race always fell within a narrow range." For these classes, the share of Asian Americans admitted ranged from a low of 17.5% in 2013 to a high of 20.3% in 2016. SFEA also relies on one Continental admissions officer's testimony that Continental uses its one-pagers—which display the racial makeup of the admitted class—to prevent "a dramatic drop-off in some group [from] last year." *See SFEA*, 101 F. Supp. 5th at 202. It argues that Continental's use of "one-pagers" therefore ensures racial balancing.

The district court properly concluded that Continental does not utilize quotas and does not engage in racial balancing. From 2009 to 2018, the period chosen by SFEA, the amount by which the share of *admitted* Asian American applicants fluctuates is greater than the amount by which the share of Asian American applicants fluctuates, which is also true for Hispanic and African American applicants. It is the opposite of what one would expect if Continental imposed a quota.

SFEA's argument on the impermissibility of one-pagers, in turn, is foreclosed by *Grutter* and *Fisher II*. The *Grutter* majority held that the "consultation of the 'daily reports,' which keep

track of the racial and ethnic composition of the class" does not "'sugges[t] there was no further attempt at individual review save for race itself' during the final stages of the admissions process." *Grutter*, 539 U.S. at 336. *Grutter* also pointed to two additional factors—present here—supporting its conclusion that the university's admissions program did not function as an unconstitutional quota: (1) the variation in the percentage of minority applicants admitted each year and (2) the uncontradicted testimony by admissions officers "that they never gave race any more or less weight based on the information contained in these reports." *Id.*

Continental's witnesses testified that they used one-pagers for three main reasons, to: (1) assess how well diversity recruitment efforts were working; (2) manage Continental's yield rates; and (3) avoid drop offs in students with particular characteristics due to inadvertence or lack of care. Continental may permissibly use one-pagers in this manner. *Fisher II*, 136 S. Ct. at 2214 (universities must "continue to use ... data to scrutinize the fairness of its admissions program [and] to assess whether changing demographics have undermined the need for a race-conscious policy"); *Grutter*, 539 U.S. at 335 (finding Harvard's "flexible use of race" instructive and refusing to characterize its use of race as a quota when "Harvard certainly had minimum goals for minority enrollment, even if it had no specific number firmly in mind").

B. The District Court Did Not Err in Holding That Continental Did Not Use Race as a Mechanical Plus Factor.

Next, SFEA argues that Continental's admissions program is not narrowly tailored because, in its view, Continental's consideration of race is mechanical. The Supreme Court has found that race-conscious admissions policies are mechanical, and therefore unconstitutional, when they give pre-defined boosts to applicants solely because of race, when they preclude individualized consideration of applicants, and when race becomes the decisive factor in admission. *See Gratz*,

539 U.S. at 271-72; *see also Fisher II*, 136 S. Ct. at 2207 (holding that consideration of race "does not operate as a mechanical plus factor for underrepresented minorities" when it is contextual).

SFEA argues that Continental's race-conscious admissions process does not pursue student-body diversity, places too much weight on race, and has no defined end point. SFEA's contention that Continental elevates racial diversity above other types of diversity is not supported by the evidence. Continental has demonstrated that it values all types of diversity, not just racial diversity. Continental's use of race in admissions is contextual and it does not consider race exclusively.

Next, Continental's process does not weigh race so heavily that it becomes mechanical and decisive in practice. Continental's undergraduate admissions program considers race as part of a holistic review process. This use was previously praised by the Supreme Court as a way of considering race in a non-mechanical way. Unlike the program in *Gratz*, Continental does not award a fixed number of points to applicants because of their race.

The Supreme Court has also approved admissions programs where race has a larger effect on a student's chances of admission than Continental's use of race. In *Grutter*, the Supreme Court upheld the University of Michigan Law School's race-conscious admission program that, if eliminated, would have reduced the underrepresented minority population of the admitted class from 14.5% to 4%, a 72.4% decrease. *See* 539 U.S. at 320. Here, without considering race, the share of African American and "Hispanic and Other" students enrolled at Continental would decrease by 45%. *SFEA*, 101 F. Supp. 5th at 210-12. The impact of Continental's use of race on the makeup of its class is less than the one at issue in *Grutter*.

