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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Harvard used to boast that it was this Court's "model" for how to use race. *E.g.*, BIO.15. It no longer makes that point. Harvard *was* the model; it just never deserved to be. Once the "Harvard Plan" was challenged in court, litigation revealed that Harvard uses race as a proxy for character, equates race with winning a national award, micromanages tight racial ranges, never considered race neutrality, makes no plans to stop using race, and more. If the Court knew how universities would abuse the limited license it was granting them in 2003, *Grutter* would have come out the other way.

Harvard insists that race is "part of who [applicants] are," that race "'still matters'" in America, and that ignoring race ignores "reality." Harv.-Br.2, 29, 20. *Plessy* agreed. *See* 163 U.S. 537, 543-44 (1896) (stressing that racial distinctions will "always exist" in America and insisting that the Fourteenth Amendment "could not have been intended to abolish distinctions based on color"). Of course, Americans sometimes treat each other differently based on race. But Harvard should not be perpetuating that "'unfortunat[e]'" reality. Harv.-Br.29. Harvard should be leading by example. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality).

Grutter "betrayed our commitment to 'equality before the law.'" *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2265 (2022). It's time to fix *Grutter*'s mistake, including its misplaced faith in Harvard.

ARGUMENT

Harvard correctly drops its challenge to SFFA's standing. On the questions presented, *Grutter* should be overruled. One key reason is that Harvard—*Grutter*'s model—never followed the law.

I. SFFA has standing.

In a one-sentence footnote, Harvard "reiterates" its challenge to SFFA's standing. Harv.-Br.20 n.3. SFFA reiterates its responses. *See* SFFA-Cert-Reply.2-5; SFFA-Supp-Cert-Br.4-6. Moreover, Harvard's failure to brief this argument is fatal. While standing cannot be forfeited, factual disputes underlying standing can be. *Workman v. UPS*, 234 F.3d 998, 999-1000 (7th Cir. 2000). Harvard thus concedes the finding below that SFFA is a genuine, traditional membership association. Pet.App.51-55, 335-49. That finding means SFFA has standing even under Harvard's indicia-of-membership test—which, as every court has held, doesn't apply. *SFFA v. Univ. of Tex. at Austin*, 37 F.4th 1078, 1085 & n.8 (5th Cir. 2022) (collecting cases).

II. *Grutter* should be overruled.

Harvard summarizes *Grutter*, but fails to defend its indefensible reasoning. That decision remains egregiously wrong, harmful, and ripe to be overruled.

A. *Grutter* is grievously wrong.

Grutter is "more than just wrong"; it stands on "exceptionally weak grounds." *Dobbs*, 142 S.Ct. at 2266. To rehabilitate it, Harvard tries to raise the standard

for overruling precedent, offers shaky history, misreads *Brown*, and halfheartedly defends the diversity rationale.

1. Though Harvard spends its entire brief discussing constitutional history and law, it insists that the Court should apply the statutory version of stare decisis. Harv.-Br.21. Harvard is wrong.

Constitutional stare decisis applies because *Grutter* was a constitutional precedent. Both it and *Gratz* resolved the constitutional issues *before* the statutory ones. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). Though that sequence seems backward, it made sense given the Court's longstanding view that Title VI incorporates the Fourteenth Amendment. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.22 (2003). No party asks this Court to overrule that interpretation. *See Ramos v. Louisiana*, 140 S.Ct. 1390, 1415 n.4 (2020) (Kavanaugh, J., concurring in part) ("the Court typically does not overrule a precedent unless a party requests overruling"). Overruling *Grutter* will change the underlying law that Title VI incorporates, but this Court's interpretation of Title VI will stay the same: The statute will remain coextensive with the Fourteenth Amendment. For example, if this Court overruled *Grutter* in SFFA's case against UNC (where constitutional stare decisis concededly applies), its decision would necessarily ban race-based admissions at Harvard too. So no heightened stare decisis applies here either. *See id.* at 1413 n.2 (no heightened stare decisis for "common-law statutes"); *Swift & Co. v.*

Wickham, 382 U.S. 111, 133 (1965) (Douglas, J., dissenting) (same for statutes with "constitutional overtones").

That Congress could have amended Title VI after *Grutter* doesn't raise the standard. Congressional inaction doesn't signal approval of *Grutter*; it signals only that Congress takes Title VI's "statute-follows-the-Constitution principle seriously." Sen.Rep.-Br.20. Because this Court has been "the front line of review," it would be improper to "ask Congress to address a false constitutional premise of this Court's own creation." *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2096 (2018). Punting on the constitutional question would also imply that these racial classifications are "in accord with our society's most basic compact." *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015). This Court should eliminate *Grutter* fully, "whether or not Congress can or will act in response." *Wayfair*, 138 S.Ct. at 2097.

