No. 20-1199

IN THE

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and the court of appeals properly applied this Court's precedents in concluding, based on detailed findings of fact entered after a three-week trial, that Harvard does not engage in racial balancing, does not overemphasize race in its admissions decisions, does not currently have workable race-neutral alternatives to accomplish its educational goals, and does not discriminate against Asian-American applicants.

2. Whether the Court should overrule *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Fisher* v. *University of Texas at Austin*, 136 S. Ct. 2198 (2016), and interpret Title VI of the Civil Rights Act of 1964 to prohibit a private university from considering race as one factor among many in admissions.

CORPORATE DISCLOSURE STATEMENT

Respondent President and Fellows of Harvard College is a non-profit corporation with no parent corporation, and no public company owns any interest in it.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTORY PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

In a 130-page opinion including detailed factual findings entered after a three-week trial, the district court concluded that Harvard College's admissions program comports with this Court's precedents governing consideration of race in university admissions and does not discriminate against Asian-American applicants. The First Circuit upheld those findings and conclusions as firmly grounded in the trial record and precedent.

Students for Fair Admissions' (SFFA's) petition recycles allegations both courts rejected and offers a thoroughly distorted presentation of the record. For example, SFFA contends that Harvard "automatically" awards "enormous" preferences to all African-American and Hispanic applicants, Pet.5, 41, and "penalizes" Asian-American applicants and caps their admission, Pet.37-40. The record and the district court's findings refute those contentions. Harvard does not automatically award race-based tips but rather considers race only in a flexible and nonmechanical way; consideration of race benefits only highly qualified candidates; and Harvard does not discriminate against Asian-American applicants.

Given these extensive findings, SFFA's request that this Court evaluate whether Harvard's admissions program comports with the Court's precedents does not merit review. There is no circuit split to resolve, and this Court rarely grants certiorari to review the application of settled law to a particular set of facts. Where, as here, two lower courts have made "concurrent findings," this Court will not overturn them absent "a very obvious and exceptional showing of error,"

Exxon Co. v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996)—a showing SFFA cannot remotely make.

Unable to seriously challenge the rejection of its claims under existing law, SFFA asks the Court to overrule more than 40 years of decisions regarding the limited consideration of race in university admissions. Under established precedent, to achieve the educational benefits that flow from student-body diversity, universities may consider race as one factor among many in a full, individualized evaluation of each applicant's background, experiences, and potential contributions to campus life. Universities across the country have followed this precedent in structuring their admissions processes. And the American public has looked to this precedent for assurance that the Nation recognizes and values the benefits of diversity and that the path to leadership is open to all. SFFA falls far short of providing a "compelling" reason, *Hilton* v. *South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991), for the Court to repudiate that precedent, particularly because SFFA must carry the extra burden associated with any attempt to overturn statutory precedent, *Kimble* v. *Marvel Entertainment, LLC*, 576 U.S. 446, 456 (2015).

Finally, SFFA lacks standing. SFFA invoked "associational standing," but it is not a genuine membership organization. Its purported members exercise no real influence over the organization; it is directed, controlled, and financed by parties with no personal stake in this case. Were the Court inclined to reconsider decades of precedent, it should do so in a case brought by parties with a true stake in the outcome. The petition should be denied.

STATEMENT

A. Harvard's Admissions Process

1. Harvard's mission is to educate "citizens and citizen-leaders for our society." Pet.App.108. And Harvard concluded long ago that a diverse student body is essential to that mission. Pet.App.109; Pet.App.30-31. In 2015, after consulting students, faculty, alumni, and other stakeholders, Pet.App.29, a faculty committee reaffirmed the importance of diversity at Harvard, finding that it "enhances the education of all of [Harvard's] students," Pet.App.151-152, by helping students learn to "engage across differences," broadening the range of scholarly interests and endeavors, and preparing students to "'assume leadership roles in the increasingly pluralistic society into which they will graduate,'" Pet.App.109-110.

To advance its mission, Harvard "pursues many kinds of diversity," including diversity of "academic interests, belief systems, political views, geographic origins, family circumstances, and racial identities." Pet.App.108. Harvard also "create[s] opportunities for interactions between students from different backgrounds and with different experiences," inside and outside the classroom, including through living assignments, extracurricular activities, and athletics. Pet.App.109.

2. Each year, Harvard receives more than 35,000 applications for its roughly 1,600-seat freshman class. Pet.App.110. Most applicants have strong test scores and grades; to admit every applicant with a perfect GPA, Harvard would need to expand its class fourfold and reject all other applicants, regardless of their other academic credentials, talents, or life experiences and perspectives. Pet.App.111.

Thus, to assemble the strongest first-year class, Harvard looks for students who excel beyond academics and who will bring distinctive experiences, perspectives, talents, and interests to campus. Pet.App.111; Pet.App.114; Pet.App.131-132. And even in evaluating applicants' academic strength, Harvard looks at many factors, such as academic prizes, the rigor of an applicant's coursework, whether the applicant has conducted original research, and whether the applicant has demonstrated "creativity" and a "love of learning." Pet.App.123-124; C.A.J.A.930:12-931:14.[1]

To identify the strongest applicants, 40 admissions officers conduct a "time-consuming, whole-person review process" in which each applicant is "evaluated as a unique individual." Pet.App.113-114; Pet.App.120. They consider personal essays, recommendation letters, extracurricular activities, athletics participation, honors and prizes, intended major, intended career, transcripts, test scores, family and demographic information, alumni or staff interview reports, and samples of academic or artistic work. Pet.App.115-117.

Subcommittees initially review applicants by geographic region. Pet.App.122. A "first reader" tentatively rates each applicant's strength in four domains—academic, extracurricular, athletic, and personal—and assigns "school support ratings" based on teacher and guidance counselor recommendation letters. Pet.App.122-123. Race is not taken into account in as-

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[1] As it did at trial, SFFA emphasizes applicants' "academic index," Pet.11, a number derived mechanically from test scores and GPAs that is *not* considered in admissions but rather is used only for mandatory reporting to the Ivy Athletic League, Pet.App.181; C.A.J.A.779:25-780:4; C.A.J.A.886:1-11; C.A.J.A.2365:19-2366:4.

signing these ratings. Pet.App.138. The reader then assigns a preliminary "overall" rating, reflecting the reader's "impression of the strength of the application, taking account of all information available at the time the rating is assigned." Pet.App.126. In assigning the "overall" rating, the reader may give an applicant a "tip" for unusual intellectual ability; strong personal qualities; the capacity to contribute to racial, ethnic, socioeconomic, or geographic diversity; outstanding creative or athletic ability; or excellence in other dimensions. Pet.App.127. Readers may also give "tips" to recruited athletes and children of alumni, donors, faculty, or staff (ALDCs). *Id.* First readers then send the files of competitive candidates to subcommittee chairs, who similarly review and rate the applicants. Pet.App.128.

