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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

UNC's opposition confirms that this case should be heard with its companion, SFFA's case against Harvard. The first question presented in *Harvard*—whether to overrule *Grutter*—is identical to the first question presented here. If the Court grants certiorari in *Harvard*, then it should grant certiorari before judgment here so it can evaluate the continued legality of race-based admissions in the context of both a public and a private university. Even more fitting is the fact that UNC and Harvard are our nation's oldest public university and private university, respectively.

UNC urges this Court to reserve certiorari before judgment for time-sensitive emergencies. But that is not this Court's practice. Indeed, UNC can't meaningfully distinguish *Grutter* and *Gratz*, where the Court granted certiorari to consider race-based admissions at the graduate level and certiorari before judgment to consider race-based admissions at the undergraduate level. *See* Pet. 10-11. SFFA is simply asking the Court to follow that same procedure as it revisits that same question here.

The only purported obstacle that UNC identifies is a meritless standing argument buried at the back of its brief. From the start, UNC has conceded that SFFA meets this Court's three-part test for associational standing. So it unsuccessfully asked the district court to invent a new "genuineness" test—one that SFFA would meet in any event. SFFA is a voluntary association with over 20,000 members, including the many

rejected applicants on whose behalf it brought this action. UNC's argument has been roundly rejected by every court to consider it because it has no legal, logical, or factual foundation. SFFA's standing is not an obstacle to this Court's review because UNC's argument is easily dispatched, just as other standing arguments were easily dispatched in the other race-based admissions cases this Court has decided.

As a final plea, UNC asks the Court to deny certiorari because, in its view, the use of racial preferences in education should be left to the voters. If that plea sounds familiar, it is because the exact argument was made in *Brown*. *See* Kansas Br. on Rearg. in *Brown v. Bd. of Educ.*, O.T. 1953, at 57 ("[T]he people of Kansas, ... through the normal process of local government, are abandoning the policy of segregation whenever local conditions and local attitudes make it feasible. We submit that this is a more wholesome process than to accomplish the same result by the coercive decrees of federal courts."). This Court rejected the argument then, and it should reject the argument now.

I. This case meets the criteria for certiorari before judgment.

UNC's rhetoric about "short-circuit[ing] the appellate process" and "[r]espect for precedent" makes little sense here. UNC.BIO 1. The Fourth Circuit cannot overrule this Court's precedent, so there's nothing for it to do on SFFA's request to overrule *Grutter* except summarily affirm the dismissal of that claim. If this Court will be reconsidering *Grutter* in the *Harvard* case anyway, there's no reason not to grant certiorari

before judgment here. This Court could never "benefit [from] the Fourth Circuit's review" because that court cannot reassess this Court's precedent. Intervenors.BIO 36.

Although UNC concedes that whether to overrule *Grutter* is "indisputably important," UNC.BIO 16, it claims that certiorari before judgment is inappropriate without a "true emergency, where delay in the appellate process pose[s] significant, time-sensitive risks." UNC.BIO 17-20 (citing *Supreme Court Practice* §4.20 (10th ed. 2013)). But "'avert[ing] a national catastrophe'" and preventing "'disarray'" aren't the only reasons to grant certiorari before judgment. UNC.BIO 18-19. This Court "has also reviewed cases before judgment below when a similar or identical question of constitutional or other importance was before the Court in another case." *Supreme Court Practice* §4.20 & n.17 (11th ed. 2019) (listing 14 cases). That is this case. Pet. 10-12.

UNC begrudgingly acknowledges that this Court has granted certiorari before judgment in similar circumstances, yet it deems that step unnecessary here because the Court can overrule *Grutter* in the *Harvard* case alone. UNC.BIO 21-24. SFFA agrees, of course, that this Court can overrule *Grutter* "in either case." Pet. 10-11; SFFA-Supp.-Br. 6-7, *SFFA v. Harvard*, No. 20-1199 (S. Ct.). And SFFA agrees with UNC that Harvard's status as a private institution makes no legal difference. *See* UNC.BIO 24 n.5. But Harvard and the Solicitor General disagree. *See* Harvard.BIO 25-26 & SG-Br. 21-22, *SFFA v. Harvard*, No. 20-1199 (S. Ct.).

In the end, there's no denying that this Court's analysis would be more complete if the two cases were heard together. Pet. 11. UNC can't meaningfully distinguish this case and *Harvard*, on the one hand, from *Grutter* and *Gratz*, on the other. While *Grutter* and *Gratz* both arose from the same university and the same district court, *cf.* UNC.BIO 24-25, that fact played no role in the Court's decision to grant certiorari before judgment, Pet. 11-12. To the contrary, the Court granted *Gratz* so it "could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003). So too here. Filed on the same day, by the same plaintiff, making overlapping claims, *Harvard* and *UNC* are companion cases that should be heard together.

