No. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Harvard's opposition confirms that this case is worthy of the Court's review. Instead of focusing on the pertinent issue—whether certiorari should be granted—Harvard devotes nearly all its brief to arguing why it should ultimately prevail on the merits. That was a telling, but understandable choice. This case plainly raises important questions of federal law that merit consideration under Rule 10(c).

There thus should be no doubt about whether this is an appropriate case for review. If there were any, the avalanche of amici supporting SFFA, including roughly 350 different Asian-American organizations, would eliminate it. Harvard retreats to a defense on the merits at the certiorari stage because it has no viable alternative.

The only purported obstacle to certiorari that Harvard raises is a meritless standing argument buried at the back of its brief. From the start, Harvard has conceded that SFFA meets this Court's three-part test for associational standing. So it unsuccessfully asked the lower courts to invent a new "genuineness" test—one that SFFA would meet in any event. SFFA is a voluntary association with over 20,000 members, including the many rejected applicants on whose behalf it brought this action. Harvard's argument has been roundly rejected at every turn because it has no legal, logical, or factual foundation. There is no serious dispute over SFFA's Article III standing.

In the end, Harvard asks the Court to deny certiorari because, in its view, now would be the wrong

time to overrule *Grutter*. Harvard is wrong. In fact, it is not the first defender of racial preferences to make this plea. *See, e.g.*, Kansas Br. on Rearg. in *Brown v. Bd. of Educ.*, O.T. 1953, at 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal."); Appellees' Br. in *Briggs v. Elliott*, O.T. 1952, at 26-27 ("[I]t would be unwise in administrative practice ... to mix the two races in the same schools at the present time and under present conditions."); Resp'ts' Br. in *Sweatt v. Painter*, O.T. 1949, at 96 ("'[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions.'"). Pleas for more time didn't work in *Brown* and shouldn't work here. The perpetuation of racial discrimination is the problem, not the solution.

I. There is no obstacle to this Court's review.

Though standing is a threshold question of jurisdiction, Harvard treats it as an afterthought, devoting a mere two pages to it at the end of its brief. Harvard's standing argument has been rejected at every stage of this case. App.51-55, 222, 298-301, 332-49. For good reason. SFFA is a 501(c)(3) voluntary membership association dedicated to ending racial discrimination in college admissions, and it has members who were denied admission to Harvard and who stand ready and able to apply to transfer if Harvard stops racially discriminating. Pet.6. SFFA satisfies *Hunt*'s well-known, three-part test for associational standing: (1) its members have "standing to sue in their own right"; (2) this litigation is "germane to [SFFA's] purpose"; and

(3) this litigation does not "require[] the participation of individual members." App.345-46 (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). Harvard has never "dispute[d] that the three *Hunt* prerequisites are met." App.345, 52.

Harvard instead argues that SFFA lacks standing because it is not a "genuine" membership organization. BIO.37. Pointing to *Hunt*, Harvard insists that SFFA must show that its members "control, direct, [and] finance the organization" to some unspecified degree. BIO.37. But the lower courts correctly rejected this argument. App.52-55, 337-44; *see also SFFA v. Univ. of N.C.*, No. 14-cv-954, 2018 WL 4688388, at *3-6 (M.D.N.C. Sept. 29, 2018) (same). In *Hunt*, the Court examined whether apple growers and dealers had "indicia of membership" only because the state agency representing them was *not* a "voluntary membership organization." 432 U.S. at 342-44. If the agency had been a "traditional voluntary membership organization," the Court said it would have applied the ordinary three-part test. *Id.* Because SFFA "is, on its face, a traditional voluntary membership organization," the indicia-of-membership test is "inapplicable." App.53.

But SFFA has standing even under Harvard's test. The district court found that SFFA's members "voluntarily joined SFFA, support its mission, have been in contact with SFFA, [have] had the opportunity to express their views on the direction of this litigation," can "vote for one member of the Board of Directors," and can "voluntarily donate funds, in addition to the [membership fee], as a way of influencing the

organization." App.336, 348. These unchallenged findings confirm that SFFA "in a very real sense ... represents the [injured individuals] and provides the means by which they express their collective views and protect their collective interests." *Hunt*, 432 U.S. at 345.