In Continental's holistic admissions process, tips are used for athletic ability, legacy status, geographic and economic factors, race at times, and perhaps other reasons. But the outcomes of

Continental's admissions process do not indicate that race is impermissibly "'decisive' for virtually every minimally qualified underrepresented minority applicant" within it. *See Gratz*, 539 U.S. at 272. According to SFEA's own expert's analysis, Continental rejects more than two-thirds of Hispanic applicants and slightly less than half of all African American applicants who are among the top 10% most academically promising applicants to Continental in terms of standardized test scores and GPA. *See SFEA*, 101 F. Supp. 5th at 215. *Gratz* precludes programs where race is decisive for minimally qualified candidates. Continental's admissions process is so competitive that race is not decisive for highly qualified candidates.

Notwithstanding SFEA's arguments to the contrary, nothing in *Fisher II* suggests that a university can only consider race once or that only a single use of race is a necessary component of a narrowly tailored policy. The Supreme Court made clear that as long as race is "considered in conjunction with other aspects of an applicant's background" and is "but a 'factor of a factor of a factor' in the holistic-review calculus," it will not be considered impermissibly mechanical. *Fisher II*, 136 S. Ct. at 2207. Continental has shown that its holistic consideration of race is not impermissibly extensive.

Finally, SFEA argues that Continental's use of race has no end point because Continental has not identified a stopping point. It derives this argument from *Grutter*'s statement that the "use of race must have a logical end point," 539 U.S. at 342, and its hope that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," *id.* at 343. This argument is not persuasive and is insensitive to the achievement of the university's legitimate goals once it has met the requirements established by the Supreme Court. Indeed, the Supreme Court never mentioned *Grutter*'s 25-year timeline in *Fisher I* or *Fisher II*. And no Supreme Court precedent requires Continental to identify a specific end point for its use of race.

C. The District Court Did Not Err in Holding That Race-Neutral Alternatives Were Not Workable.

SFEA argues that Continental's use of race fails the narrow tailoring prong of strict scrutiny because Continental has disregarded race-neutral ways to achieve its diversity goals. *See Fisher I*, 570 U.S. at 312 ("Narrow tailoring ... involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."). The Supreme Court has distinguished "conceivable" alternatives from "workable" alternatives, requiring only the use of workable alternatives. *Fisher II*, 136 S. Ct. at 2208.

Continental has met its burden, including through the Wolfe Report, to show that it has carefully considered all alternatives. It has concluded that they are not workable and would undercut its educational objectives. "Narrow tailoring does not ... require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Grutter*, 539 U.S. at 339 (citations omitted).

As set forth above in the description of the Wolfe Report, Continental has tried to implement many of the policies SFEA proposes, like eliminating Early Action and increasing financial aid and outreach but found those policies insufficient. This accords with *Fisher II*. 136 S. Ct. at 2212-13 (finding race-neutral alternatives unworkable when the university had introduced scholarship programs and "submitted extensive evidence of the many ways in which it already had intensified its outreach efforts").

As the district court found, Continental "has already reached, or at least very nearly reached, the maximum returns in increased socioeconomic and racial diversity that can reasonably be achieved through outreach and reducing the cost of a Continental education." *SFEA*, 101 F. Supp. 5th at 222. Further, the Wolfe Report, while not entitled to any deference, does show that

Continental has carefully considered and rejected race-neutral alternatives. The Wolfe Report was supported by the testimony of Continental officials and its economic expert.

SFEA focuses its argument on "Simulation D," one of its proposed race-neutral alternatives. Under this scenario, Continental would eliminate its consideration of race, eliminate ALDC tips, and increase the tip for low-income applicants. *See id.* at 216-17. If Continental were to adopt Simulation D, the admitted share of white and African American applicants would decrease (from 40% to 33% and 14% to 10%, respectively) and the share of Asian American and "Hispanic and Other" applicants would increase (from 24% to 31% and 14% to 19%, respectively). The average student's high school grade point average would remain unchanged, but the average SAT score would decrease from 2244 to 2180. *See id.* at 216-18.