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

Though standing is a threshold question, UNC follows Harvard's lead and treats standing as an afterthought, devoting barely two pages to it at the end of its brief. UNC's standing argument was rejected by the court below, App. 237-45, in addition to every other court to consider the issue, *see SFFA v. Harvard*, 980 F.3d 157, 182-84 (1st Cir. 2020) (affirming *SFFA v. Harvard*, 261 F. Supp. 3d 99, 103-11 (D. Mass. 2017)); *SFFA v. Univ. of Tex. at Austin*, 2021 WL 3145667, at *4-7 (W.D. Tex. July 26, 2021). For good reason. SFFA is a 501(c)(3) voluntary membership association dedicated to ending racial discrimination in college admissions, and it has members who were denied admission to UNC and who stand ready and able to apply to transfer if UNC stops racially discriminating. Pet. 7.

SFFA satisfies *Hunt*'s well-known, three-part test for associational standing: (1) its members have "standing to sue in their own right"; (2) this litigation is "germane to [SFFA's] purpose"; and (3) this litigation does not "require[] the participation of individual members." App. 243-45 (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). UNC has never disputed that SFFA meets the three *Hunt* prerequisites. App. 243.

UNC instead argues that SFFA lacks standing because it was not a "genuine" membership organization when it filed suit. UNC.BIO 37. Pointing to *Hunt*, UNC insists that SFFA must show that its members direct, "control," and "financ[e]" the organization to some unspecified degree. UNC.BIO 37-38.

But the district court correctly rejected this argument. App. 237-45. In *Hunt*, the Court examined whether apple growers and dealers had "indicia of membership" only because the state agency representing them was *not* a "voluntary membership organization." 432 U.S. at 342-44. If the agency had been a "traditional voluntary membership organization," the Court said it would have applied the ordinary three-part test. *Id.* Because SFFA "is, on its face, a traditional voluntary membership organization," the indicia-of-membership test is "inapplicable." *Harvard*, 980 F.3d at 183.

That SFFA modified its bylaws after it filed suit is legally irrelevant. *See Harvard*, 261 F. Supp. 3d at 110 n.14. Nor did these minor changes affect the district court's standing analysis. App. 237-45. The basic facts

about the organization and its members were sufficient to show "'that SFFA adequately represents the interests of its current members without needing to test this further based on the indicia-of-membership factors.'" App. 242-43 (quoting *Harvard*, 261 F. Supp. 3d at 109).

Regardless, as the district court recognized, "even if [UNC's] test applies, 'SFFA would easily satisfy it.'" App. 237. SFFA's members "voluntarily joined SFFA," "support its mission," "receive updates about the status of the case from SFFA's President," and "have had 'the opportunity to have input and direction on SFFA's case.'" App. 234-35. These unchallenged findings confirm that SFFA "in a very real sense ... represents the [injured members] and provides the means by which they express their collective views and protect their collective interests." *Hunt*, 432 U.S. at 345.

UNC speculates that the case might be moot because the standing members who SFFA previously identified may have since graduated. UNC.BIO 38. But throughout this litigation, SFFA has had members who were denied admission to UNC (as recently as the Spring of 2021) and who stand ready and able to apply to transfer if UNC stops racially discriminating. Pet. 7. If certiorari is granted, SFFA will lodge any necessary materials to that effect with the Court under Rule 32.3, as the petitioner did in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 718 (2007).

UNC's arguments are predictable. Universities that use racial preferences regularly invoke flawed

standing arguments to try to avoid this Court's review. *See, e.g.*, BIO 7-22, *Fisher v. Univ. of Tex.*, No. 11-345. But the Court has always rejected them. SFFA, like countless other membership organizations before it, has standing.

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

Grutter is wrong in every way—historically, legally, factually, practically, and morally. Pet. 13-28; States-Br.; AACE-Br.; Former-Officials-Br.; Speech-First-Br.; PLF-Br.; CERF-Br.; NAS-Br.; JW-Br. UNC disagrees. UNC.BIO 25-33; *see* Intervenors.BIO 21-37. But the question before the Court at the moment is whether it should grant certiorari to *consider* overruling *Grutter*. It should. Indeed, UNC concedes that the continued legality of race-based admissions is "indisputably important." UNC.BIO 16. *Grutter* itself was divided 5-4, and the *Grutter* dissents, as well as the many amicus briefs supporting SFFA here and in *Harvard*, prove that this issue is anything but "settled." UNC.BIO 30. And contra UNC, *Grutter* has no support in the Fourteenth Amendment's original meaning. Pet. 14; Meese-Br. 5-25, *SFFA v. Harvard*, No. 20-1199 (S. Ct.).