Harvard asks the Court to "defer" resolving the questions presented here until it gets a case where the plaintiff is an individual student. BIO.37-38. But the Court routinely decides cases brought by membership associations. *E.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 713, 718-20 (2007). And Harvard knows that individuals' claims for prospective relief expire once they graduate, Pet.30, and that few young adults could endure the threats, insults, and harassment that Abigail Fisher suffered, Dkt.150-4. This case has reached the Court *only* because thousands of Asian-American students and families came together to "vindicat[e] interests that they share with others." *UAW v. Brock*, 477 U.S. 274, 290 (1986).

* * *

Harvard's standing argument is predictable. Universities who use racial preferences regularly invoke flawed standing arguments to try to avoid this Court's review. *See, e.g.,* Br. in Opp'n at 7-22, *Fisher v. Univ. of Tex.*, No. 11-345. But the Court has always rejected them. Harvard has discriminated against SFFA's student members every year since 2014—including just weeks ago when SFFA members were denied admission to Harvard's Class of 2025. SFFA, like countless

other membership organizations before it, has standing to vindicate their rights.

II. Whether *Grutter* should be overruled is a question of exceptional importance.

This is the ideal case for reconsidering *Grutter*. Indeed, Harvard boasts that it was "the model" for race-based admissions that the Court relied on in *Grutter*. BIO.15. Racial preferences began with Harvard, Pet.4, Brandeis-Center-Br.5-13; they were perpetuated by Harvard, *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 316-18 (1978) (Powell, J.); and they should end with Harvard.

Grutter is wrong in every way—historically, legally, factually, practically, and morally. Pet.22-32; States-Br.; Texas-Br.; Meese-Br.; Heriot/Kirsanow-Br.; SLF-Br.; NAS-Br.; Speech-First-Br.; PLF-Br.; HLL-Br.; CCJ-Br.; JW-Br.; CERF-Br.; Former-Officials-Br.; AACE-Br. Harvard disagrees. BIO.25-36. But the question before the Court is whether it should grant certiorari to *consider* overruling *Grutter*. Harvard cannot deny that the continued legality of race-based admissions is a momentous question that remains hotly disputed. *Grutter* was sharply divided 5-4, and the *Grutter* dissents, as well as the many amicus briefs supporting SFFA here, prove that this issue is anything but "settled." BIO.26.

If this Court grants certiorari, SFFA will not carry the "extra burden" of overturning a "statutory precedent." BIO.2. SFFA is asking the Court to overrule *Grutter*—a constitutional precedent with the "'weakest'" claim to stare decisis. *Knick v. Twp. of Scott*, 139

S. Ct. 2162, 2177 (2019). And this Court has held that Title VI imposes "the same standards that the Equal Protection Clause imposes upon state actors." App.235; *see Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (collecting cases). Harvard does not argue otherwise. Overruling *Grutter* thus would not affect the meaning of Title VI at all: the statute would continue to prohibit any use of race that is prohibited under the Equal Protection Clause.

Even if overruling *Grutter* somehow "changed" Title VI, no "superspecial justification" would be needed for that change. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015). By writing Title VI to incorporate the Equal Protection Clause, Congress fully intended Title VI to "be shaped by experience" and to "evolve with the [Court's] interpretation of the commands of the Constitution," *Bakke*, 438 U.S. at 337-40 (Brennan, J., concurring in the judgment in part and dissenting in part); *accord id.* at 286-87 (Powell, J.). Congress entrusted Title VI to the courts by tying its meaning to a body of judge-made law. Changes to that judge-made law thus "do not fall within [the] category of stringent statutory *stare decisis*." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 n.2 (2020) (Kavanaugh, J., concurring in part); *see Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

Harvard offers no good reason for retaining *Grutter*. Notwithstanding Harvard's misleading surveys about "affirmative action," BIO.33 & n.10, Americans of all races overwhelmingly support colorblind admissions, Hoover, *What Do Americans Think About Affirmative Action? It Depends on How You Ask*, Chron.

of Higher Educ. (2019), bit.ly/3yx5CHq. A strong majority of Americans (73%), including "majorities across racial and ethnic groups," believe that universities "should not consider race or ethnicity when making decisions about student admissions." Graf, *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, Pew (Feb. 25, 2019), pewrsr.ch/2Xq43K0. Nor does the "First Amendment," BIO.28, give Harvard the right to racially discriminate while accepting federal funds, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983); *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991).