2. Harvard's originalist arguments are wrong because, other than *Grutter*'s aberration, Title VI and the Fourteenth Amendment have always meant the same thing: no racial classifications in education. With respect to race, §1 of the Fourteenth Amendment was originally understood to make the law "what justice is represented to be"—"blind." *Appendix to the Pennsylvania Legislative Record* XCIX (1867) (Rep. Mann). Though Harvard cites an earlier draft that banned "discrimination" instead of guaranteeing "equal protection," Harv.-Br.23, Harvard cites nothing suggesting that the enacted language was meant to give States *more leeway* to use race. Representative

Stevens, who drafted the "discrimination" version, didn't see "any difference" between the two. U.S.-*Brown*-Rearg.-Br.43-44. With one exception: He and others feared that the "discrimination" version covered voting rights, which Congress instead addressed in §2 of the Fourteenth Amendment (and later in the Fifteenth Amendment). *See id.*; Rappaport, *Originalism and the Colorblind Constitution*, 89 Notre Dame L. Rev. 71, 127-28 (2013). But that debate suggests that, for the topics §1 *does* cover, Congress understood it to require colorblindness.

Harvard tries to muddy the constitutional text with a "strong record" of race-based laws, both "state and federal." Harv.-Br.25. But the federal laws aren't illuminating. Meese-Br.20-27. As for the state laws, Harvard's "strong record" consists of only two statutes: one from South Carolina and one from Kentucky. Harv.-Br.25. Harvard makes no claim that these laws were representative; in fact, colorblind statutes from the era are more prevalent. *E.g.*, Johnson, *The Development of State Legislation Concerning the Free Negro* 64, 69, 70, 74, 75, 80, 129 (New York 1918).

Even assuming Harvard's two statutes were racial classifications, they don't help Harvard. The Constitution "does not bar"—and sometimes "requires"—the government to "remedy past state-sponsored discrimination." *Parents Involved*, 551 U.S. at 773 n.19 (Thomas, J., concurring). So "[r]ace-based government measures during the 1860s and 1870s to remedy *state-enforced slavery*" could have survived strict scrutiny. *Id.* Both of Harvard's examples were likely remedial toward former slaves. *E.g.*, 1871 Ky. Acts ch. 1340, §7,

at 274 (authorizing relief for "colored persons who are residents of Mercer [C]ounty" who own no property, have no assets, and cannot work); 1870 S.C. Acts No. 279, pream., at 386 (documenting "persist[ent]" racial discrimination by state-licensed entities). But the 1870s are over. Surely Harvard doesn't think that, *today*, States could distribute benefits based on race. *See Vitolo v. Guzman*, 999 F.3d 353, 360-64 (6th Cir. 2021).

Harvard's curated list of post-ratification statutes is also grossly incomplete. The Fourteenth Amendment was ratified in 1868 primarily to shore up the Civil Rights Act of 1866. *McDonald v. City of Chicago*, 561 U.S. 742, 775 (2010). That all-important Act imposed strict colorblindness. *Jam v. Int'l Fin. Corp.*, 139 S.Ct. 759, 768 (2019). Harvard also omits the most "race conscious" laws from this era: de jure segregation. While Harvard stresses federal funding for integrated schools, it ignores that the government ran segregated schools in D.C. until 1954. And while Harvard stresses federal benefits for black soldiers, it ignores that the military was segregated until 1948. More glaringly, Harvard omits that the South greeted the Fourteenth Amendment with decades of Jim Crow. Harvard never explains why overt racial discrimination doesn't inform the original meaning, but ambiguously "race conscious" benefits do. *See* Rappaport 113-15. The answer is that none of the postbellum statutes are controlling because, for decades, this country largely disregarded the Fourteenth Amendment's text. But that "text," not "'post-ratification … laws that are *inconsistent*'" with it, "controls." *N.Y.*

State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S.Ct. 2111, 2137 (2022).

Harvard's originalist arguments are also "halfway originalism" at best. *Janus v. AFSCME*, 138 S.Ct. 2448, 2470 (2018). Harvard urges this Court to "begi[n] with 'the language of the instrument,'" but ignores that the instrument here is Title VI. Harv.-Br.21. For example, Harvard notes that an earlier draft of the Fourteenth Amendment would have "prohibit[ed] all distinctions based on race," Harv.-Br.23, but misses that Title VI uses that *exact* language, *compare* Harv.-Br.23 ("'No discrimination shall be made … because of race'"), *with* 42 U.S.C. §2000d ("No person … shall, on the ground of race … be subjected to discrimination"). To be sure, SFFA agrees that Title VI incorporates the Fourteenth Amendment. But Harvard's arguments elide tough originalist questions, like whether Title VI incorporates the Fourteenth Amendment as it was understood in 1868 (when it was ratified) or in 1964 (when Title VI was enacted). *See Bruen*, 142 S.Ct. at 2163 (Barrett, J., concurring). Strong evidence suggests that in 1964—on the heels of *Brown*—Congress understood the Fourteenth Amendment to ban all racial classifications in education. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 415-16 (1978) (Stevens, J., dissenting).

