No. 21-707

In The Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,
v.
UNIVERSITY OF NORTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI BEFORE JUDGMENT

JACK HOLTZMAN
SARAH LAWS
NORTH CAROLINA JUSTICE CENTER
224 South Dawson Street
Raleigh, NC 27601

DAMON HEWITT
JON GREENBAUM
DAVID HINOJOSA
Counsel of Record
GENEVIEVE BONADIES TORRES
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street, NW, Suite 900
Washington, DC 20005
(202) 662-8600
dhinojosa@lawyerscommittee.org

REED N. COLFAX
SOOHYUN CHOI
RELMAN COLFAX PLLC
1225 19th Street NW, Suite 600
Washington, DC 20036

Counsel for Respondents Cecilia Polanco, et al.

December 20, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. Whether this Court should grant the extraordinary relief requested and bypass review in the Fourth Circuit before judgment where the constitutionality of race-conscious holistic admissions practices was affirmed by this Court as recently as 2016 and there is no immediate need to revisit this issue or the fact-intensive issue of race-neutral alternatives raised by Petitioner?

PARTIES TO THE PROCEEDING

Petitioner is Students for Fair Admissions (SFFA). Petitioner was the plaintiff below.

Respondents are the University of North Carolina; the University of North Carolina at Chapel Hill; the University of North Carolina Board of Governors; John C. Fennebresque; W. Louis Bissette, Jr.; Joan Templeton Perry; Roger Aiken; Hannah D. Gage; Ann B. Goodnight; H. Frank Frainger; Peter D. Hans; Thomas J. Harrelson; Henry W. Hinton; James L. Holmes, Jr.; Rodney E. Hood; W. Marty Kotis, III; G. Leroy Lail; Scott Lampe; Steven B. Long; Joan G. Macneill; Mary Ann Maxwell; W. Edwin McMahan; W.G. Champion Mitchell; Hari H. Math; Anna Spangler Nelson; Alex Parker; R. Doyle Parrish; Therence O. Pickett; David M. Powers; Robert S. Rippy; Harry Leo Smith, Jr.; J. Craig Souza; George A. Sywassink; Richard F. Taylor; Raiford Trask, III; Phillip D. Walker; Laura I. Wiley; Thomas W. Ross; Carol L. Folt; James W. Dean, Jr.; and Stephen M. Farmer. These parties were defendants below.

Respondents also are Cecilia Polanco; Luis Acosta; Star Wingate-Bey; Laura Ornelas; Kevin Mills, on behalf of Q.M.; Angie Mills, on behalf of Q.M.; Christopher Jackson, on behalf of C.J.; Julia Nieves, on behalf of I.N.; Tamika Williams, on behalf of A.J.; Ramonia Jones, on behalf of R.J.; and Andrew

Brennen.[1] These parties were defendant-intervenors below.

[1] SFFA's petition for writ of certiorari before judgment misspells the names of Cecilia Polanco, Andrew Brennen, and Ramonia Jones and omits the initials of the minor children represented by Christopher Jackson and Ramonia Jones. *See* Pet.ii. Those errors are corrected here.

CORPORATE DISCLOSURE STATEMENT

Respondent Cecilia Polanco, et al., are a multiracial, multiethnic group of students and now alumni at the University of North Carolina at Chapel Hill, none of whom has a parent corporation and there is no publicly held corporation that owns 10% or more of any of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Students for Fair Admissions' (SFFA) (Petitioner) request for this Court to review the decision below before judgment in the Court of Appeals for the Fourth Circuit does not satisfy the demands for extraordinary relief under Supreme Court Rule 11. SFFA's petition is clouded with a series of arguments (i.e., "*Grutter* is grievously wrong" (Pet.14)) that go to the merits of the case but it fails to demonstrate how this case is of "such imperative public importance as to justify deviation from normal appellate practice" *and* "require[s] immediate determination in this Court." S. Ct. R. 11. The "drastic and extraordinary remedies" available under Rule 11 "should be used sparingly: 'only where appeal is a clearly inadequate remedy.'" Stephen Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 130 (2019). Because relief under Rule 11 is rarely granted and SFFA's petition fails to substantiate the need for intervention before judgment, Respondent-Students—a multiracial, multiethnic group of talented, ambitious students and now alumni, who intervened as defendants in the district court—urge this Court to deny the petition.

Indeed, the interests of stare decisis on the constitutionality of race-conscious admissions weigh in favor of adhering to ordinary procedures. For over forty years, this Court has recognized the unique missions of universities as the training grounds for

future leaders and has recognized that universities may pursue the educational benefits of diversity, including racial diversity, through race-conscious means that satisfy strict scrutiny. As late as 2016, this Court, in *Fisher v. University of Texas at Austin*, reviewed and affirmed the constitutionality of holistic admissions where race is only one of several other factors considered through an individualized process *after* remanding the case to the Fifth Circuit for further consideration. 136 S. Ct. 2198, 2207 (2016) (*Fisher II*). Here, too, the federal district court applied this Court's strict scrutiny analysis to the University of North Carolina's (UNC) holistic admissions program. After an eight-day trial that consisted of extensive fact and expert witness testimony and evidence from UNC and Respondent-Students—but only two expert witnesses called by SFFA—the court issued a 155-page opinion upholding UNC's race-conscious admissions. SFFA cites no reason why *Grutter v. Bollinger,* 539 U.S. 306 (2003) must be considered immediately, especially after this case has proceeded for over seven years.

This case is inapposite to the rare case in which the Court accepts certiorari review before judgment. SFFA avers that because this Court granted certiorari before judgment in *Gratz v. Bollinger*, 539 U.S. 244 (2003) to consider alongside *Grutter,* the Court should do the same here if the Court decides to take up SFFA's challenge to Harvard's race-conscious

admissions plan. But the *Grutter*/*Gratz* cases are clearly distinguishable. Those cases involved similar claims against programs at the same university (Michigan) with similar histories and similar admissions priorities; and the *Gratz* respondents did not oppose certiorari if this Court accepted review in *Grutter*. Here, UNC and Harvard involve different universities with different histories, missions, goals, admissions policies and procedures, and periodic review processes, among several other variances. In fact, SFFA brought several different claims against Harvard, including (unsuccessful) claims alleging that Harvard discriminated against Asian American students *vis-à-vis* white students, whereas here, SFFA did not raise that same claim on behalf of its white associational standing member. Its lone common claim between the two factually distinct cases is that *Grutter* should be overruled, but this Court typically does not take up cases before judgment even when other cases involving the same claims may be in the pipeline—especially in cases, like the present, where there are no grounds to forgo the normal appellate process.