Subcommittees then meet to discuss applicants and decide whom to recommend to the full Admissions Committee. Pet.App.129-130. The full 40-person Admissions Committee then convenes over several weeks to discuss applicants and decide whom to admit. Pet.App.130-131. The decisions focus on the underlying information in the applicants' files, not the initial ratings. Pet.App.129-131. The ratings are considered only tentative assessments; more information, such as additional grades and alumni-interview evaluations, often becomes available later in the process. Pet.App.131; Pet.App.16. Full-committee consideration is not limited to applicants recommended by the subcommittees. Pet.App.130-131.

During the process, Admissions Office leaders periodically review "one-pagers," which summarize characteristics of the applicant pool and tentatively admitted class, including intended major, geographic region, citizenship status, socioeconomic circumstances, gender,

race, and legacy and recruited-athlete status. Pet.App.135. The leaders occasionally share that information with the Admissions Committee. Pet.App.136. The information is not used to pursue racial quotas or balance. *Id.*; Pet.App.139. It may be used to recognize declines in representation of admitted students with certain characteristics, in which case the committee may "give additional attention" to applications from students with those characteristics to ensure they were fairly considered. Pet.App.136-137. The information is also used to predict the number of admits who will matriculate, as "yield rates" vary by intended major, geography, and demographic factors, including race. Pet.App.137; Pet.App.66.

In assigning overall ratings at the initial-review stage, and in later voting on whom to admit, admissions officers do not automatically award "tips" to students from particular racial or ethnic groups. Pet.App.68; Pet.App.70; Pet.App.209-211 & n.51. The consideration of race only ever benefits students who are otherwise highly qualified, and it is not decisive even for those candidates. Pet.App.68; Pet.App.70; Pet.App.210-211. Asian-American applicants too may benefit from the consideration of race. Pet.App.70; Pet.App.209-210 & n.51. Harvard, moreover, "does not treat race monolithically because students of the same race do not 'share the same views, experiences, or other characteristics,'" Pet.App.34; Harvard takes into account, for example, that there are "different groups and sub-groups within the category of Asian Americans," C.A.J.A.1003:15-1004:1.[2]

[2] SFFA disparages Harvard's use of the term "Asian American," but this category is set by the federal government's Integrated Postsecondary Educational Data System, which Harvard is

Harvard's process contains numerous checks and balances. For example, Harvard trains admissions officers on consistently evaluating applicants and permissibly considering race and provides written "reading procedures" to guide the evaluation of applicants. Pet.App.121-122.[3] Any admissions officer can review any application and raise any applicant for discussion, and the 40-person committee openly discusses and votes on applicants using a one-member, one-vote process that "mitigates the risk that any individual officer's bias or stereotyping would affect Harvard's admissions process." Pet.App.83.

3. Harvard has long devoted significant resources to race-neutral means to improve diversity. It provides one of the most generous financial aid programs in the country, requiring no loans and no contributions or only modest contributions from families earning $150,000 per year or less. Pet.App.113; C.A.J.A.1022:2-1023:8. It has extensive programs to encourage diverse students to apply and matriculate, including an Undergraduate Minority Recruitment Program, which recruits African-American, Hispanic, Asian-American, and other minority applicants. Pet.App.112-113; Pet.App.13.[4] And from 2007 to 2011, Harvard sought to

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required to use for mandatory reporting of demographic data, Pet.App.135; C.A.J.A.4114; C.A.J.A.4460, and SFFA's own complaint uses this term to define the applicants against whom SFFA accuses Harvard of intentional discrimination, C.A.J.A.108-226.

[3] In 2018 Harvard amended its reading procedures to provide explicit written guidelines on the consideration of race; as the district court recognized, the revisions codified existing practice and reflected no policy change. Pet.App.121; Pet.App.159.

[4] Harvard sends letters to students who achieve certain test scores, encouraging them to consider Harvard. Pet.App.111-112. At times, the scores for students to receive such letters have var-

improve diversity by eliminating Early Action, but reinstated the program because diversity suffered. Pet.App.212.

In 2017 Harvard established a committee to evaluate race-neutral alternatives to its current admissions process with the benefit of scholarly research and the extensive expert analyses produced in this case. Pet.App.152-153. The committee's final report carefully considered 13 race-neutral alternatives, including each alternative proposed by SFFA. Pet.App.153; C.A.J.A.4418-4419. It concluded that there currently are no workable alternatives that would allow Harvard to achieve the educational benefits of diversity while also maintaining its demanding standards of excellence and recommended that Harvard reexamine that conclusion in five years. Pet.App.153.

B. Prior Consideration Of Harvard's Admissions Process

As in the lower courts, SFFA claims Harvard has long known that its admissions program discriminates against Asian-American applicants, citing two prior analyses. As the district court held, neither found that Harvard discriminates.

1. In the late 1980s, concerns that universities were discriminating against Asian-American applicants prompted the U.S. Department of Education's Office for Civil Rights (OCR) to review Harvard's admissions

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ied based on race, gender, and region. For example, for a time, Harvard's "search list" included Asian-American students with lower ACT scores than white students in some states, but white students with lower SAT scores than Asian-American students in other states. Pet.App.154-155. These "search list" letters do not affect admissions decisions. Pet.App.156.

process. After conducting interviews, reviewing application files, and analyzing ten years of data, OCR concluded that Harvard did not discriminate against Asian-American applicants, Pet.App.156. OCR found Harvard did not impose any quota, Pet.App.26, assigned Asian-American applicants ratings generally consistent with their applications, C.A.J.A.4496, and provided an "opportunity for Asian American ethnicity to be positively weighted," C.A.J.A.4518. Although OCR identified a few comments that might be consistent with stereotyping, it found no evidence that the comments "'negatively impacted the ratings given to th[o]se applicants,'" and found "'no significant difference between the treatment of Asian American applicants and the treatment of white applicants.'" Pet.App.26.

2. In 2012, following articles asserting universities were discriminating against Asian-American applicants, Harvard's Dean of Admissions and Financial Aid, William Fitzsimmons, "solicit[ed] input" from Harvard's Office of Institutional Research (OIR). Pet.App.140-141. Later, following criticism that selective colleges were not doing enough to enroll low-income students, Dean Fitzsimmons asked OIR to analyze whether low-income students were receiving "tips" in admissions. Pet.App.145-146. Although OIR's rough models indicated a slight negative correlation between Asian-American identity and admissions outcomes, the district court found that the models omitted many variables important to Harvard's admissions process; OIR did not view or present the models as evidence of discrimination against Asian-American applicants; and, given their incompleteness, Dean Fitzsimmons reasonably did not interpret the models as evi-

dence of discrimination against Asian-American applicants. Pet.App.141-150; Pet.App.27-28.

C. This Litigation

1. SFFA filed this lawsuit under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Count I alleged that Harvard intentionally discriminates against Asian-American applicants vis-à-vis white applicants; Counts II-V alleged that Harvard's admissions process violates this Court's precedents on permissible use of race in admissions because Harvard engages in racial balancing, gives race too much weight, and eschews workable race-neutral alternatives; Count VI challenged this Court's precedents.