3. Harvard ultimately doesn't want this case decided on originalist grounds; it defends all existing precedent. SFFA thus must show only that *Grutter* violated the precedents that came before it. It did—most critically *Brown*, which Title VI codified and extended to all federal-funding recipients.

The "position that prevailed" in *Brown* was that the law denies "'any authority … to use race as a factor in affording educational opportunities.'" *Parents Involved*, 551 U.S. at 747 (plurality). Harvard accuses *Parents Involved* of quoting the petitioner's oral argument out of context. Harv.-Br.27-28. But there was "no ambiguity" in his "'fundamental contention.'" *Parents Involved*, 551 U.S. at 747 (plurality). That same contention appeared throughout the briefs. *Id.*; *id.* at 772-73 & n.20 (Thomas, J., concurring). And that same contention was adopted in this Court's opinions. *Id.* at 746-47 (plurality).

Harvard's alternative reading of *Brown* is unpersuasive. Harvard claims that segregation was illegal because it made race "'*the* factor,'" not merely "'a factor.'" Harv.-Br.28. Of course, race is also "*the* factor'" for many at Harvard. Br.24-25. But Harvard confuses *Brown*'s rule with its application. Segregation was illegal because it violated the rule against "'according differential *treatment*'" based on race. *Parents Involved*, 551 U.S. at 747 (plurality) (emphasis added). Surely Harvard doesn't think that *Brown* would have been different if southern schools had used a holistic policy that covertly reduced the number of black students (as Harvard did with Jewish students). The rule of racial neutrality is "offended by 'sophisticated as well as simple-minded modes of discrimination.'" *United States v. Fordice*, 505 U.S. 717, 729 (1992). SFFA doesn't "trivialize" segregation by comparing *Grutter* to *Plessy*. *Cf.* U.S.-Br.6. Harvard and the United States trivialize *Brown* by trying to confine that foundational precedent to its facts.

Harvard also reads *Brown* as resting on the "importance of education," contending that its race-based admissions seek to include rather than "'exclud[e].'" Harv.-Br.27. But the importance of education is the point: These crucial opportunities cannot turn on so irrelevant and dangerous a factor as race. *Parents Involved*, 551 U.S. at 746-47 (plurality). Harvard's contention that its racial classifications seek to "include" is irrelevant, myopic, and subjective. *Id.* at 741-42. Asian-Americans aren't "included." And Harvard ignores that *it* is the one excluding underrepresented minorities—mainly by preferencing the overwhelmingly white children of donors, alumni, and professors. Br.16-17. Harvard cannot use racial preferences for minorities to offset its subsidies for whites. *See Grutter*, 539 U.S. at 368-70 (Thomas, J., concurring in part and dissenting in part).

4. No educational benefits could justify departing from *Brown*, especially not *Grutter*'s imaginary benefits. When *Grutter* discussed the educational benefits of diversity, it meant a diversity of viewpoints. Br.65. Yet Harvard concedes that race says nothing about an applicant's views, experiences, or background. Harv.-Br.33. Common sense, plus this Court's precedents, agree. Br.52-53. But if race is no better than random, why use race?

Neither Harvard nor *Grutter* fills this logical gap with evidence. The district court in *Grutter* found that the "connection between race and viewpoint" is "tenuous, at best." 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001). Witnesses "generally conceded" that viewpoints expressed by minority students "might equally

have been expressed by non-minority students." *Id.* at 849-50. A former dean of Michigan Law agreed, noting the faculty's consensus that "racial diversity is not responsible for generating ideas" in class even on questions of race. *Id.* at 850. The studies in *Grutter* and Harvard's brief are equally unimpressive. They concede that racial diversity "does not directly contribute to student development." Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. Educ. Res. 4, 5-6 (2010). So these studies proceed to measure something other than racial diversity, like taking an ethnic-studies class or socializing with minorities. *Grutter v. Bollinger*, 288 F.3d 732, 804 (6th Cir. 2002) (en banc) (Boggs, J., dissenting). Even on those variables, the studies aren't causal, and they rely on highly unscientific surveys. *Id.*; Killenbecks-Br.17-19.[1]

Indeed, nether Harvard nor *Grutter* has *any* evidence measuring the marginal difference in educational benefits between race-based admissions and race-neutral alternatives. Br.55; Harv.-Br.36. Harvard has race-neutral alternatives now, and those alternatives will perform even better if *Grutter* is overruled and no university can use race. Br.70-71. Harvard also has no answer to the historic success of HBCUs, which provide world-class educations despite

