No. 20-1199

IN THE

# Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
*Petitioner*,

*v.*

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
*Respondent.*

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

## SUPPLEMENTAL BRIEF FOR RESPONDENT


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## INTRODUCTION

The United States is correct that this case satisfies none of this Court's certiorari standards. "[T]he court of appeals correctly applied this Court's precedents," its decision does not "conflict[] with any decision of another court of appeals," and SFFA's quest to relitigate the factual findings of two courts below is "'a quintessential example'" of what this Court "'almost never review[s].'" U.S. Br. 9, 16 (quoting *Taylor* v. *Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring in the judgment)); *see also* Sup. Ct. R. 10. The government is also right (at 9) that this Court's decisions in *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Fisher* v. *University of Texas at Austin*, 136 S. Ct. 2198 (2016), correctly interpreted equal-protection principles and that "all traditional *stare decisis* factors—including the substantial reliance interests of colleges and universities around the Nation—strongly support adhering to" those precedents. And as the government points out (at 19-23), even if that were not so, this case is a poor vehicle for re-examining those precedents.

## ARGUMENT

### I. THE UNITED STATES IS CORRECT THAT SFFA SEEKS TO RELITIGATE THE CONCURRENT FINDINGS OF TWO LOWER COURTS

SFFA's argument that the court of appeals misapplied this Court's precedents attempts to "relitigate for a third time case-specific factual disputes that both lower courts resolved against it." U.S. Br. 9. Indeed, although SFFA incredibly disclaims any intent to challenge the lower courts' factual findings, arguing that

this Court "need not overturn a single factual finding to rule for SFFA" on the second question presented (Reply 9-10), its challenge is irreconcilable with the evidentiary findings of the courts below in two detailed opinions following a 15-day trial. *See* Opp. 15-24. And SFFA offers no sound reason to assess the record differently—certainly not the "'very obvious and exceptional showing of error'" that this Court requires for "'review[ing] concurrent findings of fact by two courts below.'" *Exxon Co.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996); *accord* U.S. Br. 15.

All four arguments SFFA makes challenging the validity of Harvard's admissions program under the Court's precedents are based on SFFA's distorted view of the record, which was squarely rejected by the lower courts. For example, while SFFA asserts (Reply 11-12) that Harvard uses race as more than a mere "[p]lus" because race is "determinative" for some African-American and Hispanic applicants, it ignores the district court's key finding that Harvard considers race "'in a flexible, nonmechanical way,'" only "as a 'plus' factor in the context of individualized consideration of each and every applicant," Pet. App. 242 (quoting *Grutter*, 539 U.S. at 334). The court of appeals similarly determined that the impact of Harvard's use of race in admissions "is less than the one at issue in *Grutter*." Pet. App. 69; *see also* U.S. Br. 11-12.

The lower courts likewise concluded that Harvard does not engage in racial balancing. *See* U.S. Br. 12-13. As both lower courts explained, "[t]he amount by which the share of *admitted*" Asian-American, Hispanic, and African-American applicants fluctuates "is greater than the amount by which the share of" those same groups of *applicants* fluctuates—which "is the opposite of what one would expect if Harvard imposed a quota." Pet.

App. 64; *see also* Pet. App. 204-208. And contrary to SFFA's contention that Harvard's use of one-pagers is dissimilar to the use of "daily reports" that this Court approved in *Grutter* (Reply 11), the government correctly notes (at 13) that the court of appeals found the two analogous, Pet. App. 65. *See Grutter*, 539 U.S. at 318 (approving Director of Admissions' consultation of "'daily reports' that kept track of the racial and ethnic composition of the class"). As the district court found, the evidence at trial showed that Harvard uses "one-pagers" for three purposes, none of which suggests any balancing: to evaluate the effectiveness of its diversity recruitment efforts, to detect inadvertent drop-offs in the number of students with particular characteristics, and to forecast the number of admitted students likely to accept their offers of admission—a forecast that cannot be made as accurately without monitoring the racial composition of the admitted-student pool because yield rates vary by racial group. Pet. App. 135-137.[1]

Similarly, as the government explains (at 13-14), SFFA's argument regarding race-neutral alternatives contradicts the factual findings below. The lower courts determined that Simulation D would have "significant costs," such as diminishing African-American representation by "nearly one-third" and weakening the strength of Harvard's admitted classes by reducing students with top academic, extracurricular, personal, and athletic ratings. Pet. App. 219-220; Pet. App. 76-78. As the district court noted, moreover, "the work of the