The fact-intensive nature of this case, focused on UNC-specific information and evidence, also makes it an especially poor vehicle for granting certiorari before judgment on SFFA's race-neutral claim. The district court found that UNC had properly evaluated in good faith all available race-neutral

alternatives and validly determined that they would not work about as well and at tolerable administrative expense as UNC's race-conscious program. And the court examined all race-neutral alternatives proposed by SFFA and rejected those because they would force UNC to abandon holistic admissions altogether, directly undermine UNC's broad diversity goals, and lead to a drop in enrollment of underrepresented students of color. Such outcomes run contrary to this Court's well-settled precedent. Allowing this case to proceed through the normal process, as in *Fisher*, will allow the Fourth Circuit to more properly weigh SFFA's dispute with the factual underpinnings of the district court's ruling.

Because SFFA has not and cannot demonstrate any exigent circumstances, much less an issue of imperative public importance warranting resolution of this case on an emergency basis, this Court should deny SFFA's petition.

STATEMENT

A. Procedural Posture

SFFA filed this case in 2014, asserting three claims against UNC: 1) failure to use race merely as a "plus" factor in admissions decisions; 2) failure to employ available race-neutral alternatives capable of achieving student body diversity; and 3) employing an undergraduate admissions policy that uses race as a

factor in admissions. App.2. In 2015, SFFA and UNC agreed to a partial stay of the proceedings pending resolution of *Fisher II* in the Supreme Court. App.6. Following this Court's decision in 2016 upholding the University of Texas at Austin's (UT-Austin) race-conscious holistic admissions plan, the district court fully resumed the proceedings. In 2017, the district court granted Respondent-Students intervention as defendants. App.5-6. Respondent-Students are a racially and ethnically diverse group of historically underrepresented and marginalized students of color[2] who applied, attended, and/or recently graduated from UNC. App.4-5.

In November 2020, the court held an eight-day trial, receiving testimony and evidence from the parties, including testimony, declarations, and college applications from Respondent-Students. App.7. After thoroughly examining the evidence against this Court's strict scrutiny standards, the district court issued its 155-page opinion upholding UNC's race-conscious holistic admissions plan, concluding that UNC "met its burden of demonstrating that the University's undergraduate admissions program withstands strict scrutiny and is therefore constitutionally permissible." App.145. The court

[2] For purposes of this brief, "students of color" refers to students who identify with historically underrepresented and marginalized racial and ethnic groups, including Black, Hispanic/Latinx, and Native American students.

issued its Final Judgment on November 4, 2021 (App.252-53) and on November 6, 2021, SFFA filed its appeal to the Fourth Circuit Court of Appeals. D.C.Dkt.258. On November 11, 2021, SFFA filed the subject petition now pending asking this Court to review the district court's opinion rejecting its race-neutral claim and dismissing its claim seeking to overrule *Grutter*.

B. UNC's Holistic Admissions

UNC remains a highly selective university, with approximately 43,500 applicants vying for only 4,200 freshman seats. App.23. Its application process allows highly trained admission officials to review a wide portfolio of student experiences and qualifications, including but not limited to the Common Application, essay questions, high school transcripts, standardized test scores, and letters of recommendation. App.24. Race is one of more than forty criteria considered by UNC in a flexible way to consider all pertinent elements of diversity for any applicant and each of the criteria may be considered at every stage of the admissions process. App.37, 51.

Contrary to SFFA's disingenuous portrayal of the evidence in this case, race is not focused on "intently" and "crudely" by UNC admissions officers. Pet.5-6. SFFA cites to a handful of isolated comments in emails and application reviews noting a student's

race but SFFA fails to apprise this Court of the district court's careful examination of those allegations. Upon review of the evidence, the district court concluded that none of the comments "indicate[] that race is considered outside of a holistic admissions process, much less as the defining feature of any application." App.40. In rejecting SFFA's assertions, the court noted:

- There is no evidence that any of the statements about race was considered as anything other than a "plus" factor.
- Every comment that invoked a provisional decision is accompanied with nonracial factors, such as "solid everything," "[s]tellar academics," and standardized test scores.
- The eight statements were the only statements proffered out of hundreds of thousands of application files and materials shared with SFFA.

App.39-41.

Indeed, the record bears out how UNC's admissions process is highly individualized, only considers race alongside other contextual factors, values many other diversity attributes, and does not apply an automatic or outsized boost for race. *See, e.g.*, App.22-37; D.C.Dkt.246 at 19 ¶ 35. SFFA's expert analysis itself showed how UNC admits many white students with relatively low standardized test scores and rejects many underrepresented students of color

with relatively high test scores. App.78; D.C.Dkt.246 at 21 ¶ 38. Similar evidence in *Grutter* demonstrated how the university applied a flexible approach that weighs many diversity factors besides race that can make a difference for all applicants. 539 U.S. at 338-39.

C. UNC's Pursuit of the Educational Benefits of Diversity

UNC's decision to pursue the educational benefits of diversity through its race-conscious holistic admissions is based on a principled, well-reasoned explanation and is grounded in its mission: "to serve as the center for research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders." App.8. Consistent with this Court's prior opinions, UNC views diversity broadly as "all the ways in which people differ, including primary characteristics, such as age, race, gender, ethnicity, mental and physical abilities, and sexual orientation; and secondary characteristics, such as education, income, religion, work experiences, language skills, geographic location, and family status." App.9.

UNC's pursuit of the benefits of diversity is materializing on campus. Respondent-Students, among other witnesses, testified "credibly and compellingly" that their educational experiences have

been enriched by the racial and ethnic diversity at UNC. App.18. Rimel Mwamba testified that her experiences will "enable her to treat and care for a diverse patient population in her career as a doctor." *Id*. Andrew Brennen described at trial how he became aware of islamophobia on UNC's campus after attending a campus vigil held for the murder of three Muslim students. D.C.Dkt.246 at 24 ¶ 45. Mary Cooper, a white alumna, testified by declaration that her educational experiences with diversity "prepared her to work with, coach, and teach others who do not look like her or who have not had similar experiences." App.17-18. Other alumni testified that exposure to diversity is necessary to prepare future leaders. App.18. SFFA did not submit evidence contesting these benefits.

But while the benefits of diversity are accruing at UNC, challenges remain. UNC's sordid history with racial discrimination and continuing vestiges present a formidable barrier to equal educational opportunities for historically marginalized students of color. App.11, n.5. In 2013, UNC struggled to enroll African American males in the first-year class when their enrollment fell below 100 students. App.20. This incident provoked three students to film a video describing their experiences in front of the UNC admissions office and Native American students similarly spoke out shortly thereafter. App.61. In 2016, total Black enrollment at UNC was only 8%

compared to a population in North Carolina of 21.5% while white student enrollment registered at 72% compared to 69% across the state. App.21. This is not to suggest that UNC's student population should match the state population by race, but it does show, in part, that UNC's program still faces significant challenges in enrolling Black students.