[1] Harvard pretends that SFFA conceded the benefits of diversity below. But diversity wasn't "'on trial,'" Harv.-Br.11, because Harvard got SFFA's challenge dismissed on the pleadings, stressing that the benefits of diversity were "not appropriate topics for litigation" because only this Court can overrule *Grutter*. Dkt.186 at 10-11. Regardless, whether diversity is a compelling justification for using race is legal, not factual.

lacking what Harvard would consider an adequate level of racial diversity. Okla-Br.17-19. Indeed, the top-ranked HBC in the country is 0.62% white, 0.41% Asian, and 0% Hispanic. *Fact Book (2021-2022)* 9, Spellman College, bit.ly/3caJ3lx.

Harvard's arguments also assume that it's diverse now. But it's not socioeconomically, geographically, or politically. *See* JA756, 787-91, 1775; Burstein, *The Graduating Class of 2022 by the Numbers*, Harvard Crimson, bit.ly/3wL3jl5. Nor does Harvard know whether it's racially diverse. Harvard tracks only which box its students check. Br.14; Harv.-Br.33. Students could lie. Bernstein-Br.17-18; Br.78-79. Students' self-classifications are unpredictable in this multiracial era. Bernstein-Br.19-20. And the boxes themselves are arbitrary—they lump totally different cultures together in categories that were never designed to achieve educational benefits. Bernstein-Br.5-16. All Harvard can really say is that race-neutral alternatives will change Harvard's racial statistics. But maintaining specific racial numbers has never been a legitimate interest. *Parents Involved*, 551 U.S. at 729-32.

While *Grutter* also cited an amicus brief touting the importance of race to the military, 539 U.S. at 331, the United States opposed race-based admissions in *Grutter*, U.S.-*Grutter*-Br.13-18. Those amici were wrong, General Olson explained, to suggest that "black soldiers will only fight for black officers" or that "race neutral means" wouldn't work "in the academies." O.A.Tr.19. The United States now supports

Harvard, but it offers no evidence about how the military academies use race, what race-neutral alternatives they've considered, why those alternatives wouldn't work, or why its contrary position in *Grutter* was wrong. As for the ROTC, the quality of those officers won't meaningfully change because race-neutral alternatives still achieve diversity. Even today, the United States can't explain how officers who attend race-blind universities (say, Texas A&M) are inferior to officers who attend race-based universities (say, Texas). The military did just fine during the *forty years* that Harvard and other elite colleges banned ROTC from their campuses. Hayden, *ROTC Marches Through the Ivy League*, Atlantic (May 26, 2011), bit.ly/3TcXczi.

If anything, overruling *Grutter* will improve national security and military readiness. More than 600 veterans—who have "fought at every enlisted and officer level"—know that using race "erodes trust, undermines unit cohesion, and compromises military effectiveness." VFM-Br.1-3, 1a-49a, 22-27. And according to a Harvard study of junior officers, making assignments or promotions on anything other than merit risks "driving qualified officers out of the service." VFM-Br.23-24 & n.47. The United States' contrary view thus seems to speak not for the military, but for a minority of military elites. The United States had it right the first time in *Grutter*.

B. *Grutter* has spawned significant negative consequences.

Grutter's problems extend beyond its poor reasoning. The decision is rooted in racism, unworkable, and destabilizing.

1. Despite exalting Harvard's holistic admissions as a model, *Grutter* "spent … no time grappling with … [its] racist origins." *Ramos*, 140 S.Ct. at 1405. Harvard never disputes that it pioneered holistic admissions to reduce the percentage of Jewish students. *See* Br.12-13; Brandeis-Br.5-25. In a footnote, Harvard dismisses this antisemitic history as irrelevant to "'the claims at issue'" in the district court. Harv.-Br.1. But whether to overrule *Grutter* wasn't "at issue" in the district court. It is now, and "how can that analysis proceed to ignore the very functions [holistic admissions] were adopted to serve?" *Ramos*, 140 S.Ct. at 1401 n.44.

Though the primary victims are now Asian Americans, holistic admissions have "continuing racially discriminatory effects." *Id.* at 1419 (Kavanaugh, J., concurring in part). It is *undisputed* that Harvard systematically gives Asian-American applicants lower personal ratings. Br.15-16, 19, 25-28, 30-32. And it is *undisputed* that Asian-American admissions would increase if Harvard abandoned race. CA1.JA6021-22, 6121. The 370 Asian-American groups who support SFFA witness this discrimination firsthand. AACE-Br.2, 11-19. Their "perception"—which is grounded in the experiences of countless students and families—matters. *Ramos*, 140 S.Ct. at 1418 (Kavanaugh, J.,

concurring in part). Harvard calls anti-Asian discrimination a "bogeyman" and tells Asian Americans to trust Harvard's econometric models rather than their experiences. Harv.-Br.38, 32. But "stare decisis isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Ramos*, 140 S.Ct. at 1405.

