No. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC., PETITIONER

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE, RESPONDENT

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

BRIEF OF AMERICA FIRST LEGAL AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

GENE P. HAMILTON
America First Legal Foundation
300 Independence Avenue SE
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for Amicus Curiae

QUESTION PRESENTED

The language of Title VI of the Civil Rights Act of 1964 clearly and unambiguously prohibits *all* forms of racial discrimination at universities that receive federal financial decision. *See* 42 U.S.C. § 2000d. The textual prohibition in Title VI is absolute—and it makes no exceptions for "compelling interests," "student body diversity," "remedial racial preferences," or any of the catch phrases that judges and university administrators invoke to justify race-conscious admissions.

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), however, the solo opinion of Justice Powell and the four-justice opinion of Justice Brennan asserted that Title VI does not prohibit all forms of racial discrimination, but only the subset of racial discrimination that would violate the Equal Protection Clause if committed by a state actor. *See id.* at 284–87 (opinion of Powell, J.); *id.* at 328–40 (Brennan, J., concurring in the judgment in part and dissenting in part). Neither opinion based this claim on anything in the text of Title VI. Instead, Justice Powell and Justice Brennan invoked legislative history and announced that Congress had "intended" to equate Title VI with the Equal Protection Clause. Subsequent decisions of this Court have simply assumed that Title VI should be equated with the Equal Protection Clause without conducting any analysis. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). The question presented is:

> Should the Court enforce Title VI as written and repudiate its textually indefensible claim that Title VI prohibits only the types of racial discrimination that would violate the Equal Protection Clause if committed by a state actor?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

In the Supreme Court of the United States

No. 20-1199

STUDENTS FOR FAIR ADMISSIONS, INC., PETITIONER

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE, RESPONDENT

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

BRIEF OF AMERICA FIRST LEGAL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed under the Constitution and federal statutes. America First Legal has a substantial interest in this case because this Court's affirmative-action cases have disregarded the text of Title VI and other federal civil-rights statutes that

1. All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

clearly and unambiguously prohibit *all* forms of discrimination on account of race. The Court's refusal to enforce these statutes as written undermines the rule of law, by liberating judges to interpret statutes according to what they would like them to say rather than what they actually say. America First Legal urges this Court to enforce Title VI as written and prohibit Harvard College from considering race in admissions unless Congress amends the text of Title VI to permit the practice, or unless Harvard University chooses to decline federal funds.

SUMMARY OF ARGUMENT

The language of Title VI makes no allowance for racial considerations in university admissions. It prohibits *all* forms of racial discrimination at universities that accept federal funds, with no exceptions for "compelling interests," "diversity," or "strict scrutiny." Harvard is indisputably violating this statutory command by using racial considerations in its undergraduate admissions. And the Court must enforce the statute as written and demand that Harvard stop using racial preferences or forgo federal funds.

It is not necessary for this Court to resolve the more difficult questions surrounding the constitutionality of affirmative action under the Equal Protection Clause. Title VI prohibits racial preferences regardless of whether the Equal Protection Clause should be construed to impose a separate constitutional prohibition on the practice, and the idea that Title VI mirrors the commands of the Equal Protection Clause is textually indefensible and should be repudiated. The Court needs only to enforce the commands of an unambiguous federal statute to resolve this

case, and there is no affirmative-action exception to the requirements of Title VI.

ARGUMENT

I. TITLE VI MEANS WHAT IT SAYS, AND IT UNAMBIGUOUSLY PROHIBITS ALL FORMS OF RACIAL DISCRIMINATION AT UNIVERSITIES THAT RECEIVE FEDERAL FUNDS

The command of Title VI is clear, unambiguous, and absolute:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. There is no conceivable way that Harvard's "race-conscious admissions"[2]—or any other university admissions program that considers an applicant's race—can be squared with this statutory language. Harvard openly acknowledges that it uses race as a factor in its undergraduate admissions decisions, and it does so with the conscious aim of increasing black and Hispanic student enrollment at the expense of Asians and whites. *See* Br. in Opp. at 23 ("If Harvard were to abandon race-conscious admissions, African-American and Hispanic representation would decline by nearly half."). That means that applicants to Harvard College are being "subjected to discrimination" "on the ground of race." And it

2. Br. in Opp. at 23.

means that Harvard College—as a "program or activity receiving Federal financial assistance"—is violating the unambiguous text of Title VI.