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[1] The government states (at 3) that Harvard's "admissions officers are periodically provided with 'one-pagers.'" To clarify, only a few Admissions Office *leaders* (much like the Director of Admissions in *Grutter*) ever receive one-pagers, and only share information from them with the admissions committee "from time to time." Pet. App. 135-136; *see also* CAJA 1031:2-10.

experts" on "both sides" corroborated its conclusion that "Harvard has demonstrated that there are no workable and available race-neutral alternatives, singly or taken in combination, that would allow it to achieve an adequately diverse student body while still perpetuating its standards for academic and other measures of excellence." Pet. App. 220; *see also* Pet. App. 73-74 (court of appeals' similar conclusion).

Finally, the courts below found emphatically that Harvard does not intentionally discriminate against Asian-American applicants. *See* U.S. Br. 14. SFFA's contention that the court of appeals incorrectly "found no discrimination against Asian Americans even though the district court admitted that it could not 'clearly say what accounts for' the observed penalties and could not rule out 'overt discrimination or implicit bias'" (Reply 10) is deeply misleading.[2] As the United States recognizes (at 14), the court of appeals concluded that any statistically significant negative effect of Asian-American identity on overall admissions chances—as opposed to the personal rating alone—is "almost undetectable on a year-by-year basis even within SFFA's preferred model," and "disappear[s] entirely" in Harvard's model including more variables, Pet. App. 96. And even as to the personal rating—which is only one of six preliminary ratings considered in the early stages of the admissions process—the district court found definitively that the slight numerical disparity did not reflect intentional discrimination against Asian-American applicants. Pet. App. 245. SFFA simply ignores the district court's conclusion that, although, in theory,

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[2] As the government explains (at 23), SFFA "conflates" its intentional-discrimination claim with its claims regarding Harvard's use of race, even though the two are "distinct."

"overt discrimination or implicit bias" might explain the lower personal rating, it saw "no evidence of discrimination in the personal rating save for the slight numerical disparity itself." *Id.*

In short, the government's brief confirms that there is no way for this Court to overturn the court of appeals' application of the governing precedents without unraveling the factual findings of two courts below based on an extensive trial record. The Court should not take that extraordinary step, especially when SFFA has fallen far short of making the requisite showing.

## II. THE UNITED STATES IS CORRECT THAT THE COURT SHOULD NOT GRANT REVIEW TO OVERRULE ITS PRECEDENTS

As the government explains (at 16-19), there are multiple reasons why the Court should decline certiorari on the first question presented—whether to overrule *Bakke*, *Grutter*, and *Fisher*.

Those precedents correctly held that obtaining the educational benefits of a diverse student body is a compelling interest and that admissions systems that use race as one factor among many can satisfy the stringent narrow-tailoring requirement, consistent with the Court's equal-protection precedents that SFFA cites (Pet. 23). *See* Opp. 28-31. The evidence here confirms the correctness of the Court's conclusion that the educational benefits of diversity are a compelling interest and that there is no basis to revisit that holding. Harvard's expert testified that cross-racial interactions benefit all students and society. CAJA 2773:24-2777:10; CAJA 2780:15-2781:11; CAJA 2805:9-2806:15. Harvard students and alumni of diverse racial backgrounds,

including Asian-American students, also testified forcefully about the crucial impact that diversity at Harvard had on their college educations. *E.g.*, CAJA 2551:3-2553:4; CAJA 2569:14-2572:8; CAJA 2612:12-2616:15. SFFA introduced no contrary evidence. Moreover, although SFFA challenges (Pet. 25-29) the Court's narrow-tailoring framework as too lenient, this case shows how searching that inquiry is. As explained above, both lower courts rejected SFFA's claims only after finding based on an extensive record that Harvard conducts individualized, whole-person review of each applicant and considers race only as one among numerous factors. *See* Pet. App. 68 (emphasizing Harvard's "holistic review process"); Pet. App. 242 ("Harvard's admissions program 'bears the hallmarks of a narrowly tailored plan'").