2. *Grutter* also "score[s] poorly on the workability scale." *Dobbs*, 142 S.Ct. at 2272. Consider the "hopelessly contradictory" things that *Grutter* makes Harvard say. Okla.-Br.29. While race is just "one factor among many" and never "'outcome determinative,'" Harv.-Br.15, 37; CA1.JA2125, Harvard can't stop using race because black enrollment will plummet, Harv.-Br.53. While Harvard evaluates everyone "as a unique individual," Harv.-Br.6, it automatically assumes that race "is an important component of who [applicants] are," Pet.App.116. And while Asian-Americans' stellar academics aren't that important to Harvard, Harv.-Br.44, race-neutral alternatives are unworkable if the admitted class will "have lower SAT and ACT scores," JA1318. The list goes on. Okla.-Br. 26-32.

3. To navigate *Grutter*'s contradictions, this Court had to compromise strict scrutiny. When a precedent requires "engineer[ing] exceptions to longstanding background rules," the precedent "has failed to deliver the principled and intelligible development of the law that stare decisis purports to secure." *Dobbs*, 142 S.Ct. at 2276 (cleaned up). *Grutter* does that in several ways.

From the jump, *Grutter*'s application of strict scrutiny was influenced by the university's claimed intentions. *See* 539 U.S. at 327 (stressing that "[c]ontext matters" and that "[n]ot every decision influenced by race is equally objectionable"). That framing contradicted the "many" precedents rejecting that "motives affect the strict scrutiny analysis." *Parents Involved*, 551 U.S. at 741 (plurality). And *Grutter*'s forays into "our Nation's struggle with racial inequality" ventured back into *Bakke*'s rejected interest of "remedying societal discrimination." 539 U.S. at 339, 323.

From there, *Grutter* papered over many problems by giving "deference" to the university, presuming "good faith," and taking the university "at its word." *Id*. at 328-29, 343; *see id.* at 387 (Kennedy, J., dissenting). This "deference" was "'fundamentally at odds'" with precedent. *Parents Involved*, 551 U.S. at 744 (plurality). Though Harvard admits that *Fisher I* walked this deference back, Harvard elsewhere defends *Grutter*'s assertion that universities deserve "'special'" deference under the "'First Amendment.'" Harv.-Br.30. Of course, Harvard cites no actual First Amendment doctrine. Even assuming that the public university in *Grutter* had First Amendment rights and that a ban on racial preferences wouldn't survive strict scrutiny, *but see Schuette v. BAMN*, 572 U.S. 291, 314 (2014) (op. of Kennedy, J.), Title VI is a condition on federal funds. Harvard has no more First Amendment right to have Congress subsidize its racial discrimination than did Bob Jones. Br.55-56.

Perhaps least defensible is how this Court compromised the rule that race must be "necessary to

achieve the asserted educational benefits." *Parents Involved*, 551 U.S. at 727 (plurality). Apparently, race need only play a "minor" role in achieving the stated benefits. *Fisher II*, 579 U.S. at 384. And apparently, facially neutral alternatives can be rejected if they aim to "boost minority enrollment." *Id.* at 386. To Harvard's credit, it doesn't defend these excesses of the *Grutter* regime. Harv.-Br.36. But to *Grutter*'s discredit, these holdings will bind the lower courts and harm students until *Grutter* is overruled.

C. *Grutter* has generated no legitimate reliance interests.

Harvard's reliance arguments boil down to an interest in not changing current admissions policies. But *Brown* rejected the legitimacy of that interest. *Grutter* cannot support it. And despite two decades' time, the supposed benefits behind that interest haven't materialized.

1. Reliance interests matter little when overruling cases that bless racial classifications. "[S]tare decisis accommodates only legitimate reliance interests," *Wayfair*, 138 S.Ct. at 2098 (cleaned up), and no one has a legitimate interest in racial classifications, Br.66. Though Harvard and the United States fail to even cite it, *Dobbs* recently held that *Plessy* should have been overruled immediately because it "betrayed our commitment to 'equality before the law.'" 142 S.Ct. at 2265. Yet overruling *Plessy*, as the *Brown* Court understood, forced seismic changes, required prolonged litigation, and sparked violent resistance. Next to that baseline, overruling *Grutter* is nothing.