Harvard does not deny that its undergraduate applicants are being "subjected to discrimination" "on the ground of race. *See* Br. in Opp. at 23 (admitting that Harvard College deploys "race-conscious admissions" and that a race-neutral admissions process would cause black and Hispanic enrollment to "decline by nearly half."). And Harvard does not deny that it is a "program or activity receiving Federal financial assistance." Yet Harvard thinks it can somehow escape the inevitable conclusion it is violating Title VI—because it claims that Title VI does not mean what it says.

According to Harvard, Title VI does not prohibit *all* forms of racial discrimination at universities that receive federal funds (even though that is clearly what the statute says). Instead, Harvard maintains that Title VI prohibits only the racially discriminatory acts that would violate the Equal Protection Clause if committed by a state actor. Yet Harvard does not base this contention on anything in the language of Title VI. Rather, Harvard claims that it can flout the enacted language of Title VI—and should be allowed to continue doing so—because past opinions from members of this Court have likewise disregarded the statutory text,[3] and because Congress has not enacted legislation to repudiate these atextual interpretations of Title

3. *See, e.g.*, *Regents of the University of California v. Bakke*, 438 U.S. 265, 284–87 (1978) (opinion of Powell, J.); *id.* at 328–40 (Brennan, J., concurring in the judgment in part and dissenting in part).

VI. *See* Br. in Opp. at 25 ("If Congress wanted to amend Title VI to prohibit private universities from considering race in admissions, it could do so, but it has not.").

Harvard's argument is untenable. Title VI means what it says, and this Court must repudiate the indefensible idea that Title VI extends no further than the Equal Protection Clause. Nor can the doctrine of stare decisis be used to salvage the atextual constructions of Title VI that appear in previous opinions of this Court. Title VI, as a federal statute enacted by Congress, is the "supreme Law of the Land" under Article VI of the Constitution,[4] and the unambiguous words of that statute *must* be enforced—notwithstanding anything to the contrary that might appear in a (non-supreme) judicial opinion. Stare decisis may never be used to elevate a non-supreme judicial precedent over the unambiguous text of a federal statutory enactment.

A. The Notion That Title VI Prohibits Only The Racially Discriminatory Acts That Would Violate The Equal Protection Clause Is Indefensible

Consider once again the language of Title VI:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under

4. U.S. Const. art. VI, ¶ 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

> any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Now consider the text of the Equal Protection Clause:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV. The idea that these provisions mean the same thing is, as a textual matter, preposterous. The Equal Protection Clause presupposes the existence of "laws," and it forbids state officials to selectively withhold the "protection" of those "laws" from any "person within its jurisdiction." Title VI, by contrast, has nothing to with "laws" or "protection" or the behavior of state governments. And it reaches well beyond the textual command of the Equal Protection Clause by prohibiting *all* forms of discrimination on the ground of race, color, or national origin by entities that receive federal funds. It does not matter whether the victim of the discriminatory conduct is a person "within" the jurisdiction of the state, as Title VI protects out-of-state university applicants from racial discrimination even though they fall outside the state's "jurisdiction." And it does not matter whether these discriminatory acts can be justified under the doctrine of "strict scrutiny" or any of the jargon that this Court uses to evaluate racial discrimination under the Equal Protection Clause. Racial discrimination in federally funded programs or activities is *per se* unlawful, and there are no exceptions and no allowances for "compelling state interests."