2. Following years of discovery, the district court held a 15-day bench trial. The parties' experts presented competing statistical models of Harvard's admissions process. SFFA's expert excluded all ALDCs, aggregated data across admissions cycles, and excluded the personal rating, claiming that rating is influenced by race, while Harvard's expert included all domestic applicants, modeled the admissions process on a year-by-year basis, and included the personal rating, explaining that the rating either is not influenced by race or that "any causal effect of race … is insignificant relative to the value of the variable in controlling for a race-correlated, but not directly race-caused, relationship." Pet.App.166-167; Pet.App.183. SFFA's model suggested a slight but statistically significant negative correlation between Asian-American identity and chances of admission; Harvard's model suggested no statistically significant relationship. Pet.App.197.

The court also heard extensive evidence about the educational benefits of diversity and about Harvard's

admissions process. In addition to the statistical experts, the court heard from 28 witnesses, including current and former admissions officers, and current and former students, including several Asian-American students, who testified about the importance of being able to discuss their racial and ethnic identities in their applications and about the positive impact that diversity at Harvard has had on their educational experiences.

3. The district court issued meticulous findings of fact and conclusions of law. It concluded that Harvard has a compelling interest in pursuing the educational benefits of diversity, finding "[t]he evidence at trial … clear that a heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community." Pet.App.107-108. Subjecting Harvard's admissions process to strict scrutiny, the court further concluded that Harvard's process comports with this Court's precedents, and that the consideration of race is narrowly tailored to achieve the educational benefits of diversity. Pet.App.238-242. Specifically, the court found that Harvard uses race only as one factor among many and only as a plus; the magnitude of the tip is comparable to the size and effect of the consideration of race previously upheld by this Court; Harvard does not pursue racial quotas or balance; and Harvard currently has no workable race-neutral alternatives. Pet.App.204-220; Pet.App.247-260. On the last point, the court found that abandoning consideration of race "would cause a sharp decline in the percentage of African American and Hispanic students," Pet.App.211, and that SFFA's proffered race-neutral alternatives were inadequate, unworkable, or both. Pet.App.211-220.

The court also found that Harvard does not discriminate against Asian-American applicants, finding "no evidence of any racial animus whatsoever or intentional discrimination," and no "evidence that any particular admissions decision was negatively affected by Asian American identity." Pet.App.261.[5] The court considered both parties' statistical models and found Harvard's more probative of the effect of race on admissions, explaining that SFFA's modeling choices "expand[ed] the omitted variable bias," "carv[ed] out" pieces of the dataset in a way that "distort[ed] the analysis," failed to "conform[] to the reality" of the admissions process, and "excluded … variables" in a way that "exaggerates the effect of race." Pet.App.197-204. The court also found "consistent, unambiguous, and convincing" admissions officers' testimony that Harvard does not discriminate in admissions decisions or in assigning personal ratings, noting "[n]ot one [admissions officer] had seen or heard anything disparaging about an Asian American applicant despite the fact that decisions [a]re made collectively and after open discussion about each applicant in … committee meetings." Pet.App.264.

And the district court found SFFA's supposed evidence of discrimination unpersuasive. For instance, though SFFA argued that Dean Fitzsimmons discounted purported indicia of discrimination in OIR's models, the models were "entitled to little weight" and were never "presented or understood as evidence of discrim-

[5] The district court held that Harvard bore the burden of proof on SFFA's intentional-discrimination claim. Pet.App.235-238 & n.56. Although Harvard disagrees with that conclusion, both lower courts found that even if Harvard bore the burden, it carried that burden. Pet.App.260-265; Pet.App.79-80 & n.34.

ination." Pet.App.144-145. Finally, although SFFA hand-picked hundreds of admissions files to review during discovery, "SFFA did not present a single admissions file that reflected any discriminatory animus, or even an application of an Asian American who [SFFA] contended should have or would have been admitted absent [discrimination or bias]," Pet.App.246.

4. The First Circuit affirmed. It agreed that Harvard has a compelling interest in the benefits of diversity and that Harvard's admissions process is narrowly tailored. Pet.App.58-79.

It also upheld the district court's finding that Harvard does not discriminate against Asian-American applicants. Pet.App.79-98. It concluded that the district court did not err in generally preferring Harvard's regression model, explaining that SFFA's analysis purporting to show that the personal rating is influenced by race omitted key variables that could explain the correlation between the personal rating and race, and that omitting the personal rating results in a much less complete analysis of Harvard's admissions process. Pet.App.93-94. The court also endorsed the district court's favorable assessment of Harvard's witnesses' credibility and its assessment that "[t]he nature of Harvard's admissions process … offset[s] any risk of bias." Pet.App.82-83.

ARGUMENT

For more than four decades, this Court has recognized that universities have a compelling interest in pursuing the educational benefits that flow from student bodies that are diverse along many dimensions, including race. *See Regents of Univ. of California* v. *Bakke*, 438 U.S. 265 (1978); *Grutter* v. *Bollinger*, 539

U.S. 306 (2003), *Fisher* v. *University of Texas at Austin*, 136 S. Ct. 2198 (2016).[6] Diversity "promotes cross-racial understanding, helps to break down racial stereotypes," "enables students to better understand persons of different races," produces "livelier, more spirited, and simply more enlightening and interesting" classroom discussion, "promotes learning outcomes," and "better prepares students for an increasingly diverse workforce and society." *Grutter*, 539 U.S. at 330 (quotation marks and alterations omitted). It also provides substantial societal benefits, including "cultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry," by making clear that "the path to leadership [is] open to talented and qualified individuals of every race and ethnicity." *Id.* at 332.

The Court has also repeatedly held that universities may pursue the educational benefits of diversity by considering race in admissions, as long as that consideration is narrowly tailored to achieve those educational benefits. *Grutter*, 539 U.S. at 326; *Fisher*, 136 S. Ct. at 2210. Narrow tailoring is satisfied if race is considered as one factor among many in evaluating each applicant's background, experiences, and potential contributions to the school's educational environment; is considered only as a plus; is considered flexibly and not mechanically; is not used to pursue racial quotas or balance; and is considered only where there are no workable race-neutral alternatives. *Grutter*, 539 U.S. at 334, 339, 341; *Fisher*, 136 S. Ct. at 2208. Consideration of race in this manner enables schools to pursue profound educational benefits while using race only in a limited way and only to the extent needed to assemble diverse

[6] Unless otherwise indicated, citations to *Bakke* are to Justice Powell's controlling opinion.

classes that will produce such benefits. And considering race in this manner "treats each applicant as an individual." *Bakke*, 438 U.S. at 318; *see also Grutter*, 539 U.S. at 324. The Court has twice cited Harvard's individualized, whole-person review as the model of a narrowly tailored program. *Grutter*, 539 U.S. at 335; *Bakke*, 438 U.S. at 316-319.