At trial, university officials, experts, and students all testified irrefutably that despite some progress on diversity, significant work remains. App.19-22. Respondent-Students testified how the underrepresentation of students of color caused them to experience feelings of isolation, tokenism, and unfair pressure to represent their race or ethnicity. App.20, 61. Star Wingate-Bey testified that as the only Black student in many of her classes, she often felt like "the token or the sole representative for [her] race[,] or the fact checker for [her] race, which can be a bit of a burden, in class." App.61-62. Cecilia Polanco testified that she was often called upon to speak on Latinx and immigrant issues, which made her feel uncomfortable because she "didn't want to be a speaker for [her] whole community just based on [her] experience. It felt like tokenization." App.61. Campus-wide surveys reflected similar distress among underrepresented students of color. App.21.

UNC's pursuit of the educational benefits of diversity has not compromised its commitment to a holistic, individualized review of each applicant,

which aligns well with this Court's previous opinions. There was no credible evidence of UNC using race as the defining feature of any application or that it separated applicants into different admissions tracks, used quotas, or awarded any kind of bonus points on the basis of race. App.22, 36-37. No credible statistical or non-statistical evidence demonstrated otherwise. App.38-42, 65-113.

D. Race-Neutral Alternatives

The district court found that "UNC has engaged in serious, good faith consideration" of race-neutral (or nonracial, race-blind) approaches and has implemented several promising policies and practices. App.114. Adopted practices and programs include: UNC's targeted recruitment in underrepresented communities across North Carolina; operation of Project Uplift, a pipeline program available to rural, low-income, underrepresented, and first-generation students, among others; support for affinity students groups; travel grants for low-income students and one parent to visit campus; and the Carolina College Advising Corps, which places recent UNC graduates as college advisors in public high schools across the state to help underrepresented students and families with college admissions, scholarship applications, and the financial aid process. App.118-120. Other programs include robust financial aid programs and college transfer programs for low- and moderate-

income students attending partner community colleges. App.120-22.

The court also examined SFFA's and UNC's expert analyses of UNC-specific data involving several race-neutral alternative programs proposed by SFFA. The court found that SFFA's expert Richard Kahlenberg "lacked an intimate knowledge of the simulations prepared by [SFFA's other expert] Professor Arcidiacono from which he was testifying" and that his independence was seriously questioned. App.180. In contrast, the court recognized UNC's expert, Dr. Caroline Hoxby, as providing "credible expert evidence that supports and strengthens its assessment that no available race-neutral alternative would allow the University to achieve its compelling interest nearly as well as race conscious strategies at tolerable expense." *Id.* Dr. Hoxby performed more than 100 race-neutral simulations. *Id.*

After an exhaustive analysis of the testimony received, the court found that "[w]hen taking into account the assumptions that must be made to attain even the most optimistic outcomes, [] none of the models before it from either party would be viable in reproducing the educational benefits of diversity about as well as a race-conscious admissions policy." App.182.

The district court concluded that UNC has a continuing duty to examine and identify—through serious, good faith efforts—a race-neutral alternative

program that would promote its compelling interest about as well as its race-conscious program and at tolerable administrative expense and that it has engaged in such periodic assessments. App.164-65, 184. The court further noted a stark reality: that although UNC has made progress, UNC still has a ways to go to achieving the educational benefits of diversity. Students of color "still report being confronted with racial epithets, as well as feeling isolated, ostracized, stereotyped, and viewed as tokens in a number of University spaces." App.185. In light of these facts and continuing inequities in admission rates for underrepresented students of color, the court did not suggest that UNC must engage in perpetual race-conscious admissions as SFFA avers. Instead, it recognized: "Ensuring that our public institutions of higher learning are open and available to all segments of our citizenry is not a gift to be sparingly given to only select populations, but rather is an institutional obligation to be broadly and equitably administered." *Id.*

ARGUMENT

I. This Litigation Presents No Emergency Warranting the Extraordinary Remedy of Certiorari Before Judgment

A. SFFA Fails to Demonstrate the Kind of Urgency Demanded Under Rule 11

The petition should be denied because SFFA has failed to show the exigent circumstances that warrant the extraordinary relief of certiorari before judgment. In fact, SFFA conspicuously omits Rule 11's language that petitioners must show the issue "require[s] immediate determination." Pet.10. For this Court to bypass the court of appeals, the case must be "of great constitutional significance and of extraordinary national importance for other reasons" and the "public interest in a speedy determination must be exceptional." Stephen M. Shapiro et al., Supreme Court Practice § 4.20 (10th ed. 2013) (*Supreme Court Practice*). The petitioner's burden is "heavier than if petitioner were seeking review after the court of appeals had issued a judgment." 23 James Wm. Moore et al., Moore's Federal Practice – Civil § 511.02 (1997). Accordingly, "[c]ertiorari before judgment is . . . 'an extremely rare occurrence.'" *Supreme Court Practice* § 2.4 (citing *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers)).[3]

Adherence to the strict standard established in Rule 11 promotes this Court's administration of justice. It allows the Court to have the "benefit of developed arguments on both sides and lower court opinions squarely addressing the question" at issue. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). When the Court departs from this normal procedure, it risks considering cases without the full record, which may lead to "'untoward practical ramifications' not foreseen at the time of the decision," such as "framing broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). *See also Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion.").

Moreover, strictly observing Rule 11 is important because the Court's compliance with its own operating principles affect how society and litigants perceive the Court. This Court has repeatedly recognized that when it "adhere[s]

---

[3] SFFA mischaracterizes the *Supreme Court Practice* treatise when describing the Court's practice as "regularly" granting certiorari before judgment "in situations where similar or identical issues of importance [are] already pending before the Court…." Pet.11 (internal quotations omitted). *Supreme Court Practice* does not refer to this as a "regular" practice and cites to only four cases, showing that it is indeed a rare occurrence.

scrupulously to the customary limitations on [its] discretion," it will "'promote respect . . . for the Court's adjudicatory process [and] the stability of [its] decisions." *Gates*, 462 U.S. at 224 (quoting *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting)). This Court has indeed exercised restraint in granting Rule 11's extraordinary relief, even in time-sensitive cases. *See, e.g.*, *Aaron v. Cooper*, 357 U.S. 566, 567 (1958) (denying review before judgment despite "the vital importance of the time element in this litigation"); *United States v. Clinton*, 524 U.S. 912 (1998).