Continental proved that Simulation D was not a workable alternative. Not only would SAT scores drop, but the fraction of applicants with academic, extracurricular, personal, and athletic ratings of 1 or 2 would decrease by more than 10% (ranging from an 11% decrease for the personal rating to a 22% decrease for the athletic rating). If Continental were to increase its tip based on socioeconomic status, it would make sacrifices on almost every dimension important to its admissions process, including one designed to measure a student's academic excellence. *See id.* As the *Fisher II* majority held when it found the plaintiff's alternative of "altering the weight given to academic and socioeconomic factors in the University's admissions calculus" unworkable, "the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence." *Fisher II*, 136 S. Ct. at 2213.

Ample record testimony, including from Continental students and alumni, supports the findings that implementing SFEA's proposal would damage Continental. As these witnesses' testimony makes clear, a meaningful reduction in representation—and a 32% reduction in African

American representation is clearly meaningful—would make Continental less attractive to minority applicants while limiting all students' opportunities to engage with and learn from students with different backgrounds from their own. Enabling students to understand, relate to, and learn from people of different backgrounds is a main goal of Continental's race-conscious admissions program. It is a compelling interest that Continental cannot achieve under Simulation D. Continental has carried its burden of showing that no workable race-neutral alternatives exist.

II. SFEA FAILED TO ESTABLISH INTENTIONAL DISCRIMINATION

SFEA additionally claims that both the non-statistical and statistical evidence showed that Continental's admissions policy intentionally discriminates against Asian Americans. From this premise, it argues that Continental cannot carry its burden of disproving intentional discrimination under strict scrutiny.

To make out a prima facie case of intentional discrimination on the basis of race under Title VI, a plaintiff must show that the defendant treated members of one race differently and less favorably than members of another race, and did so with a racially discriminatory purpose. *See Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (describing the intentional discrimination standard applicable under the Equal Protection Clause of the Fourteenth Amendment); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (protections of Title VI coextensive with those of the Equal Protection Clause).

Assuming, *arguendo,* that SFEA is correct that strict scrutiny operates by shifting the burden to Continental to disprove intentional discrimination, Continental succeeds only if it disproves any of these elements. Continental must show it did not discriminate on the basis of race or, if discrimination resulted, that it was not intentional (*i.e.*, it did not act with animus or

"stereotyped thinking or other forms of less conscious bias"). *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999). We hold that Continental has carried this burden.

A. The District Court Did Not Err in Finding That the Non-Statistical Evidence Showed No Discrimination Against Asian American Applicants

SFEA argues that non-statistical evidence shows intentional discrimination. SFEA first contends that Continental's admissions process is highly subjective, which makes it susceptible to stereotyping and bias. Supreme Court precedent makes clear, however, that the fact that Continental's application process is subjective is insufficient to overcome other record evidence that Continental is not biased against Asian Americans and does not stereotype them.

First, there is no requirement that universities use entirely objective criteria when considering race to admit applicants. *Cf. Bakke*, 438 U.S. at 317-18 (approving a subjective "flexible" admissions system where "the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class"). Continental presented testimony from multiple admissions officers that its admissions process, though subjective, did not facilitate bias or stereotyping. The district court found that the "testimony of the admissions officers that there was no discrimination against Asian American applicants with respect to the admissions process as a whole and the personal ratings in particular was consistent, unambiguous, and convincing." *SFEA*, 101 F. Supp. 5th at 203. No witness who testified "had seen or heard anything disparaging about an Asian American applicant." *Id.* The district court was permitted to assess the credibility of witnesses and credit the testimony of Continental's admissions officers. *See Cooper v. Harris*, 137 S. Ct. 1455, 1478 (2017) (upholding a district court's credibility determination that a witness "skirted the truth ... when he claimed to

have followed only race-blind criteria in drawing district lines" because a reviewing court "cannot disrespect such credibility judgments").

The nature of Continental's admissions process, as the district court recognized, offsets any risk of bias. *SFEA*, 101 F. Supp. 5th at 203. An applicant must secure a majority of votes at a full-body admissions committee meeting with 40 admissions officers to be admitted to Continental, which mitigates the risk that any individual officer's bias or stereotyping would affect the admissions process.