SFFA contends that Harvard's admissions process does not actually operate in the way the Court understood in *Bakke* and *Grutter*, and that the Court should rule that Harvard violates Title VI's standards for race-conscious admissions—or, alternatively, that the Court should overrule its prior decisions in this area and hold that Title VI requires "colorblind" admissions. Neither submission warrants review. SFFA's petition is based on a misleading depiction of the proceedings below, rests on factual assertions the lower courts squarely rejected, and ignores the contrary findings. And SFFA falls far short of demonstrating why this Court should take the momentous step of overruling such major decisions—especially given that this case involves a statute, Title VI, which Congress can amend at any time if it wishes to overturn longstanding precedent approving the limited and qualified consideration of race in a whole-person approach to admissions at private universities such as Harvard. If that were not enough, SFFA lacks standing. The petition should be denied.

I. THE LOWER COURTS' FACT-SPECIFIC APPLICATION OF THIS COURT'S PRECEDENTS DOES NOT WARRANT REVIEW

SFFA attempts to portray Harvard's process as an example of race-conscious admissions gone awry. But the narrative SFFA presents was rejected by the dis-

trict court in detailed factual findings upheld by the court of appeals. This Court will not reverse such "concurrent findings" of two lower courts absent "a very obvious and exceptional showing of error." *Exxon*, 517 U.S. at 841. SFFA cannot come close to making that showing.

SFFA tries to sidestep the lower courts' findings by proffering its own version of the record and urging this Court to conclude for itself that Harvard pays excessive attention to race and intentionally disadvantages Asian-American applicants. But SFFA's unreliable portrayal of the facts fatally undermines its case for review. To offer just a few examples:

- It is simply false that Harvard automatically "awards preferences to everyone who checks the box for 'Black' and 'Hispanic,'" and that those preferences are "enormous." Pet.41. Harvard does *not* award a "tip" to all Black and Hispanic applicants, Pet.App.139; C.A.J.A.999:25-1001:6, race is only ever considered in cases of highly competitive candidates, Pet.App.70; C.A.J.A.1000:10-16, and even then race-based tips are no larger than the tips upheld in *Grutter*, Pet.App.69.

- SFFA asserts, without citation, that "[r]ace is often the reason that someone gets lopped," *i.e.*, removed from the tentatively admitted class due to class-size constraints. Pet.10. That too is false. The district court found that "[t]hroughout the process, Harvard remains committed to its holistic evaluation and its whole person review," Pet.App.251, and that when the time comes to lop, the committee "discusses candidates again" and then "decides, as a group, which students to lop off the admit list based on many factors." Pet.App.133; *see* C.A.J.A.3396:1-

10 ("lop discussion[s] [a]re no different from any other discussion" in that admissions officers "discuss[] the whole candidate").

- SFFA asserts that "Harvard has long known its process discriminates against Asian Americans." Pet.12. Again, this claim was rejected by the lower courts; OCR concluded that Harvard did *not* discriminate against Asian-American applicants, and OIR's incomplete analyses were never interpreted by OIR or anyone else as evidence that Harvard discriminates. *See supra* p. 9.
- SFFA quotes the deposition of a high-school guidance counselor, Pet.31, but nowhere acknowledges that the district court excluded that testimony, C.A.J.A.730:20-21; C.A.J.A.1090:16-1093:11.

This Court rarely grants certiorari to review the fact-specific application of settled legal principles. SFFA's unreliable description of the record and disregard of the lower courts' findings strongly counsel against any deviation from that settled practice.

A. Harvard Does Not Discriminate Against Asian-American Applicants

SFFA accuses the lower courts of failing to apply strict scrutiny and faults them for preferring Harvard's statistical analysis over SFFA's. Pet.37-39. Its contentions are flawed.

To begin, SFFA's contention that the lower courts erred by giving Harvard "the benefit of the doubt," Pet.38, is incorrect. SFFA's complaint framed its intentional-discrimination claim as distinct from its claims under the Court's precedents governing race-conscious admissions, and it properly acknowledged

through trial that it bore the burden to prove that Harvard discriminates against Asian-American applicants. Dist.Dkt.413 at 5, 33; C.A.J.A.3446:2-5. Following trial, SFFA switched gears, asserting that Harvard must *disprove* that it discriminates against Asian-American applicants. Litigants cannot reinvent their claims in this fashion. *Visa, Inc.* v. *Osborn*, 137 S. Ct. 289, 289 (2016); *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 738-739 (1998).

Nevertheless, the lower courts found that, even if Harvard bore the burden to disprove discrimination, it carried that burden, Pet.App.265-266; Pet.App.79-80 n.34, and there is no basis to second-guess those findings. SFFA principally objects to the district court's treatment of the "personal rating" in the parties' statistical models, arguing that the court was obligated to accept SFFA's model, which omits that rating. Pet.38. But SFFA ignores the district court's painstaking explanations of why it found Harvard's statistical case superior—and why the totality of the evidence did not reflect discrimination.

First, the district court determined that SFFA's analysis of the personal rating "likely overstates the direct effect of Asian American identity on the personal rating." Pet.App.190. The court found that Harvard's witnesses "credibly testified that they did not use race in assigning personal ratings," and that SFFA's analysis of the personal rating "explains only a portion of the variation in personal ratings and likely suffers from considerable omitted variable bias." *Id.* For instance, SFFA's analysis omitted "variables for several factors that influence personal ratings and may correlate with race," and the court observed that there are many reasons other than bias why Asian-American applicants on average may have marginally lower personal ratings

than white applicants, such as different levels of support from school guidance counselors. Pet.App.190-191; Pet.App.194.

Second, the court found Harvard's modeling choices superior. For instance, it found that omitting the personal rating disregards fundamental aspects of Harvard's admissions process, resulting in "omitted variable bias," while including the rating "results in a more comprehensive analysis." Pet.App.199; *see* Pet.App.183 (personal rating captures information important to Harvard's admissions process, such as leadership ability and grit). Similarly, the district court criticized SFFA's exclusion of ALDCs (some 30% of the admitted class, Pet.App.166) because "they are evaluated through the same basic admissions process" and "their admissions outcomes provide data that is probative of whether Harvard is discriminating against Asian Americans," Pet.App.199.

Third, the court found that other statistical findings undermined SFFA's allegations that Harvard discriminates against Asian-American applicants. For example, as SFFA's expert conceded, Asian-American ALDCs are admitted at similar or higher rates than white ALDCs, Pet.App.170 n.43; and "it does not seem likely that Harvard would discriminate against non-ALDC Asian-Americans, but not discriminate against ALDC Asian American applicants." Pet.App.200.

Fourth, the court found that, even on its own terms, SFFA's statistical model did not establish discrimination. As the court explained, SFFA's model yielded only a "slightly negative coefficient and average marginal effect for Asian American identity"—"so slight" that the effect of Asian-American identity might

even be "positive" if the model sufficiently accounted for relevant factors." Pet.App.203-204.[7]

Most fundamentally, SFFA ignores that this case involved far more than statistics. The district court found "consistent, unambiguous, and convincing" admissions officers' testimony that there is no discrimination against Asian-American applicants, Pet.App.264—the kind of witness-credibility finding that "can virtually never be clear error," *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985). The court also noted that SFFA did not identify even a single applicant denied admission because of discrimination, Pet.App.264, despite voluminous discovery.