Here, SFFA simply fails to show why there is a sudden need to bypass the court of appeals to overturn over forty years of decisions that this Court has repeatedly found to benefit the nation. Justice Powell's controlling opinion in *Regents of University of California v. Bakke* first recognized in 1978 that achieving a diverse student body is a compelling interest that justifies the consideration of race in admissions, announcing that the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students diverse as this Nation" and a student's "racial or ethnic origin is but a single though important element." 438 U.S. 265, 313, 315 (1978). This Court has consistently and frequently reaffirmed this principle and upheld race-conscious admissions policies like UNC's. *See, e.g.*, *Grutter,* 539 U.S. at 325; *Gratz*, 539 U.S. at 268

(rejecting argument that universities do not have a compelling interest in diversity "capable of supporting narrowly-tailored means"); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013) (*Fisher I*); *Fisher II*, 136 S. Ct. at 2208.

SFFA's petition glaringly lacks any explanation for why there is a pressing need to reexamine this Court's stable line of precedent on this issue while circumventing the court of appeals. Indeed, SFFA's conduct in the district court belies the notion of immediacy. SFFA did not seek a temporary restraining order or a preliminary injunction to immediately enjoin UNC's race-conscious admissions policy. SFFA also agreed to a partial stay of the proceedings pending this Court's decision in *Fisher II*. App.6. Thereafter, the district court proceeded under a regular timeline that lasted *four years* prior to the trial in this case. Of significance, SFFA's petition does not directly allege—and the record is unclear whether—its standing members' controversies remain live after being denied admission when the suit commenced *seven* years ago, or whether its current members face an actual or imminently threatened denial of admission at UNC.

SFFA's sole justification for why this case satisfies Rule 11's demanding standard is that a petition for certiorari in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA v. Harvard)*, 980 F.3d 157 (1st Cir. 2020),

petition for cert. filed, No. 20-1199 (U.S. Feb. 25, 2021) is pending in this Court. Pet.10-11. To support this contention, SFFA relies heavily on *Gratz* (Pet.11-12), where this Court invoked Rule 11 to hear *Gratz* with *Grutter*. But this analog is inapposite for at least three reasons. First, *Gratz* and *Grutter* involved the same public university with similar histories and admissions priorities. By contrast, this case diverges from *Harvard* in various material ways—the cases involve different admissions processes and factors considered for admissions; different statutory and constitutional claims; and different historical contexts and campus climates. To specify one key distinction, SFFA's suit against UNC raises no claims of Asian American discrimination, but the First Circuit described this (unproven) claim as the "central allegation" in *Harvard*. *Compare* D.C.Dkt.1 at 8 ¶¶ 13, 14 (white standing member), *and* App.2 (no claim of intentional discrimination against Asian Americans), *with* Compl., *SFFA v. Harvard,* No. 1:14-cv-14176, 2014 WL 6241935, ¶¶ 15-16, 429, 434-439 (D. Mass. Nov. 17, 2014), *and* Appendix 57 n.23, *Harvard*, No. 20-1199. Combining the two cases risks confounding the issues, as reflected by SFFA's petition which misleadingly raises accusations of Asian American discrimination imported from its *Harvard* petition (Pet.22-23); but no such allegations—let alone support for such allegations—exist in this case record.

Second, *Gratz* and *Grutter* were filed in the same circuit, and when they reached the Sixth Circuit Court of Appeals, that court consolidated the two cases for submission. *See Gratz v. Bollinger*, 277 F.3d 803 (Mem), 804 (6th Cir. 2001), *opinion after hearing en banc ordered*, 309 F.3d 329 (6th Cir. 2001). The Sixth Circuit issued an opinion in *Grutter* that articulated the governing legal framework, *see* Pet. for Writ of Cert., *Gratz*, 539 U.S. 244 (No. 02-516) at *32-33, which differed from other circuits; and the *Gratz* petitioners requested certiorari before judgment only after an opinion in *Gratz* did not issue four-and-one-half months following argument. *See id.* at *29. By contrast, this case and *Harvard* arose in separate circuits and have no history of consolidation. Unlike in *Gratz* where this Court had the benefit of the Sixth Circuit's legal analysis of race-conscious programs, granting this petition would entirely deprive this Court of the Fourth Circuit's legal analysis, thereby denying this Court the "benefit of developed arguments" and preventing "ill-considered" rules. *Yee,* 503 U.S. at 538; *Illinois,* 462 U.S. at 224. Furthermore, the Fourth Circuit's analysis may reveal any confusion across circuits that may inform whether this Court should grant certiorari for revisiting *Grutter*, as further discussed below. *See infra* Section I.C.

Third, the *Gratz* respondents conditionally agreed to the petition before judgment if the Court

granted certiorari in *Grutter*, which it did. Brief in Conditional Opp'n, *Gratz*, 539 U.S. 244 (No. 02-516) at *5-6. Here, the UNC respondents and Respondent-Students strongly oppose granting certiorari before judgment because the Fourth Circuit is best positioned to first weigh the fact-intensive issues.

Unlike *Gratz/Grutter*, this case is not a "companion" case to *Harvard* simply because it may implicate a related legal question. Pet.2, 10. This Court has rejected similar requests to bypass the ordinary appellate process on such bare grounds. *See, e.g., All Am. Check Cashing v. CFPB*, 140 S. Ct. 646 (2019) (rejecting petition for writ of certiorari before judgment despite petitioner's claim that the case overlapped with the questions presented by another case, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), then-pending before the Supreme Court); *see also Mikulski v. Centerior Energy Corp.*, 544 U.S. 992 (2005) (rejecting petition for writ of certiorari before judgment as a companion case to *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), despite the cases originating in the same circuit).

Altogether, SFFA's failure to show urgency or imminent harm on a matter of settled law cannot justify hastening the judicial process and bypassing the Fourth Circuit.

B. The Question of Whether to Overturn *Grutter* Does Not Warrant Rule 11's Extraordinary Relief and Instead Countenances in Favor of Adhering to Ordinary Procedure

Just as SFFA cannot rely on *Gratz,* SFFA's substantive arguments in favor of certiorari similarly lack the requisite level of urgency warranting Rule 11's extraordinary relief. SFFA spends much of its petition urging this Court to reverse over forty years of well-settled precedent that permits the limited consideration of race in university admissions to achieve the educational benefits of diversity. *See* Pet.13-28. But SFFA has not and cannot explain how and why overturning precedent in this case warrants intervention under Rule 11. To the contrary, the extraordinary step of considering whether to reverse prior decisions counsels *against* speedy determination.