The required changes to universities' admissions policies would be miniscule. If universities were following *Grutter*, they would be "us[ing] race as one of many factors." 539 U.S. at 339. It isn't burdensome to *stop* considering a single factor. Harvard already blinds itself to applicants' religion, for example. JA734-43. True, admissions officers will need to be trained. But that training ("don't use race") will be far simpler than the training that admissions officers need under *Grutter* ("use race, but not so much that it's the defining feature, but enough to secure the educational benefits of diversity, but not so much that you're seeking a specific number"). Because *Grutter* "does not provide 'a clear or easily applicable standard'" to start with, Harvard's reliance arguments are "'misplaced.'" *Janus*, 138 S.Ct. at 2484.

Universities can still conduct "holistic" admissions without race. Harvard already does it for the thousands of applicants who don't list a race. JA1329; *accord* UNC.JA382. And many universities do it across the board, including some of Harvard's amici. *See* UM-Br.17; UC-Br.17-18. If universities can weigh a "multitude" of considerations under holistic admissions, Harvard asks, then why must they "uniquely exclude race"? Harv.-Br.3. The answer is that race "is not just another competing consideration." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "Classifying citizens by race" both "threatens special harms," *Shaw v. Reno*, 509 U.S. 630, 649-50 (1993), and "implicates unique historical, constitutional, and institutional concerns," *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 868 (2017). Title VI says nothing about discrimination based on "home

state," "family circumstances," or "academic interests." *Cf.* Harv.-Br.2, 5. It says a lot about discrimination based on "race." 42 U.S.C. §2000d.

2. In fact, universities *aren't* relying on *Grutter*. No one in higher education believes *Grutter*'s diversity rationale. Br.59-60; *accord Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) ("'diversity is merely the current rationale of convenience'"). Harvard never denies the charge. And its amici prove the point. The Universities of Michigan and California ask this Court to sustain *Grutter*, even though overruling it would *improve* diversity on their campuses (because they could better compete with universities who currently use race). *See* Br.70-71; UM-Br.26. Harvard's other amici lob desperate alternatives to *Grutter*—from international law, HRA-Br.4-28; to religious liberty, Georgetown-Br.29-35; to structural racism, WBA-Br.3. These arguments reveal that people are really "relying" on universities getting to use race indefinitely. But that reliance is neither legitimate nor rooted in *Grutter*.

Harvard, especially, isn't relying on *Grutter*. Harvard has no "firm deadline" for ending race-based admissions, and it says *Grutter*'s 25-year deadline was "not a warning" but a "hope." Harv.-Br.52, 41. Harvard also agrees that it doesn't pursue "critical mass." Br.15; Harv.-Br.52. While critical mass was itself "imprecise," *Fisher II*, 579 U.S. at 402 (Alito, J., dissenting), Harvard's resort to even *less* precise goals is no solution. And though Harvard has considered layering some race-neutral alternatives on top of race-based admissions, Harv.-Br.54, it never once considered

abandoning race until SFFA sued it, more than a decade after *Grutter*. Br.18. Harvard ignored *Grutter*'s basic requirements despite Harvard's status as the national model for race-based admissions. Putting Harvard on a pedestal is yet another way that *Grutter* erred.

3. Finally, any reliance on *Grutter* has expired because *Grutter* "rested in part on a predictive judgment" that "has not borne out." *Dobbs*, 142 S.Ct. at 2308 (Kavanaugh, J., concurring). In "25 years," *Grutter* "expect[ed]" that race-based admissions would end: test scores would improve, the educational benefits of diversity would materialize, and racial preferences would wane. 539 U.S. at 342-43. Yet viewpoint diversity has declined, and race-based decisionmaking has skyrocketed. Br.54. While correlation isn't causation, Harv.-Br.39, *Grutter* seems to be exacerbating these trends, *see* Br.64-65. Even if it isn't, why keep a precedent that allows universities to use the most odious classification without real evidence of progress? The "experience" over the last two decades, at a minimum, "undermines [*Grutter*'s] precedential force." *Dobbs*, 142 S.Ct. at 2308-09 (Kavanaugh, J., concurring).

This Court doesn't need more time to pronounce *Grutter* a legal, practical, and moral failure. It took this Court 58 years to overrule *Plessy*. All agree now that each year of *Plessy* was a mistake. *Dobbs*, 142 S.Ct. at 2265. "It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history." *Peña-Rodriguez*, 137 S.Ct. at 871. *Grutter* should be overruled today.

II. Harvard fails strict scrutiny.

Only by misapplying strict scrutiny could a court conclude that Harvard isn't penalizing Asian Americans, overemphasizing race, racially balancing its classes, and rejecting workable race-neutral alternatives. These violations certainly make Harvard liable under existing law. They also prove that the law itself rests on a lie.