UNC claims that *Grutter* has "generated reliance interests," but it identifies only one: that universities currently use race in their admissions process. UNC.BIO 32. That interest is as weak as they come. Indeed, it doesn't count at all. Pet. 24-27. And as the record here demonstrates, any race-admissions pro-

cess is not worth keeping. Only under *Grutter* can government officials openly describe children first and foremost by the color of their skin. Pet. 5-6. Only under *Grutter* can a federal court find nothing wrong with admissions officers lamenting that a high-achieving applicant was "Asian" instead of "Brown," encouraging others to "give these brown babies a shot," and describing a student as having great academics "for a Native Amer[ican]/African Amer[ican] kid." Pet. 5-6.

UNC urges the Court to leave this issue to the "democratic process," noting that some States have prohibited race-based admissions and others are considering doing the same. UNC.BIO 32-33. But the Court rejected that same reasoning in *Brown*. States have leeway in many areas. Yet the "idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" *Obergefell v. Hodges*, 57 U.S. 644, 677 (2015) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)). The principle that governments cannot treat their citizens differently based on the color of their skin is a "'fundamental right[] [that] may not be submitted to a vote.'" *Id.*

IV. Whether UNC's admissions program satisfies strict scrutiny is a question of exceptional importance.

If this Court agrees to review the first question presented, then it should also review the second question presented. Detailed briefing on the race-neutral

alternatives available to UNC will inform this Court's analysis on whether to overrule *Grutter*. And whether UNC's admissions policy withstands strict scrutiny is an important question in its own right. That there is no circuit split does not diminish the need for review. Indeed, this Court *twice* reviewed whether the University of Texas's race-based admissions satisfied strict scrutiny, despite the lack of a circuit split and the case's "*sui generis*" facts. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016) (*Fisher II*); *Fisher v. Univ. of Tex.*, 570 U.S. 297, 307 (2013) (*Fisher I*). And this Court did a similar case-specific review in *Gratz*, even though the Sixth Circuit had not yet evaluated the University of Michigan's admissions program itself.

Despite respondents' insistence, SFFA is not raising a "record-intensive question[]" that "turns on factual disputes." UNC.BIO 2, 33; Intervenors.BIO 38-44. The Court need not overturn a single factual finding to rule for SFFA. Pet. 28-31. Indeed, UNC's own expert put forth viable race-neutral alternatives. App. 134 n.43, 139; Pet. 9, 29. The question presented is not *what* race-neutral alternatives are available to UNC; it's whether UNC's failure to adopt these alternatives violates the Equal Protection Clause. *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 n.5 (2013).

Nor does SFFA "agree[] that the district court applied the prevailing legal standard." UNC.BIO 34. To the contrary, the district court failed to "apply the correct standard of strict scrutiny." *Fisher I*, 570 U.S. at 303. Racial classifications are "'presumptively invalid and can be upheld only upon an extraordinary justification.'" *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993).

Yet the district court gave UNC "the benefit of the doubt" at every turn. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000). For example, the district court dismissed certain race-neutral alternatives because they "*appear to be* largely impractical" and had never been tried before. App. 141 (emphasis added). That is not strict scrutiny. States-Br. 9. Strict scrutiny requires that any doubts be resolved against UNC. *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002).

Finally, UNC's defense of the district court's application of strict scrutiny is unpersuasive and not a reason to deny certiorari. UNC's generic complaints about available race-neutral alternatives are woefully insufficient. A slight dip in SAT scores, Pet. 9, would not undermine UNC's "'reputation for excellence,'" UNC.BIO 35. Indeed, many schools are dropping test scores altogether. *See* Anderson, *Harvard Won't Require SAT or ACT Through 2026 as Test-Optional Push Grows*, Wash. Post (Dec. 16, 2021), wapo.st/33OTLK5. A decline in Native American admissions from 1.8% to 0.5%, Pet. 30, wouldn't deny "'educational opportunities to all racial groups,'" UNC.BIO 35. And admitting fewer minority students from wealthier families and more white students from poorer families, Pet. 30, wouldn't "'undercut [UNC's] efforts to achieve additional types of diversity,'" UNC.BIO 35. UNC never comes close to proving that these minor changes would cause a "dramatic sacrifice" of diversity or academic excellence. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003). Numerous universities across the nation have achieved workable race-

neutral alternatives. States-Br. 11-17; Pet. 29. UNC can too.

CONCLUSION

This Court should grant certiorari.

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