SFFA concedes that reversing precedent "is serious business." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring)[4] (quoting Robert H. Jackson*, Decisional Law and Stare Decisis*, 30 A. B. A. J. 334 (1944)); Pet.13. Adherence to precedent is the norm because "[s]tare decisis promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on

[4] Unless otherwise indicated, all subsequent citations to *Ramos* are to Justice Kavanaugh's concurrence.

judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (cleaned up). Upholding the wisdom of prior decisions "avoids the instability and unfairness that accompany disruption of settled legal expectations," *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality), but instills public confidence that court decisions are "founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact," *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

While true that stare decisis is not an "inexorable command," reexamining precedent is also—by SFFA's own admission—a "momentous" step. Pet.10-11; 13. This Court will only revisit precedent in limited circumstances where petitioners demonstrate "special justification" or "strong grounds." *Ramos,* 140 S. Ct. at 1413-14 (citing cases). For example, this Court may reconsider a decision that is "grievously or egregiously wrong," but only when the precedent has "caused significant negative jurisprudential or real-world consequences" and when overruling would not "unduly upset reliance interests," *Ramos,* 140 S. Ct. at 1414-15; *see also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, J., concurring in judgment).

The weight in favor of stare decisis and this Court's high bar for overruling precedent counsel against a rushed re-examination process under Rule 11. Indeed, granting the rare relief of certiorari before judgment based on disagreement with precedent would effectively eviscerate Rule 11's "very demanding standard." *See, e.g., Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954, 954 (2014). It would also erode this Court's important role in promoting evenhanded decision-making and preventing instability.

Careful, reasoned consideration is especially warranted here given the tremendous stakes involved. Contrary to SFFA's claims, the three broad considerations for whether to overturn precedent all weigh strongly against revisiting *Grutter*: the precedent is correct, is producing substantial benefits across colleges and our country, and has engendered extensive reliance interests. At the very least, such broad considerations reveal how the important issues implicated and absence of any circuit split countenances in favor of hewing closely to the normal appellate process.

i. Grutter *Is Correct and Consistent with this Court's Equal Protection Jurisprudence*

SFFA's view that *Grutter* was wrongly decided (Pet.14) misreads this Court's equal protection

decisions and ignores the overwhelming consensus across college administrators, social science researchers, and students that promoting racial and ethnic diversity on university campuses greatly benefits individuals, institutions, and broader society. In *Grutter*, this Court recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter,* 539 U.S. at 332. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id*. In upholding UT-Austin's holistic admissions program thirteen years later, this Court referenced similar democratic, equality-based ideals embedded in the university's goals. *Fisher II*, 136 S. Ct. at 2211.

SFFA is wrong to suggest that *Grutter* conflicts with this Court's broader equal-protection jurisprudence because it permitted universities to consider race in a limited fashion to pursue the compelling interest of student body diversity. Pet.15. While SFFA might prefer a world in which there are "no exceptions to the rule of 'racial neutrality'" (Pet.20), that is not the law. *Grutter* is fully consistent with this Court's long line of precedent which does not forbid consideration of race in all circumstances. As *Grutter* held, "[w]hen race-based action is necessary to

further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." 539 U.S. at 327. Relying on this Court's foundational equal protection cases including *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200 (1995), *Grutter* further emphasized that "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." 539 U.S. at 327. *Grutter*'s articulated framework squarely comports with this Court's equal protection principles. In fact, it is SFFA's fervent calls for absolute colorblindness that would upend this Court's Fourteenth Amendment jurisprudence and run contrary to the Amendment's original intent. *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess. 1287 (1866) (rejecting alternative versions of the Fourteenth Amendment mandating complete colorblindness).

And SFFA's suggestion that *Grutter* is inconsistent with *Brown* is baseless. Pet.14. Like *Brown v. Board of Education*, 347 U.S. 483 (1954), *Grutter* condemns defining individuals based solely on their race, *Grutter,* 539 U.S. at 336-37, and similarly affirms individuals of all racial backgrounds should have equal access to opportunities afforded through

educational institutions. *Id.* at 331-33. Indeed, *Grutter* premises its holding on *Brown's* recognition that "education . . . is the very foundation of good citizenship." *Grutter,* 539 U.S. at 331 (citing *Brown*, 347 U.S. at 493).

ii. Grutter *Is Critical for Our National Progress, and There Is No Confusion or Split Across Circuits*

In considering whether to revisit precedent, this Court considers the decision's "jurisprudential or real-world consequences." *Ramos,* 140 S. Ct. at 1415. Both strongly favor adhering to *Grutter*. To begin, "'certiorari jurisdiction exists to clarify the law.'" *Supreme Court Practice* § 4.3 (10th ed. 2013) (citing *City & Cnty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015)). But SFFA can point to no circuit split or confusion across courts. Since *Grutter,* United States courts of appeal have consistently and uniformly applied *Grutter's* holding and affirmed universities' "narrowly tailored use of race and ethnicity in admissions decisions [in order to] further [their] compelling interest in obtaining the educational benefits that flow from a diverse student body." *Smith v. Univ. of Wash.*, 392 F.3d 367, 381 (9th Cir. 2004); *see also Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 659–60 (5th Cir. 2014), *aff'd*, *Fisher II*, 136 S. Ct. at 2198; *SFFA v. Harvard*, 980 F.3d 157, 203 (1st Cir. 2020).

While SFFA points to the *Fisher* litigation for support in reversing precedent (Pet.18), that case actually counsels against granting certiorari here. There, this Court ultimately upheld the Fifth Circuit's application of this Court's legal framework, demonstrating that this Court's doctrine is sufficiently clarified and lower courts are equipped to apply it. *Fisher II,* 136 S. Ct. 2198. Since *Fisher II*, two district courts and one circuit court have properly applied the searching inquiry required by this Court's decisions. *See* App.1-186, 252-53; *SFFA v. Harvard*, 397 F. Supp. 3d 126, 178, 194-95, (D. Mass. 2019), *aff'd* 980 F.3d 157 (1st Cir. 2020). There is no immediate need to revisit the *Grutter* decision that has been applied by several courts, much less any need to hastily bypass the Fourth Circuit as SFFA seeks here.

Grutter's positive effects on "real-world consequences" also decisively cut against revisiting the decision and at the very least, countenance against rushed review. *Grutter* remains vitally important for this nation's progress because of the profound educational benefits that flow from student body diversity. While SFFA baldly asserts such benefits are "suspect" (Pet.16), SFFA provides no concrete support for its criticism. By contrast, there is abundant evidence that supports *Grutter*'s view that racial diversity across the student body promotes cross-racial understanding, breaks down racial

stereotypes, promotes learning outcomes, and better prepares students as professionals and for an increasingly diverse workforce and society. *Grutter*, 539 U.S. at 331-32; *see also* D.C.Dkt.154-20 at 14-24 (describing research); D.C.Dkt.154-21 at 7-9 (same). The record in this case underscores these facts. The district court cited "credibl[e] and compelling[]" (App.18) testimony from UNC faculty, staff, students, and alumni—including Respondent-Students—who uniformly affirmed racial diversity on UNC's campus "generat[ed] more robust conversations" in classrooms (App.14); cultivated "impactful learning moment[s]" (App.14); and better prepared students to be "future leaders for their careers" (App.18). Of significance, SFFA did not submit *any* evidence to contradict these findings during trial. Should SFFA seek to challenge the district court's conclusions and the overwhelming consensus that racial diversity produces tremendous benefits, the Fourth Circuit is best positioned to evaluate these evidentiary issues.

