No. 21-1046

In the Supreme Court of the United States

FACULTY, ALUMNI, AND STUDENTS OPPOSED TO RACIAL PREFERENCES, PETITIONER

v.

NEW YORK UNIVERSITY, RESPONDENT

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

REPLY BRIEF FOR PETITIONER

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The Second Circuit's decision to dismiss FASORP's complaint for failing to *allege* the elements of Article III standing grievously misapplies the rules of notice pleading—and summary reversal is warranted to prevent courts from using contrived pleading defects to shield a university's blatant violations of federal civil-rights laws from court challenge. The university, like the court of appeals, defends the ruling below by invoking *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009), which has nothing to do with the requirements for *pleading* associational standing, and concerns only the *evidence* that an associational plaintiff must produce to survive summary judgment. The Court should reject this deliberate

conflation of summary-judgment and pleading requirements and summarily reverse the decision below.

In the alternative, the Court should hold this petition for *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, where the parties are contesting the standing of associations to challenge university affirmative-action programs.

I. THE COURT SHOULD SUMMARILY REVERSE THE SECOND CIRCUIT'S RULING

The university makes two arguments against summary reversal. First, it contends that summary reversal would be inappropriate even if one believes that the court of appeals erred in dismissing the complaint. *See* Br. in Opp. at 15–20. Second, the university offers a full-throated defense of the court of appeals' ruling, insisting that the court correctly applied *Summers* in dismissing FASORP's complaint for insufficient factual detail. *See* Br. in Opp. at 20–26. Neither of these arguments has merit, and neither argument undermines the case for summary reversal.

A. The Alleged Errors Are Appropriate Candidates For Summary Reversal

The university appears astonished that we would request summary reversal in the absence of an alleged circuit split. *See* Br. in Opp. at 1, 15. But this Court regularly deploys summary reversal when a lower court misapplies established law, and decisions that summarily reverse courts of appeals in the absence of a split in au-

thority are rendered every term.[1] When summary reversal is requested, the certworthiness of a petition does not turn on the presence or absence of a court conflict or the criteria listed in Rule 10(a)–(c), but on whether the petition presents an appropriate candidate for summary reversal under the practices of the Court. And this Court has not hesitated to summarily reverse lower-court decisions that misapply or disregard established rules and doctrines in habeas corpus,[2] in qualified immunity,[3] or in the law of pleading. *See, e.g.*, *Johnson v. City of Shelby*, 574 U.S. 10 (2014); *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007).

The errors alleged in the petition are appropriate candidates for summary reversal, as the Court needs only to apply the rules of notice pleading to the allegations of a complaint. *See* Pet. at 17–25; Pet. App. 42a–61a (reprinted text of first amended complaint). The inquiry is simple and straightforward. It does not involve factual disputes, and it does not even require the Court to examine or consider a factual record. The requested relief is less ambitious than the summary reversals that this Court so often grants in the habeas corpus or qualified-immunity context, which typically require the Court to delve into a factual record or apply the law to a particu-

1. *See, e.g.*, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (summarily reversing the Ninth Circuit's misapplication of qualified-immunity doctrine); *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (summarily reversing the Tenth Circuit's misapplication of qualified-immunity doctrine).
2. *See, e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405 (2021).
3. *See* note 1, *supra*.

lar set of facts. *See, e.g.*, *Dunn v. Reeves*, 141 S. Ct. 2405 (2021); cases cited in note 1, *supra*.

The university insists that Rule 10 requires "compelling reasons" before certiorari is granted, even when a petition is seeking summary reversal. *See* Br. in Opp. at 15 (quoting S. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.")). But the petition identified a compelling reason for certiorari: It claimed that the court of appeals had concocted a heightened-pleading requirement in an effort to shield universities from judicial scrutiny of their affirmative-action policies. *See* Pet. at 16 ("Summary reversal is especially warranted in this case, where a court of appeals has concocted a heightened-pleading requirement to shield a university from accusations of unlawful race and sex discrimination—accusations that, if proven, would establish a patent violation of federal civil-rights statutes."). That reason has become even more compelling now that this Court has granted certiorari to review whether affirmative action is permissible under the Equal Protections Clause or federal civil-rights laws. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 142 S. Ct. 895 (2022) (granting certiorari); *Students for Fair Admissions, Inc. v. University of North Carolina*, 142 S. Ct. 896 (2022) (same). If this Court is prepared to declare race and sex preferences unlawful or unconstitutional—or if there is any possibility that it might do so in the *Students for Fair Admissions* cases—then it cannot tolerate lower-court rulings that thwart judicial review of affirmative action by imposing