Nor was there error in the district court's finding that earlier reports did not show that Continental discriminated against or stereotyped Asian American applicants. The court considered SFEA's contention that Continental referred to Asian American applicants as "quiet," "flat," "shy," and "understated," and that this showed stereotyping. *Id.* at 204. The district court found that using these words "with regard to such an applicant would be truthful and accurate rather than reflective of impermissible stereotyping." *Id.* It further found that Continental considers applicants holistically, and that the evidence did not show "that any applicant was referred to by these types of descriptors because of their race or that there was any sort of systemic reliance on racial stereotypes." *Id.* at 205, 207. To the contrary, the evidence showed that admissions officers referred to applicants of all races using similar language, not just Asian Americans. *Id.* at 208.

Separately, SFEA argues that Continental's "post-filing conduct" is evidence of past discrimination because, in response to this lawsuit, Continental amended its handbook on reading procedures to explicitly instruct admissions officers that they should not consider race when assigning a personal rating, and it increased the number of Asian Americans it admitted. But Continental updates its reading procedures annually. The district court found that "Continental has made clear to its admissions officers in more recent years that they should not use race in

assigning the profile ratings." *Id.* at 209. And while the share of Asian American applicants admitted to Continental did increase after this lawsuit was filed, SFEA ignores the statistics demonstrating that the number of Asian Americans admitted to Continental has been steadily increasing for decades.

B. The District Court Did Not Err in Finding That the Statistical Evidence Showed No Intentional Discrimination Against Asian Americans

Statistical evidence can "generate an inference of intentional discrimination." *Haidak v. University of Massachusetts-Amherst*, 933 F.3d 56, 75 (1st Cir. 2019); *see also, e.g.*, *Cohen v. Brown University*, 101 F.3d 155, 170-71 (1st Cir. 1996) ("Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination"). For a statistical disparity to support an inference of discrimination, the statistical evidence must "tend to show that there was a causal connection between the outcome of" the admissions process and the alleged bias. *See Doe v. Trustees of Boston College*, 892 F.3d 67, 91 (1st Cir. 2018).

Both parties submitted statistical evidence below. The district court correctly found that the statistical evidence did not give rise to an inference on intentional discrimination. The parties' statistical model using the personal rating shows no discrimination against Asian Americans. Rather, it shows that Asian American identity has a statistically insignificant overall average marginal effect on admissions probability of -.08%. This means that, on average, the model shows that an Asian American student has a .08% lower chance of admission to Continental than a similarly situated white student, and this effect is statistically insignificantly different from zero.

SFEA relies on one aspect of the statistical analysis presented. SFEA's preferred model without the personal rating shows a statistically significant overall average marginal effect of -0.34%. This means that, on average, the model shows that an Asian American student has a .34%

lower chance of admission to Continental than a similarly situated white student and that this effect is statistically significantly different from zero. But because SFEA calculated the average marginal effect using all applicants to Continental, including many applicants whom Continental is unlikely to admit, this number does not establish that being Asian American matters for the small subset of applicants who have a realistic chance of being admitted to Continental.

The statistically significant negative overall average marginal effect of Asian American identity in SFEA's preferred model is also not robust, in the technical sense that the model changes dramatically "when data or assumptions are modified slightly." *See* Federal Judicial Conference, Reference Manual on Scientific Evidence, at 295 (3d ed. 2011); *see also id.* at 322 ("[t]he issue of robustness … is of vital importance"). In addition to disappearing entirely when the personal rating is included in the model, it is almost undetectable on a year-by-year basis even within SFEA's preferred model. The average marginal effect of Asian American identity in the model excluding the personal rating is only statistically significantly negative in one of the six years analyzed. In five of the six admissions cycles, the effect is statistically indistinguishable from zero. Indeed, in two years, the model shows that Asian American identity has a positive effect on an applicant's chance of admission to Continental.