In the end, the district court scrupulously considered both parties' statistical models in weighing the totality of the evidence, but it did not lose sight of the point that "statistics are not irrefutable; … their usefulness depends on all of the surrounding facts and circumstances." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 340 (1977). Where, as here, the best statistical model shows no discrimination and even SFFA's model shows at most a "slight" suggestion that is refuted by the non-statistical evidence, a court is entirely justified in concluding that no bias is present.

B. Harvard Considers Race Only As This Court's Precedents Permit

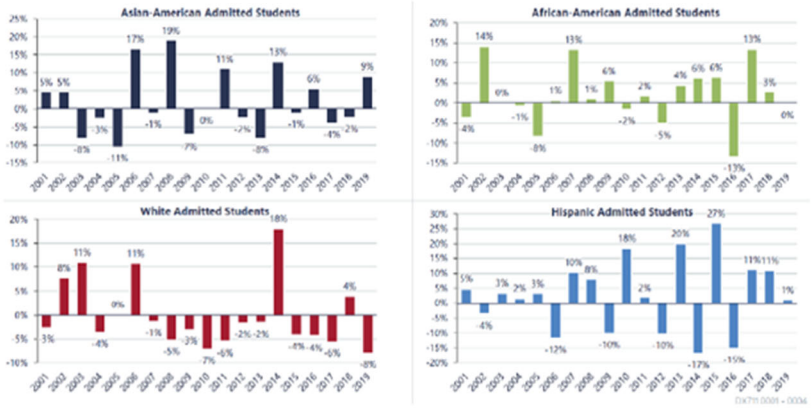
SFFA claims that Harvard persistently seeks to obtain a "precise racial balance," allows race to over-

[7] Statistics also have limits. For instance, the parties' regression analyses model Harvard's admissions process using preliminarily assigned ratings, but admissions decisions are predicated on the underlying information in the application files, not the initial ratings. Pet.App.129-131.

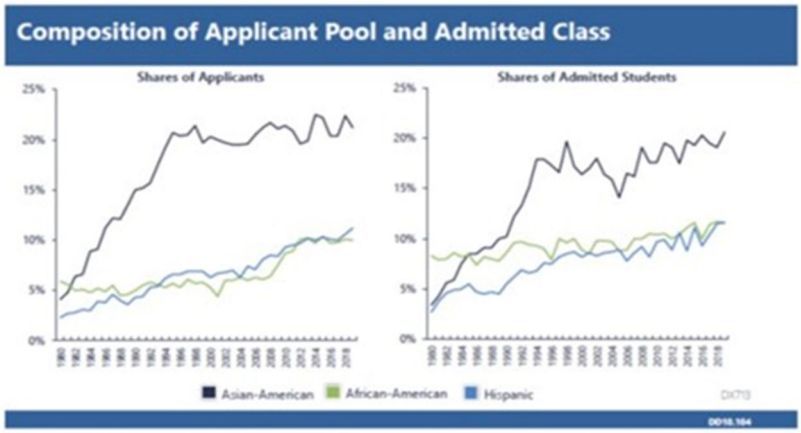
whelm all other factors, and disregards race-neutral alternatives. Pet.41-43. Once again, SFFA's rhetoric fails to account for the reality that it tried, and failed, to make this factual case to the courts below.

1. The lower courts rejected SFFA's racial-balancing claim, finding Harvard has no "target number or specified level of permissible fluctuation" in the racial composition of its classes. Pet.App.249; Pet.App.252. SFFA's own expert declined to offer testimony in support of a racial-balancing claim, Pet.App.208, and one can see why. The proportion of self-identified Asian Americans at Harvard has doubled since 1990 and increased five-fold since 1980. Pet.App.208. Statistical evidence demonstrated "considerable year-to-year variation" "inconsistent with the imposition of a racial quota or racial balancing." Pet.App.205; C.A.J.A.5743-5744.

***Figure 1*: Percent Change in Year-to-Year Admittance of Students by Race. [DD10 at 100; DX711].**



Pet.App.206. Moreover, the racial composition of the admitted class varies more than the racial composition of the applicant pool, Pet.App.208—the opposite of what one would expect if racial balancing were afoot.



C.A.J.A.6118.

The district court also rejected SFFA's claim that Harvard's periodic use of "one-pagers" suggests racial balancing, finding that Harvard keeps track of information about the tentatively admitted class "to assist it in predicting its yield rate and thereby avoid overenrolling its freshman class," Pet.App.252, and to identify declines in representation of students with certain characteristics, including race, and ensure that applicants with those characteristics were not inadvertently overlooked. Pet.App.136; Pet.App.250-251; Pet.App.65. The court further found that, "[t]hroughout the process, Harvard remains committed to its holistic evaluation and its whole person review." Pet.App.251. As this Court has made clear, "some attention to numbers" does not amount to a "rigid quota." *Grutter*, 539 U.S. at 336 (approving consultation of "daily reports").

2. The lower courts found that Harvard considers race flexibly, only as one factor among many, and only as a plus. Pet.App.137; Pet.App.242; Pet.App.68-70. Contrary to SFFA's unsupported assertions, Pet.41, Harvard does not automatically award a tip to appli-

cants from certain racial groups, Pet.App.70; C.A.J.A.1000:10-16. As the district court found, moreover, race "never becomes 'the defining feature' of applications," Pet.App.253 (quoting *Grutter*, 539 U.S. at 337)—consideration of race never results in the admission of unqualified applicants, race-based tips are "not disproportionate to the magnitude of other tips," and race-based tips "are not nearly as large" as those approved by the Court in *Grutter*, Pet.App.254-255. Even SFFA's expert conceded that "a large number of applicants to Harvard will be rejected without race ever becoming a factor." C.A.J.A.2362:1-3. And, in fact, race is not decisive even for "highly qualified candidates": Harvard rejects "more than two-thirds of Hispanic applicants and slightly less than half of all African American applicants who are among the top 10%" of applicants based on grades and test scores. Pet.App.70.

3. Finally, both lower courts found that Harvard currently has no workable race-neutral alternative that could sufficiently advance its interest in the benefits of diversity. If Harvard were to abandon race-conscious admissions, African-American and Hispanic representation would decline by nearly half. Pet.App.210. Such declines would seriously undermine Harvard's educational goals, Pet.App.78-79; Pet.App.219-220, and even SFFA's expert agreed such declines would be unacceptable, C.A.J.A.1490:20-1491:14.

SFFA focuses on the district court's rejection of one alternative, referred to below as "Simulation D." Pet.43. SFFA's expert simulated the likely composition of Harvard's admitted classes if Harvard were to give no consideration to race or whether an applicant is an ALDC, and give overwhelming preference to applicants with indicators of socioeconomic disadvantage. Pet.17-19.