A. Harvard penalizes Asian Americans.

Harvard effectively concedes that its whole admissions program is subject to strict scrutiny, including whether it penalizes Asian Americans. Harv.-Br.42 n.6; Pet.App.237 n.56. And Harvard never disputes that its burden is even higher because it kept the same admissions policy without reconciling its prejudiced past. Br.12-14, 75.

Harvard can't satisfy this scrutiny because it still can't answer the key question: Why does Harvard assign Asian-American applicants significantly lower personal ratings? Either Asian Americans really do lack "integrity," "courage," "kindness," and "empathy." Pet.App.125. Or Harvard is discriminating against them. Because the first conclusion is racist and false, the second must be true.

The "statistical effect of Asian-American identity on the personal rating" isn't "'relatively minor.'" Harv.-Br.45. Being Asian American causes "a 17.6 percent decrease in the probability of receiving a 2 or higher." CA1.JA2257:1-2260:13, 6012-13. And the dis-

trict court found the relationship "statistically significant and negative." Pet.App.190. It's thus "quite unlikely" that Asian Americans received lower personal ratings for nonracial reasons. CA1.JA2860:12-2861:7; Pet.App.85-86 n.37. Nor is there any evidence that Asian Americans deserve these scores due to poor recommendations from guidance counselors and teachers. These recommendations are captured in the school-support ratings, and the models still show anti-Asian discrimination with the school-support ratings included. CA1.JA2263:23-2264:17, 3230:5-21. And while those ratings penalize Asian-Americans too, they are assigned *by Harvard*, and the notion that the penalty is coming from the high schools is unproven speculation. Pet.App.126.

Harvard bizarrely asserts that the models don't "show any penalty against Asian-American applicants in admissions outcomes" when the personal rating is excluded. Harv.-Br.43, 45. But Harvard's own expert admitted that *every* model—including his—shows a statistically significant admissions penalty when the personal rating is excluded. JA895, 1064-65, 1797-1802; Pet.App.203. Nor is a 0.34% average marginal effect "small." Harv.-Br.43-44. Because the chance of admission to Harvard is less than 6%, Pet.App.170, the penalty's effect is substantial, CA1.JA2279:16-23; Economists.Br.16, 22-23. And the average marginal effect is higher—not lower—for the "'subset of applicants who have a realistic chance of being admitted,'" Harv.-Br.43, as Harvard knows, *see* CA1.JA3047:22-3048:14, 6111-12; Dkt.421-252 at 61-62, ¶¶125-26; Dkt.421-253 at 71, ¶141. That the penalty was absent for the 2% of Asian-American applicants receiving

ALDC preferences, Pet.App.119 n.16, means nothing. Harvard has no "license to discriminate ... merely because [it] favorably treats other members of the [same] group." *Connecticut v. Teal*, 457 U.S. 440, 455 (1982).

The district court didn't "rejec[t]" the models excluding the personal rating as "'no[t] credible.'" Harv.-Br.45-46. It found them "econometrically reasonable" and "probative." Pet.App.199. What isn't credible is including the personal rating, which is obviously affected by race, in a model trying to measure the effect of race. *See* Br.30-32. While the district court credited Harvard's testimony denying discrimination, that evidence carries little weight, especially under strict scrutiny. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342-43 n.24 (1977).

Though Harvard's year-by-year analysis is misleading, CA1.JA2304:21-2307:6; Economists.Br.23, Harvard still imposed a statistically significant admissions penalty against Asian Americans for the Class of 2018—the year before SFFA sued, JA1061-64. One year of discrimination is enough. *See J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 142 n.13 (1994). Nor must SFFA prove "'animus,'" Harv.-Br.32, 44, because Harvard explicitly uses race, *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Regardless, evidence of intent abounds: Harvard ignored warnings from its own research division and from the Office of Civil Rights, significantly boosted its Asian-American admits the first cycle after SFFA sued, and modified its reading procedures to blunt the very allegations SFFA raised. Br.17-20, 26-30.

Harvard's insinuation that Asian Americans have only "high test scores and GPA[s]" and lack "multiple dimensions" is unfortunate—and wrong. Harv.-Br.44-45. Asian Americans are substantially stronger on the academic, extracurricular, and alumni ratings and score similarly to whites on nearly every other metric. Br.72-73. Only their "personal qualities"—as stereotyped by Harvard—hold them back. Br.73.

B. Harvard engages in racial balancing.

Harvard implies that it "'never [gives] race any more or less weight'" based on the one-pagers. Harv.-Br.48. But Harvard doesn't review its "ethnic stats" so frequently—often daily—for no reason. Br.21-22; JA831-43, 1777. Harvard will "go back" and change certain admissions decisions to avoid a "dramatic drop-off" by race. JA747-79; Pet.App.136-37.