Based on this evidence, the district court found that, regardless of whether the personal rating is included or not, the average marginal effect on Asian American identity is close to zero. *SFEA*, 101 F. Supp. 5th at 210. It further found that the effect of Asian American identity varies by admissions cycle and is not always negative in each admission cycle. *Id.* Indeed, it found that Asian American identity could be a positive factor if the model "was better able to account for unobserved factors." *Id.*

Finally, SFEA argues that "the district court recognized that one likely explanation for why Asian Americans are penalized in the admissions process is Continental's 'implicit bias'" and that "calling the bias 'implicit' does not make it legal." *Id.* First, the district court stated this effect is "possible," but it did not find it was "likely." *Id*. Next, the district court found that this possibility was "unsupported by any direct evidence." *Id.* at 211. In fact, the court had ample non-statistical evidence before it suggesting that Continental's admissions officers did not engage in any racial stereotyping, and the court accordingly determined that "no credible evidence ... corroborates the improper discrimination suggested" by SFEA's preferred model. *Id.* at 212.

The district court did not clearly err in finding that Continental did not intentionally discriminate against Asian Americans. *See Torres-Lazarini v. United States*, 523 F.3d 69, 72 (1st Cir. 2008) ("When the evidence presented at a bench trial supports plausible but competing inferences, the court's decision to favor one inference is not clearly erroneous").

The judgment of the district court is **affirmed**.

SELDON, Circuit Judge, dissenting:

"It is a sordid business, this divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part). "[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in judgment). "[E]very time the government places citizens on racial registers and makes race relevant to the proviso of burdens or benefits, it demeans us all." *Fisher v. University of Texas at Austin*, 570 U.S. 297, 316 (2013) ("*Fisher I*") (Thomas, J., concurring). The majority's opinion betrays these principles. I respectfully dissent.

I. CONTINENTAL IS VIOLATING TITLE VI

While the viability of *Grutter v. Bollinger*, 539 U.S. 306 (2003) is in doubt for reasons I will outline below, I would reverse because Continental's admissions program does not comply with the Supreme Court's existing precedents. Continental's admissions program must—but does not—withstand strict scrutiny. For three reasons, I conclude that Continental fails to prove that its admissions program is "narrowly tailored" to achieve "the only interest that th[e] [Supreme] Court has approved in this context": the educational benefits of "student body diversity." *Fisher I*, 570 U.S. at 314-15.

First, the record shows that Continental penalizes Asian Americans. Under *Grutter*, universities can use race "only as a 'plus.'" 539 U.S. at 334. Race cannot be a minus for any applicant, as such a "divisive" use of race would serve no legitimate purpose. *Fisher v. University of Texas at Austin* ("*Fisher II*"), 136 S. Ct. 2198, 2207, 2210 (2016). Yet Continental concedes that (a) Asian Americans suffer a penalty on the "personal rating"—namely, changing an applicant's race from white to Asian lowers the personal rating to a statistically significant degree;

and (b) when the race variable is removed, projected Asian-American admissions increase by a statistically significant degree.

Continental's witnesses "assert[ed]" that they "use[] race in a permissible way," *Fisher I*, 570 U.S. at 313, but that self-serving testimony should have been insufficient to carry Continental's burden, *Castaneda v. Partida*, 430 U.S. 482, 498 n.19 (1977)—particularly because Continental penalized Asian Americans in the most "subjective" parts of its process. *Id.* at 497. In fact, the district court specifically found that it could not "clearly say what accounts for" the observed penalties against Asian Americans and could not rule out "overt discrimination or implicit bias" as the cause. By nevertheless finding for Continental, the district court did not apply strict scrutiny. The point of strict scrutiny, after all, is to "smoke out illegitimate uses of race" and minimize the "possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 226 (1995), quoting *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493 (1989) (O'Connor, J., plurality).

Second, the record establishes that Continental engages in impermissible "racial balancing," *Fisher I*, 570 U.S. at 311, which is a practice by which universities seek "some specified percentage" of a particular race. *Grutter*, 539 U.S. at 329 (four justices finding impermissible racial balancing when underrepresented-minority admissions varied only 7% over a six-year period). At Continental, the range is even narrower, moving less than 4% in the six years preceding SFEA's suit. Not only that, but Continental also *admits* that it consults race-based statistics to avoid "a dramatic drop-off in some group [from] last year," even if the total number of underrepresented minorities is increasing. *See SFEA*, 101 F. Supp. 5th at 202. Even *Grutter* is clear that "working backward to achieve a particular type of racial balance" is prohibited. 539 U.S. at 336. Yet that practice is exactly what the district court endorsed here.