Both lower courts found that Simulation D would "come at significant costs." Pet.App.219; Pet.App.76-78. First, it would decrease African-American representation by "nearly one-third," which would have adverse educational effects, including increasing African-American students' feelings of "isolation and alienation." Pet.App.219-220; Pet.App.77-78 & n.32-33. SFFA tries to bury this point by contending Simulation D would increase "racial diversity" generally, but "Harvard does not view underrepresented minorities interchangeably." Pet.App.77 n.32; *see supra* p. 11.

Second, Simulation D would diminish the strength of Harvard's admitted classes, causing a significant decline in the proportion of students with top academic, extracurricular, athletic, and personal ratings. Pet.App.76. For example, Simulation D would require Harvard to admit 17% fewer students receiving the highest academic ratings. C.A.J.A.5789. This is therefore not a matter, as SFFA asserts, of "negligible differences in … SAT scores." Pet.43. And Harvard need not choose between pursuing academic excellence and the educational benefits of diversity. *Fisher*, 136 S. Ct. at 2208.

After years of discovery, SFFA produced no persuasive evidence to support its legal claims. The court of appeals found no error in the district court's meticulous explanation of how it resolved the disputed facts and applied the relevant law. SFFA is not entitled to battle out the facts a third time in this Court. And it identifies no unsettled legal issue meriting review.

II. SFFA Offers No Reason To Revisit This Court's Precedents

Having failed to make the case that Harvard's admissions practices contravene the Court's precedents governing the use of race in admissions, SFFA asks the Court to overthrow them. But SFFA offers no legitimate justification for such an extraordinary step—particularly in a statutory case such as this. If Congress wanted to amend Title VI to prohibit private universities from considering race in admissions, it could do so, but it has not.

This Court revisits precedent only where there are "compelling" reasons to do so. *Hilton* v. *South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991). The Court may, for example, reconsider a decision that has been undermined by subsequent developments, *see Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997), or that is "grievously or egregiously wrong," but even then, only when the precedent has "caused significant negative jurisprudential or real-world consequences" and when overruling would not "unduly upset reliance interests," *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1414-1415 (2020) (Kavanaugh, J., concurring); *see also June Medical Services L.L.C.* v. *Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, J., concurring in judgment).

The bar is particularly high here, for this case involves the application of a statute. "[S]tare decisis carries enhanced force when a decision[] … interprets a statute," *Kimble*, 576 U.S. at 456, and this Court has generally left "the updating or correction of erroneous statutory precedents to the legislative process," *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J.)). And universities—and the Nation more broadly—have a profound

reliance interest in the Court's settled approach to admissions.

A. No Recent Developments Warrant Review Of The *Bakke/Grutter/Fisher* Framework

SFFA identifies no recent factual or legal developments that warrant revisiting *Bakke*, *Grutter*, and *Fisher*.[8] SFFA does not claim, for instance, that there is any confusion among universities or lower courts about the cases' guiding principles. Nor does SFFA offer any new evidence undercutting *Grutter*'s determination that student-body diversity, including racial diversity, has profound educational benefits. Indeed, while Harvard and amici put on evidence about the educational benefits of diversity, C.A.J.A.2757:14-2806:15, C.A.J.A.2551:3-2553:4; C.A.J.A.2612:25-2613:13, SFFA offered no rebuttal, declaring that "[d]iversity and its benefits are not on trial here," C.A.J.A.453:14-15.

SFFA's principal contention regarding "later developments" is that Harvard considers race more extensively than the Court was led to believe in *Grutter* and that Harvard uses race-conscious admissions to penalize "disfavored minorities." Pet.26-27. That is simply wrong. Both lower courts found that Harvard considers race flexibly, not mechanically, only as one factor among many, and only as a plus factor, and that Har-

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[8] SFFA conspicuously ignores *Bakke*, but five Justices agreed that universities could consider race in admissions under some circumstances. *See* 438 U.S. at 311-319 (Powell, J.); *id.* at 324-326 (Brennan, J.). And in *Grutter*, this Court recognized that "Justice Powell's opinion announcing the judgment … ha[d] served as the touchstone for constitutional analysis of race-conscious admissions policies," and that "[p]ublic and private universities across the Nation ha[d] modeled their own admissions programs on Justice Powell's [opinion]." 539 U.S. at 323.

vard's consideration of race does not overwhelm other factors, Pet.App.68-72; Pet.App.242; Pet.App.250-255—exactly what *Bakke* and *Grutter* require and how those decisions understood Harvard's process to operate, *Bakke*, 438 U.S. 316-318; *Grutter*, 539 U.S. at 321, 335-339. Both lower courts also found that Harvard does not discriminate against Asian-American applicants. Pet.App.264-265; Pet.App.139; Pet.App.64-65; Pet.App.79-98.

Relying on untested anecdotes, SFFA also claims *Grutter* has had the counterproductive effect of encouraging universities to "openly embrac[e] segregation" rather than pursue "integration." Pet.32. But the record contains no evidence that Harvard (or any other university) embraces "segregation"; the evidence was to the contrary. C.A.J.A.2686:25-2689:19; C.A.J.A.2743:12-2745:6. SFFA also points to nothing to suggest that a university's offering of events to support underrepresented groups impedes the educational benefits that flow from bringing together racially diverse students in classes, dining halls, extracurricular activities, athletics, and campus-wide events.

B. SFFA's Attacks On This Court's Precedents Are Meritless

SFFA's bid to overrule *Bakke*, *Grutter*, and *Fisher* largely recycles arguments this Court has heard and rejected before. None of SFFA's arguments suggests that those cases were wrongly decided, much less "egregiously" so.

1. SFFA wrongly contends that the Court's admissions cases are out of step with its broader equal-protection jurisprudence.

First, SFFA suggests that *Grutter's* deference to universities is inconsistent with strict-scrutiny jurisprudence. Pet.24-25. That is incorrect. *Grutter* grants universities a limited measure of deference in defining their educational missions—in particular, in determining whether the educational benefits that flow from diversity are important to their missions. *Fisher*, 136 S. Ct. at 2208. This limited deference is appropriate because whether the benefits that flow from diversity are integral to a particular university's mission is, "in substantial measure, an academic judgment," *id.*, implicating academic freedom and First Amendment values and properly made by university faculty rather than federal judges, *Grutter*, 539 U.S. at 328-329; *see Bakke*, 438 U.S. at 312 (the "'essential freedoms' of a university" include deciding "'who may be admitted to study'" (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring))).

To ensure that race is used no more than necessary to further that compelling interest, however, the Court requires a searching inquiry into "whether the use of race is narrowly tailored to achieve [a] university's permissible goals." *Fisher*, 136 S. Ct. at 2208. This case demonstrates how searching that inquiry is. The district court denied Harvard summary judgment and closely scrutinized its admissions practices at a three-week trial. Only after that extensive examination did the court find that Harvard's program survives strict scrutiny. Pet.App.266.