There is also no indication that this Court's precedents have proven "'unworkable'" (Pet. 29). *See* U.S. Br. 18. Unlike those instances in which the Court has reconsidered precedents that have been undermined by subsequent decisions, the Court has consistently reaffirmed *Bakke*'s approval of holistic admissions programs that consider race as one of many factors in the only challenges to such programs that have even reached this Court (*i.e.*, *Grutter* and *Fisher*). SFFA provides no evidence that universities or courts have had trouble applying *Bakke*, *Grutter*, and *Fisher*. And contrary to SFFA's contention that "*Grutter* has been disastrous, especially for Asian Americans" (Reply 9), both lower courts found that Harvard's admissions program reflecting this Court's guidance does not discriminate against Asian-American applicants. Indeed, at trial multiple Asian-American students testified persuasively that their Asian-American heritage featured prominently in their applications and was affirmatively

valued in Harvard's admissions process. *See* CAJA 2681:6-2682:1; CAJA 2734:8-2737:19.

Moreover, *Bakke*, *Grutter*, and *Fisher* have generated significant reliance interests over the past 40 years, further counseling against certiorari. U.S. Br. 18-19. Even before *Grutter*, Justice Powell's opinion in *Bakke* had been "the touchstone for constitutional analysis of race-conscious admissions policies," with "[p]ublic and private universities across the Nation … modeling their own admissions programs on" his views. *Grutter*, 539 U.S. at 323; *see* U.S. Br. 18. *Grutter* and *Fisher* have deepened that reliance, as fifteen universities attested in their amicus brief below. *See* Brown Univ. et. al. C.A. Amicus Br. 1, 3-12 (June 15, 2020). In contrast, SFFA's argument that the constitutionality of those precedents is not "'settled'" rests on the mere fact that *Grutter* was a 5-4 decision and the dissenters there and SFFA's amici here contest the precedents' correctness (Reply 5)—facts that characterize countless precedents of this Court that have had broad impact and engendered similar reliance interests, *see, e.g.*, *District of Columbia* v. *Heller*, 554 U.S. 570 (2008); *Citizens United* v. *FEC*, 558 U.S. 310 (2010); *Obergefell* v. *Hodges*, 576 U.S. 644 (2015).

Individualized admissions systems that take some account of race as one factor among many have become part of the fabric of our society. Most Americans value racial and ethnic diversity and support programs that promote diversity on college campuses.[3] Reconsidera-

[3] *See* PEW Research Center, *More than six-in-ten say racial and ethnic diversity has a positive impact on the country's culture* (Apr. 24, 2019), https://tinyurl.com/2p9482tx; PEW Research Center, *Majorities of whites, blacks and Hispanics say racial and ethnic diversity is very good for the country* (Apr. 24, 2019), https://tinyurl.com/2p8wcn7v; *see also* Opp. 33 n.10.

tion of the Court's precedents is unwarranted and would have profound negative repercussions.

### III. THE UNITED STATES IS CORRECT THAT THIS CASE IS A FLAWED VEHICLE

The government correctly notes (at 19) that this case "is not an appropriate vehicle for reconsidering" *Bakke*, *Grutter*, and *Fisher*. The government's reasons, combined with the additional context below, further counsel against certiorari.

SFFA argues (Pet. 23) that *Grutter* was wrongly decided because its "diversity rationale is … uncompelling" and "flouts basic equal-protection principles." But SFFA never challenged the benefits of diversity below and did not introduce any evidence supporting the arguments it now seeks to raise. *See* Opp. 26-27, 34. To the contrary, in its opening statement at trial, SFFA claimed to "support[] diversity on campus" and proclaimed that "[d]iversity and its benefits are not on trial here." CAJA 453:14-16; *see United States* v. *Olano*, 507 U.S. 725, 733 (1993) ("'intentional relinquishment or abandonment'" constitutes waiver). Throughout the trial, SFFA also failed to rebut the extensive record evidence regarding the educational benefits of

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College students also support student-body diversity and value the learning opportunities it provides. *See* Carey et al., *It's college admissions season, and students are looking for diverse campuses*, Wash. Post (Apr. 14, 2020), https://tinyurl.com/mr28jna3; Carey & Horiuchi, *What do college students really think about diversity? We asked.*, Wash. Post (July 5, 2016), https://tinyurl.com/mr3c2hsa. For example, student surveys revealed that two-thirds of Harvard seniors "across racial and ethnic groups" consistently "report that their ability to relate well to people of different races, nations, and religions was 'stronger' or 'much stronger' than when they matriculated." CAJA 4407.