The statistical record reinforces that Continental's racial preferences are enormous. In absolute terms, race is "determinative" for at least "45% of all admitted African American and Hispanic applicants," or "nearly 1,000 students" over a four-year period. For the top quarter of applicants, being African American is comparable to getting a "1" on the academic, extracurricular, or personal rating.[1]

Third, Continental has workable race-neutral alternatives. Race-based admissions must be "necessary." *Fisher I*, 570 U.S. at 312. Race is not necessary when a "workable race-neutral alternative[]" is available. *Id.* An alternative is "workable" if it achieves the educational benefits of diversity "about as well and at tolerable administrative expense." *Id.* SFEA presented one such workable alternative, which the district court clearly erred in rejecting.

SFEA's statistical model simulated an alternative whereby Continental would achieve *greater* racial diversity without using race: eliminating its preferences for children of alumni, faculty, and donors—who are overwhelmingly white and wealthy—and increasing its preference for the socioeconomically disadvantaged. Under this simulation, underrepresented minority admissions would rise slightly, Asian American admissions would increase, Continental would become more socioeconomically diverse, and academic characteristics would remain excellent.

The district court's reasons for rejecting this race-neutral alternative were legally and factually erroneous. SFEA's proposed race-neutral alternative was not "unworkable" simply because Continental might see changes to its desired racial percentages, slight dips in its record-breaking endowment, or negligible differences in chosen majors, SAT scores, or profile ratings. It was Continental's burden to prove that these minor changes would prevent it from achieving

[1] "1" ratings are incredibly rare, with only .07% of applicants receiving them for achievements such as "near-perfect scores and grades," authoring "original scholarship," winning "national-level" awards in extracurricular activities, and having an "outstanding" personality.

student-body diversity. *Id.* at 311-12. Given the gains in diversity achieved by the race-neutral alternative, Continental did not meet its burden.

For these reasons, I dissent.

II. *GRUTTER V. BOLLINGER* SHOULD BE OVERTURNED

As shown above, Continental ignores *Grutter*'s commands and for this reason I would reverse. As a judge of this Court, I am duty bound to follow Supreme Court precedent.

However, I feel compelled to note that *Grutter* itself observed that universities must ensure that their race-based policies are "limited in time." *Grutter*, 539 U.S. at 339-43. This "durational requirement" is important because the "'acid test'" of racial preferences is "'their efficacy in eliminating the need for any racial or ethnic preferences at all.'" *Id.* at 342-43. That principle led the Supreme Court to express its expectation that "25 years from now, the use of racial preferences will no longer be necessary." *Id.* at 343. *Grutter* thus appeared to be the first constitutional precedent with "its own self-destruct mechanism." *Id.* at 394 (Kennedy, J., dissenting). I believe that the Supreme Court will, and should, hold that the time has now come.

"[*S*]*tare decisis* is not an inexorable command." *Franchise Tax Bd. Of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019). In deciding whether to overturn a precedent, the Court considers "three broad considerations": (1) is the prior decision "not just wrong, but grievously or egregiously wrong"? (2) has the prior decision "caused significant negative jurisprudential or real-world consequences"? and (3) would overruling the prior decision "unduly upset reliance interests"? *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring in part). Weighing these considerations, *Grutter* should be overruled.

A. *Grutter* Is Egregiously Wrong

Grutter was wrong the day it was decided. Despite reaffirming that "all" racial classifications must satisfy strict scrutiny, *Grutter* held that "student body diversity" can "justify the use of race in university admissions." 539 U.S. at 325-26. That holding departs from the Constitution's original meaning, contradicts other precedents, and has eroded over time.