heightened pleading requirements on litigants who challenge these practices.

The university observes that this Court has never summarily reversed the dismissal of a complaint for failure to allege standing, even as it acknowledges that this Court has summarily reversed courts for improperly imposing heightened-pleading requirements and departing from the notice-pleading regime established in the rules of civil procedure. *See* Br. in Opp. at 17 ("FASORP cites just two cases in which this Court summarily reversed the dismissal of a complaint at the pleading stage—and neither involves standing."). But any request for summary reversal can be characterized as a first-of-its-kind—even when it falls within a category of cases in which this Court has previously granted summary reversal. Before *Dunn v. Reeves*, 141 S. Ct. 2405 (2021), for example, this Court had never summarily reversed a court of appeals for interpreting a state-court opinion as imposing a "categorical rule" that rejects ineffective-assistance-of-counsel claims whenever the prisoner failed to call and question trial counsel to explain its actions and reasoning. *See id.* at 2409–10; *id.* at 2412–13. But this Court had summarily reversed courts of appeals for improperly granting post-conviction habeas relief, and *Dunn* fit comfortably within that category of cases. FASORP's petition accuses the court of appeals of improperly imposing a heightened-pleading requirement—an accusation which has triggered summary reversals in the past. *See Johnson*, 574 U.S. 10; *Erickson*, 551 U.S. 89. That the previous cases involved issues other than standing does not affect the propriety of summary re-

versal here. Courts cannot impose heightened-pleading requirements outside the situations described in Rule 9(b),[4] and courts of appeals that attempt to impose heightened-pleading requirements on disfavored classes of litigants should expect a swift and certain reversal from this Court.

Finally, the university repeatedly points out that FASORP's complaint was dismissed "without prejudice,"[5] implying that this disposition would somehow allow FASORP to submit yet another amended complaint to the district court. But the court of appeals (and the district court) dismissed "without prejudice" because they held that FASORP failed to allege Article III standing, which requires a jurisdictional dismissal. Jurisdictional dismissals are always "without prejudice," because a court that lacks jurisdiction is powerless to dismiss a claim with prejudice or enter a judgment with res judicata effect. *See Hernandez v. Conriv Realty Associates*, 182 F.3d 121, 123 (2d Cir. 1999) ("[W]here a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice"); *id.* ("[I]t is our view that Article III deprives federal courts of the power to dismiss a case with prejudice where federal subject matter jurisdiction does not exist."); *see also Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004) (Easterbrook, J.) ("A suit dismissed for lack of jurisdiction cannot *also* be dismissed 'with prejudice'; that's a disposition on the

4. *See* Fed. R. Civ. P. 9(b) (requiring allegations of fraud and mistake to be pleaded with particularity).

5. Br. in Opp. at 1, 12, 14, 17, 20.

merits, which only a court with jurisdiction may render. 'No jurisdiction' and 'with prejudice' are mutually exclusive." (citation omitted)). By dismissing the complaint "without prejudice," the court of appeals was merely recognizing the jurisdictional nature of its dismissal; it was not giving FASORP another opportunity to amend its complaint on remand.

B. The Court Of Appeals Clearly And Demonstrably Erred In Dismissing FASORP's Complaint For Insufficient Factual Details

The complaint clearly and indisputably alleges that FASORP's members are suffering injury from the university's discriminatory practices,[6] and nothing more than an *allegation* of injury is needed to survive a motion to dismiss. The university repeats the court of appeals' error by invoking *Summers* and insisting that the requirements to survive a motion for summary judgment are also pleading requirements necessary to survive a motion to dismiss. *See* Br. in Opp. at 21–23. FASORP's complaint is not require to "identify"[7] its members that are suffering Article III injury; it needs only to allege that such members exist.

