No. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC., PETITIONER

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, prohibits discrimination based on race in programs that receive federal financial assistance. This Court has interpreted Title VI to prohibit "only those racial classifications that would violate the Equal Protection Clause" if employed by a state actor. *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003) (citation omitted). And the Court has held that the Equal Protection Clause allows state colleges and universities to consider applicants' race if such consideration is narrowly tailored to advance a compelling interest in the educational benefits that flow from "student body diversity." *Id.* at 325; see *id.* at 322-343. The questions presented are:

1. Whether the court of appeals properly applied this Court's precedents in determining, based on the district court's factual findings affirmed on appeal, that Harvard College's admissions process does not violate Title VI.

2. Whether the Court should overrule its decision in *Grutter*, along with its decisions in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), *Fisher* v. *University of Texas*, 570 U.S. 297 (2013), and *Fisher* v. *University of Texas*, 136 S. Ct. 2198 (2016).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statute, and rules:

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, provides that "[n]o 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. Title VI prohibits "only those racial classifications that would violate the Equal Protection Clause" if employed by a state actor. *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003) (citation omitted); see *Gratz* v. *Bollinger*, 539 U.S. 244, 276 n.23 (2003). The Equal Protection Clause, in turn, permits racial classi-

fications "only if they are narrowly tailored to further compelling governmental interests." *Fisher* v. *University of Texas*, 570 U.S. 297, 309 (2013) (*Fisher I*) (quoting *Grutter*, 539 U.S. at 326).

In *Grutter*, this Court held that the University of Michigan Law School's consideration of race in admissions satisfied that standard because it was narrowly tailored "to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. In *Fisher* v. *University of Texas*, 136 S. Ct. 2198 (2016) (*Fisher II*), the Court upheld the University of Texas's limited consideration of race in undergraduate admissions for the same reason. *Id.* at 2214. The Court concluded that those two policies were narrowly tailored in part because they afforded "individualized consideration" to each applicant and considered race "in a flexible, nonmechanical way," as "a 'plus' factor." *Grutter*, 539 U.S. at 334; see *Fisher II*, 136 S. Ct. at 2207. Those features distinguished the policies at issue in *Grutter* and *Fisher* from the mechanical bonuses and quotas the Court rejected in *Gratz* and *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

2. This case concerns the admissions policies of Harvard College, a private institution that receives federal funds. Pet. App. 56. Harvard's mission is "to educate the citizens and citizen-leaders for our society" through "the transformative power of a liberal arts and sciences education." *Id.* at 108 (citation omitted). To achieve that goal, Harvard "values and pursues many kinds of diversity" in its student body, including "different academic interests, belief systems, political views, geographic origins, family circumstances, and racial identities." *Ibid.*

Harvard's admissions process begins with recruiting efforts, which aim to attract high-achieving applicants of varied socioeconomic, geographic, and racial backgrounds. Pet. App. 12-13. Harvard then evaluates applications using a rigorous multistep process. Every application is read by a "first reader," who assigns numeric scores in six areas: academic, extracurricular, athletic, school support, personal, and overall. *Id.* at 15; see *id.* at 14-21. Applicants are interviewed by alumni or admissions officers, who also assign scores in the academic, extracurricular, personal, and overall categories. *Id.* at 21.

Applications are then considered by regional subcommittees, which make recommendations to the full admissions committee. Pet. App. 15, 21-22. If a majority of the committee votes to admit an applicant, the applicant is tentatively admitted. *Id.* at 22-23. The full-committee vote, however, typically results in "a pool of more than 2,000 tentative admits, more than can be admitted." *Id.* at 23. The committee accordingly "conducts a 'lop process' to winnow down the pool." *Ibid.*

Throughout the process, admissions officers are periodically provided with "one-pagers," which report "demographic characteristics of Harvard's applicant pool and admitted class and compares them to the previous year." Pet. App. 24. One-pagers contain information including the applicant pool's distribution by geographic region, race, gender, intended concentration, legacy status, and whether applicants applied for financial aid. *Ibid.* Harvard uses this information to avoid dramatic year-to-year "drop-offs in admitted students with certain characteristics, including race, due to inadvertence or lack of care." *Id.* at 66. It also uses the one-pagers to "forecast yield rates"—*i.e.*, "the percent of

admitted applicants who accept an offer"—because applicants of certain demographic groups "accept offers of admission at higher rates." *Id.* at 24-25.

At various points during the process, Harvard may award a "tip" that improves an applicant's chances of admission. Pet. App. 23. Tips are given based on various characteristics, including "outstanding and unusual intellectual ability, unusually appealing personal qualities, outstanding capacity for leadership, creative ability," and "geographic, ethnic, or economic factors," including race. *Id.* at 23-24. Harvard also gives "tips" to recruited athletes, legacy applicants, applicants on the Dean's Interest List, and children of faculty and staff (collectively, ALDC applicants). *Id.* at 25-26. Tips may be considered in assessing an applicant's "overall" rating during the first read, during subcommittee and full-committee meetings, and during the lop process. *Id.* at 23-24.