Second, SFFA contends that *Grutter*'s recognition of a compelling interest in the educational benefits of diversity was anomalous in light of other interests the Court previously rejected. Pet.23 (citing *Palmore* v. *Sidoti*, 466 U.S. 429 (1984), *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), and *Shaw* v. *Hunt*, 517

U.S. 899 (1996)). *Grutter* cited each of those cases, 539 U.S. at 333, 339-342, and the Court understood perfectly well that "all racial classifications" are subject to strict scrutiny, *id.* at 326. But the Court also recognized that its precedents do not forbid all consideration of race in all circumstances, as SFFA suggests here; instead, those cases require strict scrutiny, which "is not 'strict in theory, but fatal in fact.'" *Id.* at 326 (quoting *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237 (1995)).

Nothing in those cases conflicts with this Court's recognition that a university may consider race in a limited fashion in pursuit of the compelling educational benefits of diversity. *Shaw* nowhere endorsed SFFA's argument that the Constitution requires absolute colorblindness; to the contrary, it observed that "under certain circumstances, drawing racial distinctions is permissible where a governmental body is pursuing a 'compelling state interest.'" 517 U.S. at 908. Likewise, although *Wygant* rejected a layoff program that gave preferential treatment to minority teachers to "remedy societal discrimination by providing 'role models' for minority schoolchildren," 476 U.S. at 272, 274-276 (plurality opinion), Justice O'Connor, concurring, specifically noted that the insufficiently compelling "goal of providing 'role models' … should not be confused with the very different goal of promoting racial diversity among the faculty." *Id.* at 288 n.*. Finally, in *Palmore*, the Court invalidated the consideration of race in custody decisions because the existence of private "racial and ethnic prejudices" was the sole factor driving the determination, 466 U.S. at 433-434. That is readily distinguishable from *Grutter*, which upheld an admissions program that—like Harvard's—considered race only as

a plus and only as one of many factors in a contextual, whole-person review of every applicant.

Third, SFFA argues that *Grutter* "flouts basic equal-protection principles" because it assumes a university can discern applicants' views and experiences based solely on their race. Pet.23. *Grutter* nowhere suggests that all individuals of a certain race will bring the same perspective to college campuses. *Grutter* recognizes that, because race still affects many individuals' lived experiences, students may have perspectives that are influenced by their racial identities and reflected in their applications, 539 U.S. at 333—a point underscored by the testimony of students and alumni in this case, C.A.J.A.2546:23-2551:2; C.A.J.A.2614:3-2616:15; C.A.J.A.2619:24-2624:3. And *Grutter* recognizes that universities can help break down racial stereotypes and challenge modes of thinking by emphasizing both inter-*and* intra-racial diversity—because students from any given racial background may have very different experiences or perspectives than a stereotype would suggest. 539 U.S. at 330, 333.

Fourth, SFFA contends (Pet.22-23) that *Grutter* is inconsistent with *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In *Brown*, this Court recognized the educational and societal importance of bringing together students of different races, and it invalidated racial classifications that excluded students from educational opportunities solely on account of their race. 347 U.S. at 493-494. *Bakke*, *Grutter*, and *Fisher* are true to *Brown*'s principles, emphasizing the educational and societal benefits of assembling diverse student bodies and prohibiting rigid racial classifications, such as quotas, that do not treat students as individuals and instead exclude them from educational opportunities based solely on their race. *Bakke*, 438 U.S. at 317-318;

Grutter, 539 U.S. at 334. Admissions programs, like Harvard's, that expand rather than constrict educational opportunities do nothing of the sort.

2. SFFA argues that *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), and *Schuette* v. *Coalition to Defend Affirmative Action, Integration & BAMN*, 572 U.S. 291 (2014), have eroded *Grutter*'s foundations. Pet.26. Neither insinuated that *Grutter* was wrongly decided.

The *Parents Involved* plurality, in fact, invoked *Grutter*'s core principles to invalidate school-assignment plans that considered students' race in a mechanical fashion to ensure that the "white" and "nonwhite" composition of K-12 schools fell within specified ranges. 551 U.S. at 712-715, 722-725. The plurality noted that, in contrast to the flexible and contextual admissions program upheld in *Grutter*, the school-assignment plans did not consider race "as part of a broader effort to [ensure students'] 'exposure to widely diverse people, cultures, ideas, and viewpoints'"; instead, the plans considered race to achieve racial balance. *Id.* at 722-723. Moreover, while "[t]he entire gist of the analysis in *Grutter* was that the admissions program at issue … focused on each applicant as an individual, and not simply as a member of a particular racial group," the school-assignment plans considered race in a rigid fashion, did not consider other ways in which students might contribute to a school's diversity, and in some circumstances treated race as "determinative standing alone." *Id.* at 722-723. Justice Kennedy's concurrence likewise contrasted the case with the consideration of race upheld in *Grutter*, stressing that the plans considered race in a "mechanical" fashion. *Id.* at 793. Neither the plurality nor the concurrence suggested *Grutter* was wrongly decided.

Schuette had even less to do with *Grutter*'s doctrinal underpinnings. Although the case involved a Michigan constitutional amendment prohibiting race-conscious admissions at public universities, the legal issues before the Court related to the political-process doctrine and voters' ability to relocate the locus of political authority over issues affecting racial minorities, 572 U.S. at 300-301, not the "the constitutionality, or the merits, of race-conscious admissions policies in higher education," *id.* at 300 (plurality opinion).

3. SFFA argues that *Grutter* has "no support in the Fourteenth Amendment's 'historical meaning.'" Pet.22. That Amendment, SFFA says, forbids any consideration of race in government decision-making. *Id.* But this Court has rejected that proposition and repeatedly held that decisionmakers may consider race as long as the consideration is narrowly tailored to serve a compelling interest, *see, e.g.*, *Adarand*, 515 U.S. at 235.

Moreover, SFFA's distorted historical submission is unsound. Congress rejected alternative versions of the Amendment mandating complete colorblindness, *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866), and enacted explicitly race-conscious laws contemporaneous with the proposal and ratification of the Amendment, *see, e.g.*, Act of Mar. 3, 1869, ch. 122, 15 Stat. 301, 302 (appropriating money for payments to African-American soldiers and sailors).

4. Finally, SFFA claims that *Bakke* and *Grutter* "depart[] so far from our basic ideals" that they have not "become part of our national culture" and should not stand. Pet.33.[9] But a basic ideal of our Nation is to

[9] SFFA's claim that "no one believes in *Grutter*," Pet.28, blatantly mischaracterizes an article written by the University of Michigan's President and ignores the support *Grutter* has received

create a society that is free of racial discrimination and harmful stereotypes and that respects and values our diverse population in every respect. *See Grutter*, 539 U.S. at 331-332; *Parents Involved*, 552 U.S. at 782, 797 (Kennedy, J., concurring). While the Nation has not always lived up to that promise, it retains a "historic commitment to creating an integrated society," *Parents Involved*, 552 U.S. at 797 (Kennedy, J., concurring), and a deep belief that education plays a critical role in preparing individuals to be good citizens in a pluralistic democracy, *Brown*, 347 U.S. at 493. *Bakke* and *Grutter* do not "depart[]" from these foundational ideals and historic commitment; they further them. It is no surprise, therefore, that a majority of Americans, including Asian Americans, support programs that promote diversity on college campuses—support that has grown since *Grutter*.[10]

SFFA also argues that *Grutter* is suspect because it "treats underrepresented minorities … as *instruments* to provide educational benefits for other, mostly white students." Pet.24. That, too, is untrue. Students of all races reap the benefits of diversity, as does society at large. The evidence in this case underscores the point; Harvard's expert on the benefits of diversity testified that cross-racial interactions benefit all students and society as a whole, C.A.J.A.2760:21-2761:19; C.A.J.A.2805:9-2806:15, and students who self-

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from, among others, members of this Court, universities of all types, the business community, and the military.