Nor are one-pagers used only to identify "marked declines." Harv.-Br.48. If that were true, Harvard wouldn't use one-pagers during the final "lopping" process when it selects the last few applicants. Pet.App.133; JA861-62; Br.22. The only reason to consult one-pagers and "lop lists"—both of which prominently identify race—is to fine-tune the class's racial makeup. Br.22.

Harvard's balancing is confirmed by the "manifest steadiness" of its numbers. CA1-U.S.-Br.8-9. Indeed, Harvard doesn't deny that its underrepresented-minority admissions are far steadier than the law school's in *Grutter*. Br.76; CA1-U.S.-Br.14. This steadiness is particularly stark for black students, whose

share of the class was *always* between 10.0% and 11.7% in the ten years before SFFA sued. JA1770.

Harvard's alternative metrics don't help. Harvard concedes that the share of black admissions varies *at most* "to the same degree" as African-American applicants. Harv.-Br.48 n.7. And Harvard's use of percentages "arbitrarily magnif[ies]" the fluctuations. CA1-U.S.-Br.14-15; SLF-Br.8-9. Yet even using percentages, the year-to-year fluctuation for blacks was no more than 6% in ten of the last twelve measured years. JA1767.

Although Harvard chides SFFA for lacking expert testimony on racial balancing, Harvard's expert merely created simple charts and provided high-level observations. JA1818-20; CA1.JA3054:16-3060:6. If rigorous statistical analysis were needed, it was *Harvard's* burden to provide it. Harvard's one-pagers, lop lists, and steady numbers speak for themselves.

C. Harvard does not use race as a mere plus to achieve overall diversity.

Harvard's use of race looks nothing like "holistic" or "individualized" review. Because 35,000 applicants compete for 1,600 spots, Pet.App.11, it isn't surprising that many are rejected for reasons other than race. Yet for the "serious candidates," Harv.-Br.49, Harvard's preferences are enormous, Br.79-80. Harvard never disputes that "the boost for being African American is comparable to getting a 1 on the academic, extracurricular, or personal rating"—the rarest achievements in an applicant pool full of rare achievers. Br.79-80. Nor does race have a "'limited'" effect, Harv.-

Br.51, when it's "determinative" for at least "45% of all admitted African-American and Hispanic applicants," Pet.App.209-10.

Whether religious "tips are needed for religious diversity to thrive," Harv.-Br.51 n.8, misses the point. "For many religious students, faith is the most important aspect of their lives." JCRL-Br.5-15; Br.78. Yet Harvard's treatment of religion versus race is striking. Applicants get tips merely for checking a racial box while Harvard *deletes* religious information and won't consider it unless the applicant writes about it. JA734-43. And while Harvard monitors race obsessively, it happily lets the religious chips fall where they may. So much for race being "one factor among many." Harv.-Br.49.

D. Harvard has workable race-neutral alternatives.

Below, Harvard insisted that SFFA's race-neutral alternatives were unworkable because Harvard needs legacy, donor, and employee preferences to "cultivate alumni and donor support" and "attract top faculty and staff." Harv.-CA1-Br.79; Br.34. Harvard wisely abandons that argument here. Harv.-Br.52-54. Catering to the rich and well-connected isn't a compelling interest, and parent-based tips don't "contribute to student-body diversity." Harv.-Br.50.

Admitting slightly fewer applicants with an academic rating of 1 or 2 is not unworkable. Indeed, a substantial portion of the admitted class lacks these ratings now. JA1775. And because there are so few applicants with an academic rating of 1, Harvard

could tweak Simulation D to admit them all. JA776-78.

Nor did Harvard show that the decline in African-American admits (from 14% to 10%, *see* JA1775, 1778, 1783) is significant in any educational way. In *Grutter*, Harvard bragged that its black admissions fluctuate up to "13%," from "as low as 8.76% and as high as 9.92%." Harvard-*Grutter*-Br.27. Harvard now insists that "go[ing] backwards," JA822-23, will "'increase feelings of isolation and alienation,'" Harv.-Br.53. But that argument isn't about what's necessary to achieve educational benefits. It's an admission that Harvard has quotas. Indeed, the Smith Committee conceded that Simulation D would "achieve a significant degree of racial diversity." JA1320; *see also* JA767-69.

In the end, Harvard's tepid promise to "continu[e] study[ing] whether consideration of race is necessary" shouldn't be taken seriously. Harv.-Br.54. Harvard has used the same "holistic" admissions system for nearly a century. Br.12-14. Despite this Court's precedents, Harvard *never* examined race-neutral alternatives until it was sued in 2014. Br.18. And even then, Harvard merely rubber-stamped its own expert's findings in a report that its litigation attorneys drafted. Br.18. The availability of race-neutral alternatives mean that Harvard must change. But Harvard's failure to take its legal obligations seriously confirms that the law must change too.

CONCLUSION

This Court should reverse.

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