The idea that Title VI does nothing more than incorporate the requirements of the Equal Protection Clause comes not from anything in a federal statute, but from a solo opinion authored by Justice Powell and a four-justice concurrence penned by Justice Brennan in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See id.* at 284–87 (1978) (opinion of Powell, J.); *id.* at 328–40 (Brennan, J., concurring in the judgment in part and dissenting in part). Neither of these opinions makes any attempt to explain how the language of Title VI could support such a construction. Instead, Justice Powell and Justice Brennan plodded through the legislative history and announced that Congress had "intended" to equate Title VI with the commands of the Equal Protection Clause and the equal-protection doctrines of this Court—and that Congress therefore had no "intention" of enacting what the statute actually says.[5] Justice Brennan went so far as

5. S*ee id.* at 284 (opinion of Powell, J.) ("Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution."); *id.* at 285 ("[S]upporters of Title VI repeatedly declared that the bill enacted constitutional principles."); *id.* at 328–35 ((Brennan, J., concurring in part and dissenting in part) ("The history of Title VI—from President Kennedy's request that Congress grant executive departments and agencies authority to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals—reveals one fixed purpose: to give the Executive Branch . . . authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by the government."); *id.* at 340 ("[A]ny claim that the use of racial criteria is

to claim that the "plain language" of Title VI should be disregarded and subordinated to the "remedial purpose" and "legislative history" of the statute. *See id.* at 340 ("[A]ny claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history.").

The analysis in the Powell and Brennan opinions is nothing short of lawless. The first problem is that the floor statements that they quote do not come anywhere close to saying that Title VI would prohibit *only* the discrimination outlawed by the Equal Protection Clause.[6] The quoted statements merely observe that Title VI prohibits racial discrimination that violates the Constitution; that is a far cry from declaring that constitutional violations are the *only* discriminatory practices prohibited by Title VI.

---

barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history.").

6. *See id.* at 284–87 (opinion of Powell, J.) (first citing 110 Cong. Rec. 6543–44 (1964) (statement of Sen. Humphrey); then citing 110 Cong. Rec. 2467–68 (1964) (statement of Rep. Celler); then citing 110 Cong. Rec. 1519 (1964) (statement of Rep. Celler); then citing 110 Cong. Rec. 2467 (1964) (statement of Rep. Lindsay); then citing 110 Cong. Rec. 1527–28 (1964) (statement of Rep. Celler); then citing 110 Cong. Rec. 13,333 (1964) (statement of Sen. Ribicoff); and then citing 110 Cong. Rec. 6553 (1964) (statement of Sen. Humphrey)); *id.* at 328–38 (Brennan, J., concurring in the judgment in part and dissenting in part) (first citing 110 Cong. Rec. 1519 (1964) (statement of Rep. Celler); then citing 110 Cong. Rec. 2467 (statement of Rep. Celler); then citing 110 Cong. Rec. 1528 (1964) (statement of Rep. Celler); then citing 110 Cong. Rec. 2467 (statement of Rep. Lindsay); then citing 110 Cong. Rec. 6544 (statement of Sen. Humphrey); then citing 110 Cong. Rec. 13,333 (statement of Sen. Ribicoff); and then citing 110 Cong. Rec. 6543–44 (statement of Sen. Humphrey)).

See, e.g., 110 Cong. Rec. 6544 (statement of Sen. Humphrey) (declaring that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution *and the moral sense of the Nation*." (emphasis added)). This is hardly the first time that judicial excursions into legislative history have led to evidence being misconstrued or misinterpreted,[7] and it is a principal reason why this Court no longer considers floor statements when interpreting a textually unambiguous statute. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1750 (2020) ("[L]egislative history can never defeat unambiguous statutory text"); *National Ass'n of Manufacturers v. Dep't of Defense*, 138 S. Ct. 617, 634 n.9 (2018) ("[A]mbiguous legislative history cannot trump clear statutory language." (citation and internal quotation marks omitted)); *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 132 (2002) ("[R]eference to legislative history is inappropriate when then text of the statute is unambiguous."); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808 n.3 (1989) ("Legislative history is irrelevant of the interpretation of an unambiguous statute."); *see also Gonzalez v. Arizona*, 677 F.3d 383, 441 (9th Cir. 2012) (Kozinski, J., concurring) ("The Supreme Court has warned us time and again not to rely on legislative history in interpreting statutes, largely because of the ease with which floor statements and committee reports can be manipulated to create a false impression as to what the body as a whole meant.").

---

7. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 Stan. L. Rev. 1833, 1838 (1998).