[10] *See, e.g.*, Norman, *Americans' Support for Affirmative Action Programs Rises*, GALLUP (Feb. 27, 2019); PEW Research Center, *Growing share views affirmative action programs positively* (Oct. 4, 2018); Asian American Voter Survey (National) (2020) (70% of Asian-Americans favor affirmative action programs in higher education).

identified at trial as Chicana, Chinese-American, and Black testified about the importance diversity at Harvard had on their educational experiences, C.A.J.A.2551:3-2553:4; C.A.J.A.2569:14-2572:8; C.A.J.A.2612:12-2616:15. In any event, SFFA defaulted on this point, because it declined to put on any evidence contesting the benefits of diversity. *See supra* p. 25.

SFFA argues that the consideration of race is "poisonous" and is "'delay[ing] the time when race will become … truly irrelevant.'" Pet.32. The benefits that flow from diversity, however, help foster the tolerance, acceptance, and understanding that will eventually obviate the need for limited consideration of race. *See Grutter*, 539 U.S. at 330-332. Endorsing SFFA's view at this moment in our Nation's history—when the need to cultivate greater tolerance, acceptance and understanding is particularly acute—would be a tragic mistake.

Grutter, of course, noted that the need for race-conscious admissions programs should eventually end, predicting that by 2028 race-neutral alternatives would be able to serve universities' educational interests. *Grutter*, 539 U.S. at 343. But this Court was not so naïve as to suggest that progress is always linear or to impose a firm deadline. And prohibiting consideration of race now would lead to substantial declines in diversity on many campuses, with significant adverse effects on the educational experiences of all students. *See*, *e.g.*, Bleemer, *The impact of Proposition 209 and access-oriented UC admissions policies on underrepresented UC applications, enrollment, and long-run student outcomes* 7 (July 2020) (concluding ban on race-conscious admissions at University of California system caused 12% decline in underrepresented groups, includ-

ing 60% decline at Berkeley, and race-neutral measures have not proven as effective at achieving racially diverse student bodies). The evidence in this case underscores the point. Were Harvard to abandon all consideration of race, African-American and Hispanic enrollment would decline from 14% to 6% and 14% to 9%, respectively. Pet.App.210. And even if Harvard were to implement SFFA's preferred race-neutral alternative, it would still see steep declines in diversity, with adverse effects on Harvard's ability to create an environment that promotes cross-racial interactions and that lessens feelings of alienation and isolation. Pet.App.75-79; Pet.App.219-220.

What is more, it is SFFA's proposition—that universities must shut their eyes and stop their ears to consideration of applicants' racial or ethnic backgrounds—that would profoundly depreciate applicants' status as individuals. Forcing universities to ignore information applicants view as important to their identities, experiences, perspectives, and interests is fundamentally inconsistent with treating them as multifaceted individuals. It would also disregard applicants' freedom to "define and express their identity," *Obergefell* v. *Hodges*, 576 U.S. 644, 652 (2015), and inhibit universities' ability to cultivate the kinds of environments in which the richest exchange of ideas can flourish, *see Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy*, 354 U.S. at 250.

C. Overturning *Grutter* Would Have Significant Adverse Consequences

SFFA's failure to identify any recent developments that warrant revisiting *Grutter*, and its inability to show that *Grutter* was "egregiously" wrong, are reason

enough for the Court to decline review. But additional factors further counsel adherence to precedent.

Universities across the country have devoted significant resources over the past several decades to developing whole-person admissions programs designed to achieve the educational benefits of diversity in accordance with this Court's guidelines. Mandating race-blind admissions programs would undermine those universities' ability to engage in the kind of individualized review that yields a class that is both diverse and excellent. For example, colleges could be forced to give applicants and recommenders laundry lists of items they are prohibited from mentioning or to redact swaths of applicants' files. SFFA's suggestion (Pet.35) that universities could "keep their admissions systems exactly as they are" is disingenuous.

The public, too, has substantial reliance interests at stake. *Bakke* and *Grutter* sent a powerful signal that diversity is vital to preparing individuals to work and participate as citizens in our pluralistic democracy. *See Bakke*, 438 U.S. at 313; *Grutter*, 539 U.S. at 330-331. Americans have come to view diversity as integral to learning and to trust that the path to leadership is open to all. Overruling those cases at this time would undermine the public's faith in those foundational principles.

III. SFFA'S LACK OF STANDING ALSO COUNSELS AGAINST CERTIORARI

To reach the merits, the Court would have to assure itself that SFFA had standing to bring this suit. *See Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016). And though the lower courts disagreed, Pet.App.51; Pet.App.221, SFFA lacks associational standing under *Hunt* v. *Washington State Apple Advertising Commis-*

sion, 432 U.S. 333 (1977). SFFA is not a genuine membership organization—it is a vehicle designed to advance the policy preferences of its controlling founder, who has no personal stake in the controversy. And even if there were doubt on that score, it would be prudent for the Court to defer the sweeping claims SFFA presents until clearly raised by a party with a genuine stake in the outcome. *Hollingsworth* v. *Perry*, 570 U.S. 693, 704–705, (2013); *see DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) (declining to address merits of race-conscious admissions because plaintiff was about to graduate).

The associational standing doctrine permits genuine membership organizations to stand in the shoes of injured members because such organizations serve as embodiments of members and their interests. *See Hunt*, 432 U.S. at 344-345. SFFA identified "member" applicants who were rejected by Harvard or who might apply in the future as the basis of its standing, but neither these nor any other members control, direct, or finance the organization. SFFA's initial "members" had no role in selecting board members or officers and contributed virtually nothing monetarily. Pet.App.10; Pet.App.335-336; C.A.J.A.238:1-239:16; C.A.J.A.301. The organization—and this litigation—were instead controlled, directed, and financed by bystanders with no personal stake. Pet.App.10; C.A.J.A.324. Even after SFFA's minimal post-suit changes to its structure, its purported members still play no meaningful role. Pet.App.335-336; C.A.J.A.338-344; C.A.J.A.356; C.A.J.A.379; Resp.C.A.Br. 29-34.

This Court has often cautioned that "the judicial power requires … more for its invocation than important issues and able litigants." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 489 (1982). If an organi-

zation with such a tenuous relationship to its purported members can avail itself of the associational standing doctrine, the federal courts will become, in effect, "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Allen* v. *Wright*, 468 U.S. 737, 756 (1984). Given the issues at stake, the Court should, at a minimum, decide the issues only in a case that is actually driven by those with a concrete stake in the controversy.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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MAY 2021