Harvard is wrong to suggest that SFFA "defaulted" its right to challenge *Grutter*'s diversity rationale. BIO.34. Diversity wasn't "'on trial,'" BIO.26, in the district court because *Grutter* already held that diversity is a compelling interest and SFFA's request to overrule *Grutter* was dismissed at the pleading stage, Pet.8 n.2. Indeed, in seeking such relief, Harvard insisted that the benefits of diversity were "not appropriate topics for litigation in this case" and that SFFA must instead "ask the Supreme Court" to reconsider that question. Dkt.186 at 10-11. Harvard's waiver aside, this Court does not need any "evidence," BIO.34, to overturn *Grutter*. It can conclude, as a matter of *law*, that diversity is not a compelling interest, that genuine diversity can be achieved without racial preferences, and that racial preferences only hinder *Grutter*'s stated goals. Pet.23-25, 32, 35.

Harvard's brief confirms that universities do not believe in *Grutter* or its critical mass rationale. *See* Pet.28. Harvard does not deny that, for more than a

decade, it ignored *Grutter*'s instructions on race-neutral alternatives. Pet.7, 28. Harvard also admits that it doesn't accept *Grutter*'s 25-year deadline. BIO.34. And although this Court has consistently rejected the notion that race-based policies can be justified as a remedy for past societal discrimination, *see, e.g., Grutter*, 539 U.S. at 323-24, Harvard nonetheless invokes this illegitimate justification, *see* BIO.2, 36. Harvard plans to never eliminate racial preferences because it views race as "profoundly" important to students' "identities." BIO.35. That is why Harvard defends its race-based graduation ceremonies. BIO.27. Harvard "talk[s] the talk of multiculturalism and racial diversity in the courts but walk[s] the walk of tribalism and racial segregation on [its] campus[]." *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part).

That is also why Harvard has no legitimate "reliance interests" in maintaining *Grutter*. *Ramos*, 140 S. Ct. at 1414-15 (Kavanaugh, J., concurring in part). "[N]o one can reasonably rely on [a legal regime] that is non-existent in practice," and "no reliance interests can be affected by forthrightly acknowledging reality." *Edwards v. Vannoy*, 593 U.S. ___ (2021) (slip op. 15). And the only concrete reliance interest Harvard can identify is that universities have spent "significant resources" developing "whole-person admissions programs … in accordance with this Court's guidelines." BIO.36. This is not a "profound" or "substantial" reliance interest. BIO.25-26, 36; *see* Pet.35-36.

Contra Harvard, maintaining *Grutter* would be the "tragic" mistake "at this moment in our Nation's

history." BIO.34. *Grutter* has been disastrous, especially for Asian Americans. Pet.31, 38-39; Heriot/Kirsanow-Br.7. "Only Asian American children have to hide that they want to be violinists or pianists, or doctors or scientists. Only they are told that it might be fatal to their college admission chances to provide a photograph that reveals their race." AACE-Br.19-23; PLF-Br.12-15. These families know that when Harvard says race-based admissions "expand rather than constrict educational opportunities," it does not mean opportunities for Asian Americans. BIO.31. Racial discrimination inevitably begets racial discrimination. The only way to stop it is to stop it. *Parents Involved*, 551 U.S. at 748.

III. Whether the First Circuit misapplied strict scrutiny is a question of exceptional importance.

This Court should also review the second question presented. That there is no circuit split does not diminish the question's importance. Whether Harvard's admissions policy—the admitted "model" for all universities, BIO.15—withstands strict scrutiny is unquestionably an "important question of federal law." S. Ct. R. 10(c). Indeed, this Court *twice* reviewed whether the University of Texas's race-based admissions satisfied strict scrutiny, despite the lack of a circuit split and the case's "*sui generis*" facts. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016) (*Fisher II*); *Fisher v. Univ. of Tex.*, 570 U.S. 297, 307 (2013) (*Fisher I*).