The second problem is that there are plenty of floor statements from legislators who insisted that Title VI *would* indeed require colorblindness, in accordance with the unambiguous statutory text,[8] and neither Justice Powell nor Justice Brennan could explain why those floor statements should be subordinated to the other statements that they invoked to support their preferred result. Justice Powell acknowledged the existence of floor statements that support a colorblind interpretation of Title VI, but he dismissed them as "isolated" instances and claimed (falsely) that these statements could support a colorblind interpretation of Title VI only when "taken out of context." *Bakke*, 438 U.S. at 284 (opinion of Powell, J.). Justice Brennan likewise acknowledged the existence of these competing floor statements but wrote them off as "a

8. *See, e.g.*, 110 Cong. Rec. 5864 (1964) (statement of Sen. Humphrey) ("What ['discrimination'] really means in the bill is . . . . [A] distinction in treatment given to different individuals because of their different race, religion, or national origin."); *id.* at 6047 (statement of Sen. Pastore) ("[I]t will not be permissible to say 'yes' to one person; but to say 'no' to another person, only because of the color of his skin."); *id.* at 6547 (statement of Sen. Humphrey) ("Human suffering draws no color lines, and the administration of help to the sufferers should not."); *id.* at 6561 (statement of Sen. Kuchel) ("[A]ll citizens should derive equal benefits from [federally funded] programs without regard to the color of their skin."); *id.* at 7055 (statement of Sen. Pastore) ("[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind."); *id.* at 12,675 (statement of Sen. Allott) (describing Title VI as mandating that federally funded benefits be distributed "regardless of color"); *see also Bakke*, 438 U.S. at 415 (Stevens, J., concurring in the judgment in part and dissenting in part) ("[T]he proponents of the legislation gave repeated assurances that the Act would be "colorblind" in its application.").

few isolated passages from among the thousands of pages of the legislative history of Title VI." *Bakke*, 438 U.S. at 340 n.17 (Brennan, J., concurring in the judgment in part and dissenting in part). Judges who invoke floor statements get to decide which statements they will treat as authoritative and which statements they will downplay as unreflective of the legislature's "true" intentions—which is why this Court now looks askance at efforts to divine legislative "intentions" from individual floor statements. *See NLRB v. SW General, Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."); *Zuber v. Allen*, 396 U.S. 168, 186 (1969) ("Floor debates reflect at best the understanding of individual Congressmen."); *see also Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."). And it is inexcusable that Justice Powell and Justice Brennan would choose to follow the floor statements that contradict the enacted statutory language over the floor statements that follow it.

Finally, the Powell and Brennan opinions in *Bakke* treat statutory language not as law, but as mere evidence of what the law might be. The real law, according to Justice Powell and Justice Brennan, is "congressional intent," with statutory text nothing more than a clue for deciphering what that "congressional intent" might have been. *Bakke*, 438 U.S. at 284 (opinion of Powell, J.); *id.* at 340 n.17 (Brennan, J., concurring in the judgment in part and

dissenting in part). But the more recent decisions of this Court emphatically reject statutory intentionalism in favor of textualist interpretive methodologies. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) ("Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("[L]egislative history is not the law. It is the business of Congress to sum up its own debates in its legislation, and once it enacts a statute [w]e do not inquire what the legislature meant; we ask only what the statute means." (citation and internal quotation marks omitted); Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* 7:59 (Harvard Law School, Nov 17, 2015), archived at http://perma.cc/7RYG-M8K7 ("[W]e're all textualists now").[9] Yet despite the apparent triumph of statutory textualism, the Court continues to retain this atextual yoke that *Bakke* created for Title VI and the Equal Protection

9. *See also Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1078 (2018) ("But this Court has no license to 'disregard clear language' based on an intuition that 'Congress must have intended something broader.'" (citation omitted)); *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."); *Lewis v. Chicago*, 560 U.S. 205, 215 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended."); *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent." (emphasis added)).

Clause, which rests on discredited theories of intentionalism and tendentious use of legislative history.

The text of Title VI is clear: racial discrimination of any type is forbidden in programs or activities that receive federal funds. Regardless of what the Equal Protection Clause means, Title VI categorically prohibits Harvard from using race in its admissions decisions—and there is no affirmative-action exception to this unambiguous statutory command.

