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

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

Just last month, the United States acknowledged that this case has "considerable importance" and presents questions with "far-reaching and long-lasting effects on universities across the nation." Memo. for the Solicitor General (Nov. 18, 2021), tmsnrt.rs/3EXYXJf. And below, the Government asked for Harvard to be held liable under Title VI because the university has "not respected" the governing law. CA1.U.S.Br. 4. Though the law requires narrow tailoring, "Harvard's use of race is hardly tailored at all." *Id.* at 2.

Yet the Government now asks this Court to deny review. The Government doesn't accept that *Grutter* is a temporary evil—as *Grutter* itself said—or argue that now is not the time to overrule it. The Government proclaims that *Grutter* is "correct," and seems to endorse Harvard's view that universities should never stop sorting high schoolers by race. SG-Br. 9, 16-17. It also frets about upsetting universities' "reliance" on the legality of race-based admissions generally, and Harvard's program specifically. *Id.* at 18-19. All while never once clearly stating that it believes Harvard is complying with the existing precedent, or explaining how universities could ever legitimately rely on *Grutter*. Pet. 32-36.

Gone from the Government's brief is the moral clarity that it offered in *Brown*. There the Government urged this Court to overrule *Plessy v. Ferguson*. It acknowledged that the end of separate-but-equal would upset reliance interests: Laws would be changed, schools closed, districts redrawn, teachers

and students transferred, and transportation rerouted. U.S.-*Brown*-Rearg.-Br. 170. The Government even noted that segregationist policies were adopted "upon the assumption, supported by previous declarations of this Court, that they were consistent with the requirements of the Fourteenth Amendment." U.S.-*Brown*-Br. 29.

The Government stood firm in *Brown*. It insisted that change was required because, in a country that professes "all men are created equal," each person must be treated "as an *American*, and not as a member of a particular group classified on the basis of race." *Id.* at 3. "The rule of *stare decisis*," the Government declared, must give way to "the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law." *Id.* at 26. Presaging this case, the Government added that no neutral principle of law "could support a constitutional distinction between universities on the one hand, and public elementary or high schools on the other." *Id.* at 19.

Like *Plessy*, *Grutter* is wrong, immoral, and unpersuasive, and has not aged well. Nor is it followed by Harvard or other universities. This Court should grant certiorari to reexamine *Grutter* and the admissions process that *Grutter* held up as a model. Because Harvard is where it all began, this case is not a "poor vehicle for reconsidering *Grutter*." SG-Br. 9. It is the perfect vehicle. As the Government concluded its brief in *Brown*, "'We know the way. We only need the Will.'" U.S.-*Brown*-Br. 32.

ARGUMENT

The Government's brief says nothing to diminish the obvious certworthiness of this case. It notes that the Government agrees with *Grutter*. And it reveals that, after a "change in Administrations," the Government now believes this case does not "warrant further review." SG-Br. 10. But while the Government nods to Harvard's vehicle arguments, the Government won't even say that those arguments are *correct*. And while the Government disclaims the need for further review, it won't even say that Harvard's program is *lawful* under existing precedent.

The Government's tepidness only undercuts Harvard's brief in opposition. As explained in SFFA's earlier briefs, this case is the quintessential example of an "important" matter that qualifies for review under this Court's Rule 10(c). This Court should grant certiorari on both questions presented.

I. *Grutter* is wrong, and this case against Harvard is an ideal vehicle to overrule it.

The Government contends that *Grutter* was "correct" as a matter of first principles. SG-Br. 9, 16-17. It was not. Pet. 22-26. The Government believes that *Grutter* does not satisfy the criteria for overruling precedent. SG-Br. 17-19. It does. Pet. 26-36; Reply 5-9. Regardless, these arguments go to the merits, not to whether this Court should grant certiorari. The Government offers no defense of *Grutter* that Harvard has not already raised and that SFFA has not already addressed.