Grutter has no support in the Fourteenth Amendment's "historical meaning." *Ramos*, 140 S. Ct. at 1405. As written, the Fourteenth Amendment contains no exceptions. According to its framers, it enshrines the principle that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). That principle was not new: the self-evident truth that "all men are created equal" was a cornerstone of the American founding. Decl. of Indep., 1 Stat. 1 (July 4, 1776). While this country long violated that principle in practice, *see e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896), those violations did not alter or diminish the principle itself. As Justice Harlan recognized in *Plessy*, "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. at 559. His dissent was ultimately vindicated in *Brown*, where this Court denied "'any authority … to use race as a factor in affording educational opportunities.'" *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 747 (2007). *Brown* is right; *Grutter* is wrong.

Grutter also "conflicted with" the Supreme Court's broader equal-protection jurisprudence. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019). Despite the absolutism of the constitutional text, the Supreme Court has held that racial classifications are legal if they satisfy strict scrutiny. But the Court has rejected many interests as not compelling enough to justify racial classifications—interests that are often more compelling than "student body diversity." Protecting

a child's best interests isn't compelling enough. *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984). Neither is remedying societal discrimination. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996). Nor is providing "role models" for minority students. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (plurality). *Grutter* does not explain how these interests are not compelling, yet "'cross-racial understanding'" and "'livelier'" classroom discussion are. 539 U.S. at 330. *Grutter* should have rejected this attempt to use nebulous educational benefits to justify classifying students based on race. *See Fisher I*, 570 U.S. at 320-30 (Thomas, J., concurring).

Grutter's diversity rationale also flouts basic equal-protection principles. Although *Grutter* praised the "educational benefits" of student body diversity at-large, its assumption that a university can predict, based solely on race, an applicant's "views" or "experience[s]" is pure racial stereotyping. 539 U.S. at 333; *see Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir. 1996). The Fourteenth Amendment forbids "the assumption that race or ethnicity determines how [individuals] act or think." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting); *see Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (op. of O'Connor, J.). If a university wants to admit students with certain experiences (*e.g.*, overcoming discrimination), it can evaluate whether applicants have that experience. It should not be permitted simply to use "race as a proxy" for their experiences or views. *Miller v. Johnson*, 515 U.S. 900, 914 (1995).

Grutter's narrow-tailoring reasoning cannot "'withstand careful analysis'" either. *Janus v. AFSCME*, 138 S. Ct. 2448, 2481 n.25 (2018). Narrow tailoring normally demands proof that racial classifications are "necessary" to achieve the compelling interest—that race was a "'last resort.'" *Parents Involved*, 551 U.S. at 734-35. But *Grutter* demands much less. Race need only have a "minor" impact on diversity. *Fisher II*, 579 U.S. at 384-85. Universities can reject race-neutral alternatives that, quite circularly, "may well compromise [their] own definition of … diversity."

Id. at 387. Universities can also reject alternatives that would compromise their "reputation for academic excellence." *Id.* at 385. And universities can reject facially neutral alternatives, like percentage plans, that would knowingly "boost minority enrollment." *Id.* at 386.

B. *Grutter* Has Caused Significant Negative Consequences

Grutter has also proven "unworkable in practice." *Knick*, 139 S. Ct. at 2178. While the Fourteenth Amendment contains no exceptions to the rule of racial neutrality, the Supreme Court has applied a "case-by-case" approach that reviews each racial classification under "strict scrutiny." *Croson*, 488 U.S. at 518-19 (Kennedy, J., concurring in part and concurring in judgment). But "the assumption" underlying this approach is that, in practice, "the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality." *Id.* at 519. Strict scrutiny is supposed to approximate an outright ban "because [the standard] forbids the use even of narrowly drawn racial classifications except as a last resort." *Id.* As it turns out, *Grutter*'s version of narrow tailoring does not meaningfully limit universities' use of race. It encourages universities to "resort to camouflage"—to use "winks, nods, and disguises" instead of explicit racial quotas. *Gratz v. Bollinger*, 539 U.S. 244, 304-05 (2003) (Ginsburg, J., dissenting).