B. Harvard's Stare Decisis Argument Violates The Supremacy Clause

Harvard's petition-stage brief argues that *Bakke*'s atextual construction of Title VI should be retained on account of stare decisis—and it suggests that *Bakke* should receive extra precedential weight because it interprets a federal statute. *See* Br. in Opp. at 25. The argument is familiar: Rulings of this Court that interpret statutes—unlike constitutional pronouncements—can be overruled by congressional legislation, and Congress's failure to amend a statute in response to a ruling of this Court should be regarded as acquiescence or implied ratification of the Court's ruling.[10] Harvard observes that Congress has not amended Title VI in response to *Bakke*, and it claims that

10. *See Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456 (2015) ("*Stare decisis* carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. . . . All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.").

this congressional inaction counsels against revisiting *Bakke*'s decision to equate Title VI with this Court's equal-protection doctrine. *See* Br. in Opp. at 25 ("If Congress wanted to amend Title VI to prohibit private universities from considering race in admissions, it could do so, but it has not."). Harvard also makes the stock arguments that are invoked whenever a litigant asks this Court to overrule precedent, constitutional or otherwise, by insisting that there must be "compelling" reasons to revisit precedent, and warning against the disruption of "reliance interests." *See* Br. in Opp. 25–26; *id.* at 35–36.

Missing from Harvard's discussion is any acknowledgement or recognition of this Court's obligation to enforce the hierarchy of laws established in Article VI of the Constitution, which tags federal statutes as "the supreme Law of the Land" and subordinates the opinions of this Court to the "supreme" sources of law:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const. art. VI, ¶ 2. Title VI is a "law of the United States" that was "made in pursuance" of the Constitution,[11] and it *must* prevail over non-supreme sources of

11. No one, to our knowledge, has suggested that Title VI is constitutionally suspect, even when construed to require colorblind admissions policies at universities that accept federal funds, and it is hard to imagine a credible constitutional objection to the

law—including the precedent of this Court, which is notably absent from the list of "supreme" laws described in Article VI.[12] Once it is acknowledged that: (1) Statutes mean what they say; and (2) The words of Title VI are unambiguous, the Court becomes constitutionally obligated to enforce this federal statutory command over the atextual pronouncements of its predecessors, and over any of the consequentialist considerations that undergird this Court's stare decisis doctrines. *See Bostock*, 140 S. Ct. at 1737 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

This is not to suggest that stare decisis may never be invoked when interpreting federal statutes. Stare decisis has an important role to play when statutory or constitutional language is less than entirely clear—as it often is—and precedent may always be consulted for its epistemic value in helping judges find the right answer to disputed questions of statutory or constitutional interpretation. *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1 (2001). But when a precedent rests on interpretive methodologies that this Court has long since repudiated, and when there is no conceivable textual argument to support the idea that Title

---

statute as written. *See Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014).

12. *See* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich. L. Rev. 1, 64 (2011) ("The Supremacy Clause prohibits textualists from invoking wrongly decided precedents to elevate a nonsupreme law over a supreme one.").

VI does nothing more than incorporate the Equal Protection Clause (and this Court's equal-protection case law) against federal-funding recipients, a textualist judge is constitutionally obligated to enforce the "supreme" federal statute over the non-supreme precedents of this Court. *See* Philip Hamburger, *Law and Judicial Duty* (2008).

Finally, Harvard's stare decisis argument falls flat even under the conventional factors that this Court looks to when reconsidering precedent. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part) ("*[S]tare decisis* factors fold into three broad considerations . . . . *First*, is the prior decision not just wrong, but grievously or egregiously wrong? . . . *Second*, has the prior decision caused significant negative jurisprudential or real-world consequences? . . . *Third*, would overruling the prior decision unduly upset reliance interests?").