Notably, though, the Government *omits* some of Harvard's defenses. The Government does not defend Harvard's argument that "colorblindness" is inconsistent with the original meaning of the Fourteenth Amendment. BIO 32. In *Brown*, the Government demonstrated that the Amendment's "primary and pervasive purpose" was to "abolish all legal distinctions based on race or color." U.S.-*Brown*-Rearg.-Br. 187. The Government also does not defend Harvard's strange suggestion that this Court somehow lacks a sufficient record to reconsider *Grutter*. BIO 26, 34.

The Government's tepidness extends not only to the merits of overruling *Grutter*, but also to whether this petition presents a good vehicle. The Government notes that Harvard has raised "questions" about justiciability. SG-Br. 20-21. And the Government describes this case as "odd" because it involves a private school and an allegation of Asian discrimination. SG-Br. 21-22. But these ruminations are not vehicle arguments; the Government doesn't argue that these issues will *actually* hinder this Court's review. They will not.

Justiciability. The Government claims that standing is "complicated" here because Harvard challenges whether SFFA is a genuine membership organization. SG-Br. 20-21. But standing can be challenged in every case; it does not become a reason to deny certiorari unless the plaintiff likely lacks it. Here, the Government *agrees* that SFFA has standing: It argued below that SFFA was entitled to judgment on the merits, and it won't even say now that Harvard's standing argument has merit. Every court to consider Harvard's argu-

ment has rejected it, including most recently the Western District of Texas. *See* Reply 2-3; *SFFA v. Univ. of Tex. at Austin*, 2021 WL 3145667, at *4-7 (W.D. Tex. July 26). This Court will reject it too, adding Harvard's challenge to a long list of losing standing arguments in affirmative-action cases. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-20 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 260-68 (2003); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (op. of Powell, J.); Br. for Respt's 17-24, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (U.S. Oct. 26, 2015).

Even less persuasive is the Government's weak suggestion of mootness. The Government claims that "it is unclear from the existing record" whether SFFA still has members with standing. SG-Br. 20. Harvard didn't raise this concern in its brief in opposition, for good reason. Throughout this litigation, SFFA has had members who were denied admission to Harvard and who stand ready and able to apply to transfer if Harvard stops using race—including members who were just "denied admission to Harvard's Class of 2025." Reply 4. If certiorari is granted, SFFA will lodge any necessary materials to that effect under this Court's Rule 32.3, as the petitioner did in *Parents Involved*. *See* 551 U.S. at 718.

The upshot of the Government's position is that racial preferences should be adjudicated only in cases involving individuals, not associations. SG-Br. 20-21. But an association is simply a "medium through which

its individual members" act. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 459 (1958). Associations have played a key role in challenging unlawful racial preferences, including in the *Brown* litigation. *E.g.*, *Parents Involved*, 551 U.S. at 713; *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 659 (1993); *see* Kluger, *Simple Justice* 515-20 (2004) (describing the role of the association Consolidated Parents Group, Inc. in organizing what became *Bolling v. Sharpe*). If this case had been brought by an individual student in 2014, then the claim for prospective relief would likely be moot. *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). The remaining claim for retrospective damages would artificially narrow this Court's review. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2209-10 (2016). And the fate of *Grutter* would turn on the views of one student, rather than an association representing a broad coalition of over 20,000 members. That this case was brought by an association makes it a stronger vehicle, not a weaker one.

Private vs. Public. The Government finds it "odd" that this Court would reconsider *Grutter* in a case involving a private university, where the Equal Protection Clause does not directly apply. SG-Br. 21. Of course, SFFA asks this Court to also grant certiorari in its case against the University of North Carolina, a public school. *See* Pet. 11, *SFFA v. Univ. of N.C.*, No. 21-707 (U.S. Nov. 11, 2021). But even looking at this case alone, there's nothing odd about reconsidering *Grutter* in a case against Harvard. Harvard is not any private institution. Its admissions program, as the

Government concedes, was *Grutter*'s "benchmark" for how to use race under both Title VI and the Equal Protection Clause. SG-Br. 19. Harvard was the benchmark based solely on untested, self-serving statements in an amicus brief about how its admissions process worked. If that benchmark is broken, then so is the precedent. Given Harvard's outsized role in this Court's precedent, there's nothing odd about reconsidering that precedent in light of the real factual record that SFFA has compiled in this litigation. It would be odd not to.