3. Petitioner is a nonprofit organization formed in July 2014 to defend "the right of individuals to equal protection under the law" through "litigation" and other means. Pet. App. 10. When petitioner filed this suit a few months later, it had 47 "affiliate members," several of whom were "Asian American members who had applied to and been rejected by Harvard." *Ibid.*; see *id.* at 330. Since filing this suit, petitioner has amended its bylaws and membership rules. *Id.* at 10. Petitioner currently has approximately 20,000 members. *Ibid.*

Petitioner's complaint alleged that Harvard's admissions process violates Title VI. Pet. App. 7. Petitioner asserted that Harvard's acknowledged consideration of race does not satisfy strict scrutiny, alleging that it amounts to racial balancing, it uses race as more than a "plus" factor, and Harvard could achieve its goals

through race-neutral alternatives. *Id.* at 7-8. Petitioner separately asserted that Harvard surreptitiously engages in intentional discrimination against Asian-American applicants, principally by assigning them lower personal ratings. *Id.* at 8. Petitioner sought only prospective relief. *Ibid.*

4. The district court denied Harvard's motion to dismiss for lack of Article III standing, holding that petitioner had associational standing to assert claims on behalf of its members. Pet. App. 43. Following a 15-day bench trial, including testimony from 30 witnesses, the district court rejected petitioner's claims. *Id.* at 99-270.

The district court determined that "Harvard's admissions process survives strict scrutiny" because it is "narrowly tailored to achieve diversity and the academic benefits that flow from diversity." Pet. App. 265. The court rejected petitioner's claim that Harvard's admissions process entails racial balancing. *Id.* at 247-252. The court found that "Harvard's admissions program intends to treat every applicant as an individual"; that Harvard "does not employ a race-based quota"; and that Harvard had neither target numbers for particular races nor predetermined ranges of permissible fluctuation. *Id.* at 248-249.

The district court additionally found no evidence that Harvard used race in a mechanical way. Pet. App. 252-256. The court explained that race was used only contextually and that the "tips" for race were "comparable to the size and effect of tips" this Court upheld in *Grutter* and *Fisher II*. *Id.* at 254. The court rejected petitioner's contention that Harvard could have achieved its diversity goals through workable race-neutral alternatives. *Id.* at 256-260.

Finally, the district court found that Harvard did not intentionally discriminate against Asian-American applicants. Pet. App. 260-266. The court found "no evidence of any racial animus whatsoever or intentional discrimination on the part of Harvard beyond its use of a race conscious admissions policy" that sometimes treats a particular applicant's race as a plus factor, but never as a negative. *Id.* at 261; see *id.* at 138-139. The court also scrutinized the parties' statistical models, *id.* at 197-204, and found that the evidence did not evince a pattern of intentional discrimination, *id.* at 264-265.

5. The court of appeals affirmed. Pet. App. 1-98.

a. The court of appeals first held that petitioner had associational standing. Pet. App. 51-55.

b. On the merits, the court of appeals affirmed the district court's conclusion that Harvard's policy satisfies strict scrutiny. Pet. App. 56-79. It explained that this Court's decisions in *Grutter* and *Fisher II* held that the educational benefits flowing from student-body diversity may constitute a compelling interest. *Id.* at 56-58. The court of appeals concluded that Harvard "ha[d] identified specific, measurable goals it seeks to achieve by considering race in admissions," and that those goals were even "more precise and open to judicial scrutiny" than the goals this Court had approved in *Fisher II*. *Id.* at 58; see *id.* at 31-35, 58-61.

The court of appeals determined that Harvard's consideration of race is narrowly tailored. Pet. App. 61-67. The court observed that, under this Court's precedents, "universities may pay 'some attention to numbers' without 'transforming a flexible admissions system into a rigid quota.'" *Id.* at 63 (quoting *Grutter*, 539 U.S. at 336) (brackets omitted). The court of appeals rejected petitioner's argument that Harvard's use of one-pagers

reflected racial balancing, finding that the evidence supported Harvard's position that it uses them for permissible purposes and that the racial composition of Harvard's classes varies over time in a manner inconsistent with balancing. *Id.* at 64-67.