SFFA does not ask the Court "'to review concurrent findings *of fact* by two courts below.'" *Exxon Co.,*

USA v. Sofec, Inc., 517 U.S. 830, 841 (1996) (emphasis added). The Court need not overturn a single factual finding to rule for SFFA. Indeed, the few factual issues that Harvard identifies are not really in dispute. For example, Harvard claims that it does not "automatically" award preferences to everyone who checks the box for Black or Hispanic. BIO.16. But it is undisputed that Harvard awards preferences to Black and Hispanic applicants "regardless of whether [they] write about that aspect of their backgrounds [in their applications] or otherwise indicate that [their race] is an important component of who they are." App.116. Simply put, the question presented is not *what* Harvard is doing; it's whether what Harvard admits to doing violates Title VI. *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 n.5 (2013).

The court of appeals did not simply apply "settled legal principles." BIO.17. It did not even "apply the correct standard of strict scrutiny." *Fisher I*, 570 U.S. at 303. Racial classifications are "'presumptively invalid and can be upheld only upon an extraordinary justification.'" *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993). Yet the First Circuit gave Harvard "the benefit of the doubt" at every turn. *United States v. Playboy Ent. Grp, Inc.*, 529 U.S. 803, 818 (2000). For example, the court of appeals found no discrimination against Asian Americans even though the district court admitted that it could not "clearly say what accounts for" the observed penalties and could not rule out "overt discrimination or implicit bias." App.265, 245. Strict scrutiny required the lower courts to resolve those omissions and doubts against Harvard. *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002).

Finally, Harvard's defenses of the First Circuit's application of strict scrutiny are unpersuasive and not a reason to deny certiorari.

Asian Discrimination. Harvard did not, as it claims, carry its "burden to disprove discrimination." BIO.18. It is undisputed that Harvard imposes statistically significant penalties on Asian Americans when assigning the "personal rating," that an "econometrically reasonable" model shows statistically significant penalties against Asian Americans in admissions decisions, and that the trial court could not rule out "overt discrimination or implicit bias" as the cause. Pet.15, 38. Under proper strict scrutiny, SFFA would have prevailed. Pet.37-39; *see* States-Br.25-30.

Racial Balancing. Harvard contends that *Grutter* allows universities to use "daily reports" to pay "some attention to numbers." BIO.22 (quoting *Grutter*, 539 U.S. at 336). But that is not how *Harvard* uses them. Pet.9. Harvard admits that if a certain racial group is "surprisingly or notably underrepresented" at the end of the process, the admissions office will "go back and look at those cases" to avoid a "dramatic drop-off" from the prior year. Pet.9. Nor are Harvard's "year-to-year" variations persuasive. BIO.21; *see* SLF-Br.8-9. Harvard's admissions ranges are far tighter than in *Grutter*, where four Justices found impermissible racial balancing. Pet.10, 40.

Using Race as a Mere "Plus" to Achieve Overall Diversity. Harvard's assertion that its racial tips are not "large" or "disproportionate to the magnitude of other tips," BIO.23, is belied by the undisputed evidence.

Race is "determinative" for hundreds of African-American and Hispanic applicants every year, and certain applicants receive racial tips of a magnitude comparable to the highest and rarest scores on the academic, extracurricular, and personal ratings. Pet.12. The weight Harvard puts on race has not changed since *Bakke*, JA.1016:18-1017:2, despite *Grutter*'s instruction that colleges must decrease their reliance on race over time. And Harvard is noticeably silent about its practice of blinding itself to applicants' religion, Pet.42, confirming that Harvard "does not put religion on the same footing as race [and] places race above everything else," Jewish-Coalition-Br.2. Harvard does not use race to pursue a "critical mass" of underrepresented minorities, JA.3710-11, even though that is the only end-goal this Court has ever approved.

Race-Neutral Alternatives. Harvard doesn't dispute that SFFA's race-neutral alternative would increase both socioeconomic diversity and overall racial diversity. Pet.17-19, 42-43. Instead, it rejects this alternative as not "workable" because it would require Harvard to abandon preferences for the wealthy and well-connected, cause African-American admits to fall slightly, and lead to negligible differences in certain admissions criteria. BIO.23-24. This is woefully insufficient, paling in comparison to the "abandon[ment]" of "academic selectivity" that *Grutter* discussed. 539 U.S. at 340; States-Br.10-13. Numerous universities across the nation have achieved workable race-neutral alternatives. States-Br.13-21. Harvard can too.

CONCLUSION

This Court should grant certiorari.

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