Apart from calling it "odd," the Government does not identify anything about Harvard's status as a private institution that would alter this Court's review. The Government says this Court will have to "adjudicate the parties' debate" about whether overruling *Grutter* implicates "the 'enhanced' version of *stare decisis* that applies in statutory cases." SG-Br. 21. But there's no real debate, which is why the Government doesn't actually endorse Harvard's argument. Rather, the Government agrees with SFFA that existing precedent reads Title VI and the Equal Protection Clause to be "the same." SG-Br. 21. Overruling *Grutter* wouldn't require the Court to change that interpretation of Title VI. *See* Reply 5-6. At least one university agrees. *See* UNC-BIO 24 n.5, *SFFA v. Univ. of N.C.*, No. 21-707 (U.S. Dec. 20, 2021) ("disagree[ing] with the Solicitor General's suggestion that it would be 'odd' to reconsider … *Grutter* … in a case arising under only Title VI").

Asian Discrimination. The Government claims it would be "anomalous" to reconsider *Grutter* in a case

that alleges intentional discrimination against Asian Americans. SG-Br. 22. That kind of discrimination does not implicate *Grutter*, the Government says, because *Grutter* already prohibits it. But Harvard was *Grutter*'s "benchmark" for how to use race. SG-Br. 19. If Harvard is using race illegally, then that conclusion should undermine the entire regime. *See* Pet. 28-29.

More importantly, it is *Grutter* that encourages elite universities like Harvard to discriminate against Asian Americans in the first place. *Grutter* praised Harvard's holistic admissions process, without acknowledging that Harvard adopted that process to discriminate against Jewish applicants. Pet. 4-5. Still today, *Grutter* encourages universities to use race as part of a subjective process that tries to obtain certain levels of racial representation—a recipe for quotas, racial balancing, and stereotyping (both conscious and unconscious). Pet. 31; Reply 9. The primary victims are now Asian Americans, who are told to appear "less Asian" on their college applications and who suffer from higher rates of anxiety, depression, and suicide. Pet. 31; AACE-Br. 19-23.

This Court cannot responsibly evaluate *Grutter* without acknowledging that the decision is being used to oppress a historically disadvantaged minority in favor of other races—including whites. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1417 (2020) (Kavanaugh, J., concurring in part). The proponents of race-based admissions might prefer to sweep the suffering of Asian Americans under the rug. But their suffering is why overruling *Grutter* is so imperative.

To be clear, the key question is whether *Grutter* should be overruled—not *Bakke*, *Fisher I*, or *Fisher II*. *Bakke* was a fractured decision with no majority opinion. While five Justices agreed that the medical school could give some "consideration to race," no majority agreed on why, how, or what test to apply. *Bakke*, 438 U.S. at 272. This Court granted certiorari in *Grutter* precisely because *Bakke* had not settled the legality of race-based admissions. 539 U.S. at 322-23. The Government recognized that fact at the time. *See* U.S.-*Grutter*-Br. 12 n.4 ("The courts of appeals disagree as to whether any of the opinions in *Bakke* represents binding precedent.").

As for *Fisher*, that litigation did not reaffirm *Grutter* because the plaintiff in those cases never asked the Court to overrule *Grutter*. Pet. 27 n.3. The Government seems to be suggesting that, when this Court overrules a precedent, it must separately consider whether to overrule every case that ever *applied* that precedent. The Court doesn't do that. *E.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448, 2460 (2018) (overruling *Abood*, not the two intervening decisions that applied it); *Pearson v. Callahan*, 555 U.S. 223, 235-36 (2009) (overruling *Saucier*, not the intervening decisions that applied its sequencing rule). Even if overruling *Grutter* suggests that *Fisher* was wrongly decided, that necessary side effect carries no weight in the stare decisis analysis. *Citizens United v. FEC*, 558 U.S. 310, 376-77 (2010) (Roberts, C.J., concurring).