In addition to these "jurisprudential consequences," *Grutter* has had significant "real-world consequences." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part). Most acutely, *Grutter* sustains admissions programs that intentionally discriminate against historically oppressed minorities. Jewish students were the first victims of holistic admissions, and Asian Americans are the main victims today. Asians have faced enormous racial discrimination in this country, from the Chinese Exclusion Act to the internment of Japanese Americans, to modern scapegoating over COVID-19. Weybright, *Study Finds Increasing Discrimination Against Asians and Asian*

Americans, WSU Insider (Nov. 4, 2020), bit.ly/39rc9YI. Asian Americans are stereotyped as shy, passive, perpetual foreigners, and model minorities who are interested only in math and science.

By considering race alongside subjective criteria like "self-confidence," "likability," and "courage," *SFEA*, 101 F. Supp. 5th at 187, universities invite admissions officers to rely on anti-Asian stereotypes. These subjective criteria also conceal ceilings on Asian-American admissions. This discrimination is not news to Asian-American high-schoolers: an entire industry exists to help them appear "less Asian" on their college applications. *E.g.*, Asian Advantage College Consulting LLC: Beat the Asian Quotas!, bit.ly/3rSYJ1D.

C. *Grutter* Has Generated No Legitimate Reliance Interests

Grutter cannot be sustained in the name of reliance interests. This Court puts little stock in reliance interests when it overrules precedents, like *Grutter*, that authorize racial classifications. *E.g.*, *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) (overruling *Grovey v. Townsend*); *Batson v. Kentucky*, 476 U.S. 79, 95-96 (1986) (overruling *Swain v. Alabama*); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu*). Reliance interests did not deter this Court from dismantling segregation, even though it recognized *Brown*'s "wide applicability" and the "considerable complexity" of enforcement. 347 U.S. at 495; see *Fisher I*, 570 U.S. at 321-22 (Thomas, J., concurring).

Because *Grutter* departs so far from our basic ideals, the decision has not "'become part of our national culture.'" *Ramos*, 140 S. Ct. at 1406. *Grutter* "is only two decades old"—a lack of "antiquity" that "cut[s] in favor of abandoning [it]." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). And Americans by large margins believe that colleges and universities should not consider race at all when making admissions decisions (74%), including strong majorities of African Americans (59%) and Hispanics (68%). Gómez, *U.S. Public Continues to View Grades, Test*

Scores as Top Factors in College Admissions, Pew Research Ctr. (Apr. 26, 2022), pewrsr.ch/3MB2vVa. Several States have expressly banned their universities from considering race—including Michigan, the State that prevailed in *Grutter*. *Schuette v. BAMN*, 572 U.S. 291, 298-99 (2014) (op. of Kennedy, J.). California, too, has long prohibited racial preferences.

The whole point of *Grutter*'s 25-year deadline was to give universities time to wind down their racial preferences. But universities are not doing that. Continental has not decreased the size of its racial preferences since 2003, and it insists that *Grutter*'s deadline is not influencing their behavior. Now is the time to overrule *Grutter.*

While overturning *Grutter* will mean that universities can no longer use race in admissions, the burden of changing illegal policies "'is not a compelling interest for stare decisis.'" *Janus*, 138 S. Ct. at 2485 n.27. And the changes here need not be "'extensive.'" *Id.* Most universities "can keep their [admissions] systems exactly as they are"—with holistic, individualized review that considers all legitimate factors— "only they cannot" use race itself as a factor. *Id.* After all, state universities in California, Washington, and seven other States already conduct colorblind admissions. It is not too much to ask Continental to act like many others who cannot consider race, including employers, landlords, businesses, lenders, lawyers, and judges. *See* 42 U.S.C. §2000e-2; §3604; §§1981-82; 15 U.S.C. §1691 *et seq.*; *Batson*, 476 U.S. at 100; *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017).

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748 (plurality). The Fourteenth Amendment and Title VI forbid institutions of higher education from using race as a factor in admissions. The Supreme Court should overrule *Grutter* and any other precedent that holds otherwise.

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IN THE SUPREME COURT OF THE UNITED STATES

STUDENTS FOR EQUITY IN ADMISSIONS, INC.,

Petitioner,

v.

TRUSTEES OF CONTINENTAL COLLEGE,

Respondent.

No. 22-0011
January 24, 2022

The petition for a writ of certiorari is granted. The parties are directed to brief the following questions:

(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 Continental College violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?