Bakke's decision to equate Title VI with the Equal Protection Clause is "egregiously wrong" to anyone who accepts textualism over intentionalism—and it appears that every member of this Court has embraced textualism and repudiated the intentionalist mindset that undergirds the Powell and Brennan opinions in *Bakke*. *See Bostock*, 140 S. Ct. at 1754 ("Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."); Kagan, *supra* ("[W]e're all textualists now");

see also note 9 and accompanying text.[13] *Bakke* has also produced "negative jurisprudential . . . consequences" because its intentionalist construction of Title VI is incompatible with the recent textualist pronouncements of this Court, and its reliance on floor statements flies in the face of this Court's instructions to eschew legislative history when interpreting an unambiguous statutory text. And *Bakke* has produced "negative . . . real-world consequences" by licensing unjust discrimination against Asian-Americans, who must do twice as much to get half as far as a similarly situated white applicant—and for no apparent reason other than the pursuit of racial balancing

13. *Bakke*'s decision to interpret the Equal Protection Clause to allow affirmative action in state-university admissions presents a much closer question, because it is far from clear that the text and original meaning of the Equal Protection Clause preclude the use of remedial racial preferences—or even racial discrimination by government officials. *See* Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 Harv. J.L. & Pub. Pol'y 457 (1996) (acknowledging that "[a]n impressive array of academic authorities" have concluded that "under the original understanding of the Fourteenth Amendment, racial segregation of public schools was constitutionally permissible."); David A. Strauss, *Originalism, Precedent, and Candor*, 22 Const. Comment. 299, 305 (2005) ("[*Brown*] essentially conceded that the original understanding of the Fourteenth Amendment did not support the conclusion it reached. . . . [T]he best lawyers and best historians of the time could not identify an originalist argument for *Brown* that was plausible enough to be used even by a Court with every incentive to use such an argument."). But our claims in this amicus are limited to Title VI; we are not contending that Harvard's admissions policies would violate the Equal Protection Clause if adopted by a state university, and we do not believe it is necessary or advisable for the Court to reach this question. *See* Part II, *infra*.

and an inchoate and unexplained desire to avoid having "too many" Asians on the Harvard campus. Finally, a decision to repudiate *Bakke* and enforce Title VI as written will not disrupt reliance interests. Students who were previously admitted to Harvard on account of affirmative action will not have their admissions revoked. And requiring universities to change their admissions policies going forward does not implicate "reliance interests" of any sort. Requiring people to change their future behavior in response to a new rule of law happens all the time, and it happens regardless of whether a ruling from this Court disavows a prior precedent.

II. THERE IS NO NEED FOR THIS COURT TO RESOLVE THE MORE DIFFICULT QUESTIONS SURROUNDING THE CONSTITUTIONALITY OF AFFIRMATIVE ACTION UNDER THE EQUAL PROTECTION CLAUSE

A decision that severs *Bakke*'s link between Title VI and the Equal Protection Clause will also allow this Court to avoid deciding the difficult and complex questions surrounding the constitutionality of affirmative action. Critics of affirmative action think it is axiomatic that the Equal Protection Clause requires colorblind government, but the text and original meaning of the Fourteenth Amendment do not support this view, and it is not at all apparent that *Bakke* or *Grutter* erred by upholding the constitutionality of race-conscious admissions at state universities. The Court can and should avoid deciding these constitutional questions by resting its holding exclusively on the text of Title VI, and by rejecting *Bakke*'s idea that Title VI does nothing more than extend the commands of

the Equal Protection Clause to the recipients of federal funds.

The idea that the Equal Protection Clause prohibits racial discrimination by government officials comes not from the text or original meaning of the Fourteenth Amendment, but from the precedent of this Court. Justice Harlan's canonical dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), famously declared that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559 (Harlan, J., dissenting). And Justice Harlan's vision of colorblind government has inspired many of the great racial-equality decisions of this Court, including *Brown v. Board of Education*, 347 U.S. 483 (1954), as well as the constitutional attacks on affirmative action by those who insist that the Equal Protection Clause and the promise of *Brown* prohibit racial segregation and racial preferences on equal terms. *See, e.g.*, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 742–43 (2007) (plurality opinion of Roberts, C.J.); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." (citation and internal quotation marks omitted)).