II. Harvard is violating existing precedent, and the First Circuit's misapplications of strict scrutiny warrant review.

The Government chose to participate in this litigation in both the district court and the First Circuit. After reviewing the parties' evidence and arguments, the Government concluded that Harvard was violating Title VI. It determined that "race infiltrates Harvard's admissions process at essentially every stage," that Harvard "accords significant weight to race," and that Harvard's stated goals and actual results reveal a scheme of precise racial balancing. CA1.U.S.Br. 11-22. The Government also determined that, even ignoring the parties' statistical disputes, it was obvious that Harvard imposes "a racial penalty on Asian Americans." *Id.* at 23-26. The district court "cited no legal authority for disregarding [this] penalty," and its decision to give Harvard every benefit of the doubt got strict scrutiny "backward." *Id.* at 26-28.

The Government's brief to this Court does not clearly abandon its analysis below, let alone explain what was wrong with it. Its brief simply quotes the lower courts' decisions. *See* SG-Br. 10-14. And the most the brief will say is that the Government now believes those decisions do not "warrant further review." *Id.* at 10.

The Government is mistaken. The First Circuit's departures from strict scrutiny present important legal questions that warrant this Court's review. These questions are not factbound. *See* Pet. 43-44. But even if they were, reviewing Harvard's compliance with

strict scrutiny is no less certworthy than reviewing Michigan's compliance in *Grutter* and *Gratz* or Texas's compliance in *Fisher I* and *Fisher II*. Reply 9. It is much more certworthy, given Harvard's special status in the caselaw.

Granting certiorari would not require this Court "to revisit the [district court's] factual determinations." SG-Br. 15. The parties do not have a factual dispute about the costs and benefits of Harvard's race-neutral alternatives; they have a legal dispute about whether strict scrutiny requires Harvard to accept them. Pet. 42-43; Reply 12. The parties do not have a factual dispute about the effect of race in Harvard's admissions process; they have a legal dispute about whether that effect is too large to satisfy strict scrutiny. Pet. 41-42; Reply 11-12. The parties do not have a factual dispute about Harvard's use of race or its racial results; they have a legal dispute about whether those uses and results constitute illegal racial balancing. Pet. 39-41; Reply 11. And while the parties dispute the extent that Harvard penalizes Asian Americans, the district court agreed that Asian-American applicants suffer real penalties that cannot be explained. Pet. 19; Reply 11. When the court nevertheless ruled for Harvard based on its own extra-record speculation and Harvard's self-serving denials, it committed *legal* error. It misapplied strict scrutiny. Pet. 37-39; Reply 10-11.

The Government ultimately pivots and argues that, even if these questions are purely legal, this Court typically does not grant certiorari to review the proper application of settled law. SG-Br. 16. But the

First Circuit weakened strict scrutiny in novel ways that exceed prior cases. *See* Pet. 43-44. And the Government admits that SFFA's claim of Asian discrimination makes this case "very different" from "*Fisher*, *Grutter*, *Gratz*, and *Bakke*." SG-Br. 22.

In any event, this case does not turn on the proper application of settled law any more than the *Fisher* cases. This Court twice granted certiorari in those cases, likely because it understands the importance of specifying what strict scrutiny requires in this area. *Fisher* ultimately did not provide much guidance; but this case will, given Harvard's status as the "benchmark" and "point of reference" for other universities. SG-Br. 18-19. If Harvard is violating strict scrutiny, then countless other schools are too. A close review of Harvard's admissions process would provide invaluable guidance to universities about the legal constraints on using race. And it would provide invaluable information to this Court as it considers whether *Grutter* should be overruled. Pet. 36-37; Reply 9.

CONCLUSION

This Court should grant certiorari.

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