Nearly seventy amicus briefs filed in *Fisher II* in support of UT-Austin just six years ago further demonstrate substantial, broad continuing support for race-conscious admissions. *See* Docket entries for *Fisher II*, https://tinyurl.com/96e5amvb (last visited November 19, 2021). Among these include: a military leaders' brief discussing how growing and maintaining a highly qualified, diverse officer corps is a national security priority and how nullifying UT-

Austin's holistic admissions policy would seriously disrupt the military's efforts to maintain cohesion and effectiveness, *see* Brief for Lt. Gen. Julius W. Becton, Jr., et al., as Amici Curiae Supporting Respondents at 5-35, *Fisher II*, 136 S. Ct. 2198 (2016) (No.14-981)); and a business leaders' brief underscoring how race-conscious admissions programs are even more important for helping businesses meet the demands of today than in *Grutter* as the country and world economies have diversified. *See* Brief for Fortune-100 and Other Leading American Businesses as Amici Curiae Supporting Respondents at 7-14, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

While *Grutter* recognized race-conscious policies should not persist indefinitely, *Grutter* understood the importance of considering each school's particularized context and maintaining such policies so long as they remained narrowly tailored and necessary. 539 U.S. at 334, 340, 343. The reality is that race-conscious policies remain necessary for many universities, including UNC, to acquire the long-lasting academic and social benefits of a diverse student body. *See, e.g.,* App.19-22, 176-83. Far from "indefinite," such policies enable universities to engender the deep-seated transformations that move institutions towards a time when such policies are no longer necessary. *See, e.g.,* D.C.Dkt.246 at 29-31 ¶¶

57-60.[5] The record here demonstrates that while the benefits of diversity have improved, much work remains at UNC. App.184-86. With so many challenges at hand, now is not the time for the Court to reconsider closing doors of opportunity to students of color through narrowly tailored programs that meet settled law. *See Randall*, 548 U.S. at 244 (2006) ("*Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations.").

Unable to point to any evidence contradicting these benefits, SFFA resorts to inaccurately arguing that this Court must consider intervening because white students are harmed by "universities [that] have used *Grutter* as a license to engage in outright racial balancing." Pet.3. That is patently false. Ed Blum and Abigail Fisher, both board members of SFFA and both at the center of *Fisher v. University of Texas at Austin*,[6] failed to demonstrate such at UT-Austin in 2016 (*see generally Fisher II*, 136 S. Ct. 2198) and at Harvard in 2020 (*SFFA v. Harvard*, 980

---

[5] *See also* Tiffany Jones & Andrew Nichols, *Hard Truths: Why Only Race-Conscious Policies Can Fix Racism In Higher Education*, The Education Trust (2020), https://files.eric.ed.gov/fulltext/ED603265.pdf; *see also* Connor Maxwell & Sara Garcia, *5 Reasons to Support Affirmative Action in College Admissions*, Center for American Progress (October 1, 2019), https://tinyurl.com /Maxwell-Garcia.

[6] *See Students for Fair Admissions, Inc., v. Univ. of Tex. at Austin*, No. 1:20-CV-763-RP, 2021 WL 3145667, at *2-3 (W.D. Tex. July 26, 2021).

F.3d at 189); and they did not even bring a separate racial balancing claim at UNC, making this case an especially inappropriate vehicle for certiorari.

SFFA's misrepresentation of harms is compounded by its gross mischaracterization of holistic admissions programs. Today, universities that employ race-conscious programs, including UNC, engage in a highly individualized review process that views race alongside several other factors, flexibly values all pertinent elements of diversity, and never makes race the defining feature of an application. App.22; *see also* Brief for Brown University, et al., as Amici Curiae Supporting Respondents at 18-20, *Fisher II,* 136 S. Ct. 2198 (2016) (No. 14-981). This is markedly different from many affirmative action programs of yesteryear. For example, UNC does not have quotas, bonus points, or set-aside admission tracks based on race, which this Court has deemed unlawful. App.22. SFFA's brash accusations of racial stereotyping and anti-Asian American bias (Pet.15, 22-23) also have no support in any trial record and absolutely no connection to this case, where SFFA brought no claim of racial stereotyping or anti-Asian discrimination against UNC.

To the contrary, the record underscores how UNC considers race as "one of more than forty criteria" to admit students who are exceptional across a range of attributes, thereby dismantling stereotypes—not perpetuating them—by cultivating

diversity within each racial group. App.37; *see also* D.C.Dkt.246 at 26-27 ¶¶ 50-51. Moreover, the evidence here shows that UNC's consideration of race, while meaningful, accounts for only 1.2% of the total admissions decision, compared to ACT and SAT scores that explain 9.8% of admissions decisions. App.110. These facts demonstrate a fair consideration of race, not one demanding urgent review before judgment.

iii. Substantial Reliance Interests Strongly Support Adhering to Grutter *and Definitively Counsel Against a Rushed Review Process*

Grutter has engendered widespread reliance by universities, students, and the broader public. Such substantial reliance interests not only disfavor revisiting the decision, *see Ramos*, 140 S. Ct. at 1414-15, they also firmly favor adhering to normal appellate procedures given the high stakes of disrupting settled precedent.

For over forty years, institutions of higher education have relied on *Grutter* and its predecessor, *Bakke*, to craft race-conscious admissions policies that are consistent with constitutional restraints. *See supra* Section I.B.ii. Such programs adhere to *Grutter's* admonition that "an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on

the same footing for consideration, although not necessarily according them the same weight.'" *Grutter,* 539 U.S. at 334 (quoting *Bakke,* 438 U.S. at 317). And these race-conscious policies are only implemented when race-neutral alternatives are unfeasible. App.176.