But none of these ideas find support in the text, structure, or original meaning of the Fourteenth Amendment. The Equal Protection Clause, as written, requires equal *protection of the laws*, not equal treatment, and it does not create special rules for racially discriminatory treatment or protection. It is also abundantly clear that the Fourteenth Amendment did not prohibit racial discrimination

in voting. The Fifteenth Amendment would not have been necessary if the Fourteenth Amendment had done this,[14] and section 2 of the Fourteenth Amendment assumes that States may deny blacks the right to vote and accept reduced representation in Congress.[15] All of this is hard to square with the oft-repeated mantra that the Equal Protection Clause prohibits all racial classifications in government[16]—and the litigants who attack the constitutionality of affirmative action have not explained how that mantra can be reconciled with these textual realities of the Reconstruction Amendments. There is also plenty of historical evidence indicating that race-conscious laws are consistent with the original understanding of the Fourteenth Amendment. *See, e.g.*, Br. in Opp. at 32 ("Congress rejected alternative versions of the [Fourteenth] Amendment mandating complete colorblindness, see, e.g., Cong. Globe, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866), and enacted explicitly race-conscious laws contemporaneous with the proposal and ratification of the Amendment."); *see also* Melissa L. Saunders, *Equal Protection, Class*

14. *See* U.S. Const. amend. XV, § 1.

15. *See* U.S. Const. amend. XIV, § 2; *see also* David A. Strauss, *The Supreme Court 2014 Term Foreword: Does The Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 38 (2015) ("[A] straightforward reading of the text makes it clear that the Equal Protection Clause does not require equality in voting.").

16. *See Johnson v. California*, 543 U.S. 499, 510–11 (2005) (relying on "the Fourteenth Amendment's ban on racial discrimination"); *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("Racial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'" (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964))).

Legislation, and Colorblindness, 96 Mich. L. Rev. 245, 275–81 (1997) (discussing history of Fourteenth Amendment).

Instead, the constitutional attacks on affirmative action rely on the precedent of this Court, invoking decisions such as *Brown* and Justice Harlan's dissent in *Plessy*. But *Bakke* and *Grutter* are also precedents of this Court, and it is hard to contend that those constitutional holdings of those cases were "egregiously wrong" when the text, structure, and original meaning of the Equal Protection Clause offer no support for a constitutional prohibition on affirmative action. As wrong as those decisions were to allow race-conscious admissions under the text of Title VI, their refusal to pronounce affirmative action unconstitutional under the Fourteenth Amendment is (at the very least) respectable, and Harvard is on much stronger ground in defending the precedential force of the constitutional holdings in those cases.

There is no need for this Court to wade into the Equal Protection Clause when the text of Title VI unambiguously precludes race-conscious admissions at universities that receive federal funds. And this Court has repeatedly cautioned against the unnecessary resolution of constitutional issues when there is a clear and obvious non-constitutional means of resolving a dispute between litigants. *See Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*) ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case"); *Harris v. McRae*, 448 U.S. 297, 306–07 (1980) ("It is well settled that if a case may be decided on either statutory or constitutional grounds, this

Court, for sound jurisprudential reasons, will inquire first into the statutory question."); *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."). The Court should heed that advice here.

* * *

The language of Title VI categorically prohibits racial discrimination at universities that receive federal funds—and it makes no exception for affirmative action or "compelling" interests of any sort. If Harvard truly believes that its need for race-conscious admissions is "compelling" or essential to its educational mission, then it can decline federal funds, as Hillsdale College and Grove City College have done, and which Harvard can easily afford with an endowment valued at $53.2 billion. *See* Virginia L. Ma and Kevin A. Simauchi, *Harvard's Endowment Soars to $53.2 Billion, Reports 33.6% Returns*, The Harvard Crimson (Oct. 15, 2021), https://bit.ly/3LWcMLF.[17] It is

17. *But see* Letter from Elena Kagan, Dean of Harvard Law School, to Members of the HLS Community (Sept. 20, 2005) (explaining that Harvard Law School was unwilling to jeopardize Harvard University's continued receipt of federal funds by enforcing its anti-discrimination policies against U.S. military recruiters), available at https://bit.ly/3kR69OM.

not entitled to demand special dispensations from the conditions that Congress has attached to federal funding.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

GENE P. HAMILTON
America First Legal Foundation
300 Independence Avenue SE
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

May 9, 2022