The university also claims that FASORP failed to allege that injury to its members was "certainly impending," or that its members faced a "substantial risk" of future injury. *See* Br. in Opp. at 22. But the complaint re-

6. *See* Pet. at 9–11; Pet. App. 48a–49a (¶¶ 33–34); *id.* at 51a–52a (¶¶ 42, 45).

7. Br. in Opp. at 21, 22.

peatedly alleges that FASORP's members are *certain* to face discriminatory treatment absent relief from the courts, and those allegations must be accepted as true at the motion-to-dismiss stage. App. 51a–52a (¶ 42) (alleging that some FASORP members "*will face discrimination* on account of their race, sex, sexual orientation, or gender identity unless the NYU Law Review is enjoined from enforcing its discriminatory article-selection policies." (emphasis added)); *id.* at App. 52a (¶ 45) (alleging that some FASORP members "*will face discrimination* on account of their race and sex unless New York University is enjoined from using race and sex preferences in its faculty hiring." (emphasis added)); *see also Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1927 (2019) ("Because this case comes to us on a motion to dismiss, we accept the allegations in the complaint as true.").

The university also cites *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and complains that FASORP alleged nothing more than "some day" intentions to submit articles or seek jobs at NYU. *See* Br. in Opp. at 23. But *Lujan*'s holding concerns the *evidence* needed to survive a motion for summary judgment; it has nothing to do with the rules for *pleading* Article III standing:

> [T]he affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any

> specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.

Lujan, 504 U.S. at 564. The required contents of an affidavit are not pleading requirements. And it is enough for a complaint to allege that FASORP's members will suffer discriminatory treatment when they submit their articles, without providing details regarding the precise time and place of their future article submissions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he pleading standard Rule 8 announces does not require detailed factual allegations" (citation and internal quotation marks omitted)); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations").[8] Finally, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), is inapposite because the complaint alleges that FASORP's members "will" face discrimination absent judicial relief;[9] there is nothing speculative or uncertain about these allegations of future injury.

II. AT THE VERY LEAST, THE COURT SHOULD HOLD THE PETITION FOR *STUDENTS FOR FAIR ADMISSIONS*

If the Court is unwilling to summarily reverse, then it should hold the petition for *Students for Fair Admis-*

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8. Indeed, FASORP's complaint would have sufficed it had merely alleged that its members were merely "likely" to submit articles or seek jobs from NYU "in the reasonably foreseeable future." *Carney v. Adams*, 141 S. Ct. 493, 500 (2020).

9. Pet. App. 51a–52a (¶¶ 42, 45).

sions, Inc. v. President and Fellows of Harvard College, No. 20-1199, and *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, No. 21-707, where the parties are disputing the standing of associations to challenge racial preferences at universities,[10] and it should GVR if the eventual ruling in *Students for Fair Admissions* weighs in on the associational-standing issue.

The Court granted certiorari in the *Students for Fair Admissions* cases on January 24, 2022—the same day that FASORP filed its petition for certiorari. Because the Court had not yet granted certiorari in those cases, FASORP did not request a hold for *Students for Fair Admissions* in its certiorari petition. The university appears to fault us for not anticipating these grants of certiorari and requesting a hold at the time we filed our petition,[11] but we do not have powers of divination.

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10. *See* Br. in Opp. at 36–38, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199; Reply Br. for Pet'r at 2–5, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199; Br. in Opp. at 36–38, *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707; Reply Br. for Pet'r at 4–7, *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707.

11. *See* Br. in Opp. at 26 n.6 ("FASORP does not request a hold—indeed, it does not reference the Harvard College case at all—in the Petition.").

CONCLUSION

The Court should grant the petition for writ of certiorari and summarily reverse the court of appeals' ruling.

Respectfully submitted.

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