Grutter's individualized, race-conscious review process allows universities to identify exceptional students of color, such as Respondent-Students, who might otherwise be overlooked in a race-blind process. These students are well-prepared for UNC's challenges and significantly contribute to UNC once admitted. D.C.Dkt.246 at 12-19 ¶¶ 22-35; *see also* Eboni Nelson, *The Case for Race-Conscious Affirmative Action*, JSTOR Daily (Apr. 3, 2019), https://tinyurl.com/Eboni-Nelson (the use of race-conscious admissions policies "opens the doors of opportunity for students of color, many of whom have achieved academic success despite their previous educational circumstances"). Race-blind processes often undervalue the talent and potential of historically marginalized applicants of color due to numerous systemic barriers that make it harder for such students to accumulate traditional credentials despite having equal talent and potential. For example, historically marginalized applicants of color are more likely to attend schools with fewer highly-trained educators and fewer educational resources (Linda Darling-Hammond, *Inequality in Teaching*

and Schooling: How Opportunity Is Rationed to Students of Color in America, *in* The Right Thing to Do, The Smart Thing to Do: Enhancing Diversity in the Health Professions 208-09 (2001)); attend schools with a larger number of students living in concentrated poverty (*id*. at 208); face harsher and more frequent school discipline when engaging in similar behavior (*see, e.g.,* Travis Riddle & Stacey Sinclair, Racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias 8255 (Jennifer A. Richeson, ed. 2019)); and have less access to high-quality coursework and Advance Placement (AP) programs. *See, e.g.,* U.S. Dep't of Educ. Off. for Civil Rights, *Data Snapshot: College and Career Readiness*, Civil Rights Data Collection (2014), https://tinyurl.com/bdz8he27; *see also* App.71. Race-based disparities persist irrespective of socioeconomic status. *See, e.g.,* Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, Q. J. of Econ. 731-733 (2019); *see also* App.131-32; D.C.Dkt.246 at 51-52, ¶¶110-12.

In light of such race-based inequities, colleges have relied on the permissibility of holistic admissions to craft admissions policies that allow them to view the full context of each applicant's lived experiences, including race and ethnicity, so that they can more accurately evaluate each applicant's achievements, capacity to succeed, and contributions to campus.

Revisiting *Grutter* would profoundly unsettle expectations and threaten each university's ability to identify talented students who can thrive on campus and best achieve its institutional mission. SFFA's bald assertion that universities' policies would remain relatively unchanged and "real diversity would not decline" (Pet.26-27) is entirely unsupported and contradicted by the record in this case. The district court performed extensive analysis of both parties' race-neutral alternatives and concluded every alternative would unacceptably reduce racial diversity, academic qualifications, or both. App.125-44, 176-83. In addition, the alternatives oftentimes would require drastic and unfeasible changes to UNC's process. *See, e.g.,* App.134, 141-42.

Governments, businesses, and this nation's citizenry have come to depend on diverse campuses to produce professionals and leaders who are equipped to work across racial differences and better tackle the challenges the nation faces today. *See Grutter*, 539 U.S. at 330 (describing the numerous benefits that our society reaps from having racially diverse colleges and universities); *see also* Brief for the United States as Amicus Curiae at 17, *Harvard, petition for cert. filed* (U.S. Feb. 25, 2021) (No. 20-1199) (asserting the federal government's "vital interest" in the "benefits of diversity" and in having a diverse pool of college graduates who can join the government's ranks).

Students also substantially rely on the racial diversity that *Grutter* engenders across colleges, and SFFA is wrong to suggest otherwise. Pet.27. Students—especially students of color—have organized their activities and made decisions to apply to and attend UNC in part because of its racially diverse campus cultivated, in part, by UNC's current admission policy. The record in this case underscores that underrepresented students of color would be less likely to apply to UNC and less likely to accept admissions offers if UNC stopped considering race and racial diversity declined. D.C.Dkt.246 at 48 ¶¶ 104-05; *id.* at 50 ¶108. In addition, applicants and students have a settled expectation that the state's flagship will provide diverse, cross-cultural experiences that will better prepare them to excel in our increasingly diverse world. *See, e.g.,* D.C.Dkt.39-1 at 6-7 ¶¶ 14-15; *id.* at 23-24 ¶¶12-14.

Altogether, revisiting *Grutter* risks disrupting institutional trust, legitimacy, consistency, and predictability between the courts, colleges and universities, and the students such institutions seek to enroll. Before considering such a momentous step, this Court should at the very least enjoy the benefit of the Fourth Circuit's review. As Justice Gorsuch has noted, "the experience of our thoughtful colleagues on the district and circuit benches[] c[an] yield insights (or reveal pitfalls) we cannot muster guided only by our own lights." *Maslenjak v. United States*, 137 S. Ct.

1918, 1931 (2017) (Gorsuch, J., concurring). The considerable reliance interests at stake countenance against an unnecessarily speedy review.

C. Rule 10 Is Inapplicable and Further Highlights the Appropriateness of Adhering to the Normal Appellate Procedure

While SFFA initially acknowledges Supreme Court Rule 11 governs its petition, it later relies on Supreme Court Rule 10(c) to urge certiorari because this case presents "an important question of federal law." Pet.11. But SFFA's invocation of Rule 10 is procedurally improper and its grounds for relief asserted thereunder should not be considered by this Court. Rule 10 pertains only to petitions for certiorari filed after either "a state court or a United States court of appeals has decided" an issue. S. Ct. R. 10. That is not the circumstance here, where SFFA seeks to bypass the Fourth Circuit. Rather, the "extraordinary review" of writ before judgment "is available only upon a showing *that satisfies Supreme Court Rule 11*." 22 James Wm. Moore et al., Moore's Federal Practice – Civil, § 405.03 (1997) (emphasis added). As discussed, Rule 11 requires showing the issue is of "imperative public importance" *and* "require[s] immediate review," but SFFA has provided no compelling reason for speedy consideration. *See supra* Section I.A. SFFA's failure to demonstrate

urgency is fatal to its petition because "the importance of an issue should not distort the principles that control the exercise of our jurisdiction." *Adarand Constructors*, 534 U.S. at 110.

Even if this Court were to consider Rule 10, its application here further underscores the benefit of adhering to normal appellate procedure. Rule 10 highlights how this Court will ordinarily grant certiorari after a state or lower court decision has occurred when faced with a circuit split or confusion in applying federal law. S. Ct. R. 10(a)-(c). As discussed, neither currently exists here. *See supra* Section I.B.ii. Allowing the Fourth Circuit to first review this case and issue its decision can reveal whether intervention is warranted or whether the consistent application of the law across circuits renders certiorari unnecessary.

D. The District Court's Fact-Specific Determination that No Workable, Race-Neutral Alternatives Are Available to UNC Does Not Warrant Immediate Review by this Court

SFFA additionally asks this Court to grant the rare relief of certiorari before judgment to review the district court's fact-intensive conclusion that UNC carried its burden of showing there are no workable race-neutral alternatives that achieve comparable benefits at tolerable expense. SFFA's complaints boil

down to factual disputes with the district court's well-supported findings. Such commonplace factual disputes do not rise to the level of "imperative public importance" that "require[s] immediate determination" under Rule 11's extraordinary relief. S. Ct. R. 11. Rather, the Fourth Circuit is better suited to consider such fact-bound inquiries. This Court has recognized the value in "permitting several courts of appeals to explore a difficult question before [the Supreme Court] grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160, 163 (1984). Even in circumstances where the normal appellate process has occurred (unlike here), this Court rarely grants certiorari to review the fact-specific application of settled legal principles. *See* S. Ct. R. 10.