diversity. *See* Opp. 33-34. Thus, in asking the Court to reject *Bakke*'s, *Grutter*'s, and *Fisher*'s conclusions that the educational benefits of diversity are a compelling interest, SFFA relies on purported evidence of intentional discrimination that two courts have squarely rejected (*supra* pp. 4-5), mischaracterizations of public opinion (*supra* pp. 7-8), and unproven anecdotes (Pet. 32; Reply 8-9; *see also* Opp. 27). Given the government's further affirmation (at 17) that genuine diversity in higher education is critical to the Nation, the lack of any evidence to the contrary makes this case a particularly bad fit for revisiting this Court's diversity rationale.

Moreover, this is not the right case to "reconsider some of the Court's most significant equal-protection precedents" because SFFA brought only statutory claims under Title VI, so the Court would have to confront whether any revision of its jurisprudence under the Equal Protection Clause could be imported into that statute consistent with Congress's intent when it enacted Title VI. U.S. Br. 21; *see also Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) ("*stare decisis* carries enhanced force when a decision[] … interprets a statute"). Similarly, as the government explains (at 22), "it would be anomalous to grant review to reconsider *Grutter*" in this case because SFFA's "most heavily pressed claim"—*i.e.*, that Harvard allegedly discriminates against Asian-American applicants—"does not implicate *Grutter*'s holding." Indeed, although SFFA argues (Reply 9) that *Grutter* should be overruled *because* it has negatively affected Asian Americans (an incorrect argument on its own, *see supra* pp. 6-7), that conflates the two questions on which SFFA seeks certiorari, making SFFA's arguments for overruling these longstanding precedents dependent on

its counterfactual assertions about intentional discrimination.

This case is also a poor vehicle for reviewing either question presented because, as the government notes (at 20), this Court would need to resolve "[s]ubstantial questions" about SFFA's standing before reaching the merits, none of which would independently warrant review.

Unlike *Bakke*, *Grutter*, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), and *Fisher*, which were brought by individual university applicants, this suit was brought by an organization that purports to maintain associational standing. Although the district court found SFFA had standing based on some SFFA members' experience with Harvard's admissions program, the government correctly notes (at 20) the "gap in the record" concerning whether any of SFFA's members currently has a live interest in admission. *See also* Pet. App. 336 (only thirteen members' rights asserted below).

The Court would also have to resolve whether SFFA is a genuine membership organization that can invoke associational standing. U.S. Br. 20-21. As the government explains, that factbound inquiry turns on whether the organization "'represent[s] adequately the interests of all [its] injured members.'" *Id.* at 21 (quoting *International Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Brock*, 477 U.S. 274, 290 (1986)); *cf. Hollingsworth* v. *Perry*, 570 U.S. 693, 707 (2013) ("Article III standing is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests") (quotation marks omitted). Yet SFFA's efforts are directed by individuals with no personal stake in the outcome. The record reveals no meaningful role

played by any of SFFA's purported members, much less those with "standing to sue in their own right," *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). SFFA's members lack power, for example, to choose the organization's officers or vote on its priorities, and the sole member-selected director can always be outvoted by the four leadership-elected directors. CAJA 338-344. Nor do SFFA's members have any meaningful involvement in funding the organization: Although SFFA has claimed to have roughly 20,000 members (Pet. App. 10), it received just $730 in dues in 2015 and 2016—less than .04% of its total revenues. *See* CAJA 356; CAJA 379. Those facts distinguish this case from the sole decision of this Court that SFFA cites (Reply 4)—*Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007)—in which the Court decided a challenge to use of race in school assignment plans brought by a membership organization.[4]

## CONCLUSION

The petition should be denied.

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[4] Unlike SFFA's diffuse and disconnected membership, which includes "[a]ny individual who seeks to support the purposes and mission of" SFFA, CAJA 338, the organization in *Parents Involved* "reported a membership of fewer than 50 individuals, who were parents of children enrolled or who wished to enroll" in the public school system at issue, Respondent Br. 11 n.11, *Parents Involved in Community Schools* v. *Seattle School District No. 1*, No. 05-908 (U.S. Oct. 10, 2006).

Respectfully submitted.

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