This case, particularly, presents a poor vehicle for re-examining the standards applied to race-neutral alternatives writ large, contrary to SFFA's claims. The district court's findings are specific to the particularized context and challenges faced by North Carolina and its flagship institution.[7] The experts in the case based their simulations on data drawn from

[7] SFFA's generalized reference to California and Michigan (Pet.31) is unpersuasive because other states' experiences cannot be extrapolated to North Carolina. As SFFA's Petition recognizes, courts apply a "case-by-case" approach to review race-conscious admissions policies. Pet.20; *see also Grutter*, 539 U.S. at 327 ("[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.") (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960)).

UNC's actual applicants and the North Carolina Education Research Data Center ("NCERDC") which collects information on North Carolina public school students. App.127, 129. Thus, the UNC-specific statistical findings and corresponding expert conclusions (App.176-83) cannot be exported beyond the state. As noted previously, the record also reflects that UNC's particularized racial climate necessitates race-conscious admissions to promote greater diversity since students of color, including Respondent-Students, continue to feel tokenized in classes and face overt forms of racial hostility that are ameliorated by greater numbers of underrepresented minority students. App.20-21, 57-58, 61-62, 151, 185. In addition, North Carolina's underrepresented students of color continue to lack equal access to college preparatory resources, and such racial disparities have increased in recent years. App.71 n.24. These disparities in North Carolina's secondary education system bolster UNC's compelling interest in fashioning a holistic, individualized process that considers race as one among many factors to ensure "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter,* 539 U.S. at 332. These state-specific, fact-bound considerations weigh against granting certiorari even under normal circumstances, but certainly disfavor granting Rule 11's extraordinary relief.

SFFA's unreliable description of the record and disregard of the lower courts' findings further counsel against any deviation from that settled practice. For example, SFFA contends that "UNC has workable race-neutral alternatives." Pet.29. This contention ignores the court's well-supported conclusion that "UNC has engaged in serious, good faith consideration" of race-neutral alternatives and has adopted several race-neutral policies and practices to support its goals. App.114. SFFA's contention also ignores the district court's exhaustive findings that none of the nonracial hypothetical alternatives considered by both parties' experts would come close to achieving comparable benefits at tolerable expense. *See* App.113-44. Indeed, many of SFFA's hypothetical models would force UNC to abandon holistic admissions entirely (App.134), directly undermining UNC's broad diversity goals (App.9) and running contrary to this Court's well-settled value for diversity in all forms. *See Fisher II*, 136 S. Ct. at 2213-14 (rejecting proposed alternative based on "class rank alone" because admitting students on any single metric "is in deep tension with the goal of educational diversity as this Court's cases have defined.").

The district court further found that SFFA's hypothetical alternative "would also lead to a drop in URM [underrepresented minority] admissions…." (App.134, 139). Such declines would make such students feel even more isolated, less likely to share

their perspective in discussions, make all students less prepared for leadership, and stifle UNC's progress towards cultivating a more inclusive campus. *See* D.C.Dkt.246 at 50-51 ¶ 109; App.20-21. And, as the record reflects, SFFA underestimates the declines as it was shown that the declines in diversity would be much steeper because high-achieving students of color would be even less likely to apply and matriculate to UNC if the university stopped considering race. *See, e.g.,* D.C.Dkt.246 at 48 ¶¶ 104-05. As the district court concluded, at this time "it would be counterproductive to abandon the current admissions process in favor of untested proposals that, even in the best-case scenarios and under dubious assumptions, exact significant consequences" on student body diversity, academic preparedness, or both. App.183.

SFFA's disparagement of the unique importance of racial diversity similarly cannot unsettle the district court's well-supported findings. SFFA proclaims that "the substantial interest here is broad student body diversity, not 'racial diversity.'" Pet.30. But SFFA is too quick to wholly discount the significance of drops in racial diversity. The record in this case demonstrates that racial diversity produces distinct benefits that are not reproduced by socioeconomic diversity. App.131-132; *see also* D.C.Dkt.246 at 51-52 ¶¶ 110-12. Expert testimony confirmed socioeconomic diversity is "not

interchangeable with racial diversity when it comes to contributing to a diversity in opinions regarding certain educationally relevant topics," including issues related to racial inequity. D.C.Dkt.179-15 at 6. Respondent-Students underscored this point by uniformly affirming that their racial identities formed their perspectives in ways that could not be captured by their socioeconomic identities. D.C.Dkt.246 at 52 ¶ 112. As Respondent-Student Luis Acosta explained, his racial identity is "more visibly salient" and therefore resulted in unique experiences and correspondingly a unique viewpoint that would be missed by only focusing on his socioeconomic status. D.C.Dkt.256 at 52 ¶ 111. This Court's equal protection law does not require a university to forgo individualized review or other core institutional values in order to pursue racial and ethnic diversity.[8] *See Fisher II*, 136 S. Ct. at 2213.

Added to these fatal flaws, the district court generally found Mr. Kahlenberg "lacked an intimate knowledge of the simulations prepared by Professor

[8] SFFA's suggestion that this Court should turn upside down university admissions because "desegregation required radical changes" relies on inapposite precedent. Pet.30. The desegregation cases that SFFA cites dismantled systems that engaged in *de jure* segregation and denied Black people access to equal opportunities and facilities based solely on their race. UNC's holistic process treats students as individuals, does not define students solely by race, and instead seeks to include students of all racial backgrounds, rather than exclude them. App.174-75.

Arcidiacono from which he was testifying." App.180. In short, the district court's conclusions rest on a thorough review of a voluminous record and credibility determinations that "can virtually never be clear error," *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).

CONCLUSION

For the foregoing reasons, Respondent-Students respectfully urge this Court to deny the Petition for Writ of Certiorari Before Judgment.

Respectfully submitted,

/S/ DAVID HINOJOSA
DAMON HEWITT
JON GREENBAUM
DAVID HINOJOSA
Counsel of Record
GENEVIEVE BONADIES TORRES
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1500 K Street, NW, Suite 900
Washington, DC 20005
(202) 662-8600
dhinojosa@
lawyerscommittee.org

JACK HOLTZMAN
SARAH LAWS
NORTH CAROLINA
JUSTICE CENTER
224 South Dawson Street
Raleigh, NC 27601

REED N. COLFAX
SOOHYUN CHOI
RELMAN COLFAX PLLC
1225 19th Street NW,
Suite 600
Washington, DC 20036

Counsel for Respondents Cecilia Polanco, et al.

December 20, 2021