The court of appeals also affirmed the district court's determination that Harvard does not use race mechanically. Pet. App. 67-73. The court of appeals noted that, unlike the admissions process this Court held invalid in *Gratz*, Harvard's program does "not award a fixed amount of points to applicants because of their race," but instead "considers race as part of a holistic review." *Id.* at 68. The court observed that "the effect of race * * * is 'not disproportionate to the magnitude of other tips,'" such as those for children of faculty or staff, or for legacy status. *Id.* at 69 (citation omitted). The court noted that the effects of Harvard's use of race in increasing the percentage of African-American and Hispanic admitted students at Harvard were smaller than the corresponding effects of the program this Court upheld in *Grutter*. *Ibid.*

The court of appeals additionally determined that "Harvard ha[d] met its burden" of showing "that it has carefully considered" race-neutral alternatives and "concluded that they are not workable and would undercut its educational objectives." Pet. App. 74. The court observed that Harvard "ha[d] implemented many of the policies [petitioner] propose[d]"—such as eliminating its early-action admissions option, increasing financial aid, and additional outreach—but that those policies had been insufficient to produce a diverse student body. *Ibid.* The court found in particular that Harvard had "proved" that one of petitioner's principal proposals (Simulation D)—in which Harvard would eliminate

consideration of race and tips for ALDC applicants, while increasing tips for low-income status—"was not a workable alternative." *Id.* at 76. The court explained that Simulation D would cause significant declines in the average SAT score of admitted students and in the percentage of admitted students with superior academic, extracurricular, personal, and athletic ratings. *Id.* at 76 (citing *Fisher II*, 136 S. Ct. at 2213); see *Grutter*, 539 U.S. at 340. The court also noted that Simulation D would cause a 32% decrease in African-American representation in Harvard's admitted class, which would "make Harvard less attractive and hospitable to minority applicants while limiting all students' opportunities to engage with and learn from students with different backgrounds." Pet. App. 78; see *id.* at 77-78.

c. Finally, the court of appeals affirmed the district court's holding that Harvard's admissions process does not intentionally discriminate against Asian Americans. Pet. App. 79-98. The court of appeals assumed, without deciding, that Harvard bore the burden of disproving intentional discrimination and concluded that "Harvard ha[d] carried" that burden. *Id.* at 80; see *id.* at 79 n.34. The court noted that the district court had credited the consistent testimony of Harvard admissions officers disclaiming any intent to discriminate against Asian-American applicants. *Id.* at 82. The court of appeals rejected petitioner's reliance on a 1990 federal-government report because that report concluded that "Harvard did not discriminate against" Asian Americans. *Id.* at 83 (citation omitted). And the court determined that the statistical evidence did not reflect intentional discrimination against Asian Americans. *Id.* at 86-98. The court emphasized that, even using petitioner's "preferred model," the negative effect of Asian-American identity

was "almost undetectable on a year-by-year basis" and "only statistically significantly negative in one of the six years analyzed." *Id.* at 96.

DISCUSSION

After affirming the district court's detailed factual findings, the court of appeals held that Harvard's limited consideration of race in admissions complies with this Court's precedents because it is narrowly tailored to further a compelling interest in the educational benefits of a diverse student body. Petitioner contends (Pet. 36-43) that the Court should review that determination. But the court of appeals correctly applied this Court's precedents, and its decision neither conflicts with any decision of another court of appeals nor otherwise satisfies this Court's certiorari standards. To the contrary, petitioner seeks to relitigate for a third time case-specific factual disputes that both lower courts resolved against it.

Petitioner also contends (Pet. 21-36) that the Court should grant review to overrule *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and the Court's other precedents authorizing consideration of race in university admissions. But petitioner cannot justify that extraordinary step. In the view of the United States, *Grutter*'s interpretation of equal-protection principles is correct, and all traditional *stare decisis* factors—including the substantial reliance interests of colleges and universities around the Nation—strongly support adhering to *Grutter*. In any event, this case would be a poor vehicle for reconsidering *Grutter*.

A. The Court Of Appeals' Application Of This Court's Precedents Does Not Warrant Further Review

The district court and the court of appeals held that Harvard's limited consideration of race as part of its holistic assessment of applicants satisfies strict scrutiny. Pet. App. 56-98, 234-266. The United States participated in the lower courts as an amicus curiae supporting petitioner, arguing that Harvard's consideration of race is not narrowly tailored to serve a compelling interest. *E.g.*, Gov't C.A. Amicus Br. 10-31. But both courts rejected that view of the evidence. The United States has now reexamined the case following the court of appeals' decision, the change in Administrations, and this Court's invitation to file an amicus brief. Based on that review, the United States has concluded that neither the district court's factual findings nor the court of appeals' application of this Court's precedents to those findings warrant further review.

1. The court of appeals correctly recognized that Harvard's admissions policy is subject to "strict scrutiny," under which its "use of race must further a compelling interest and be narrowly tailored to do so." Pet. App. 44, 56; see, *e.g.*, *Fisher* v. *University of Texas*, 570 U.S. 297, 309 (2013); *Gratz* v. *Bollinger*, 539 U.S. 244, 276 n.23 (2003). The court also correctly recognized that, under this Court's precedents, attaining the educational benefits of "student body diversity is a compelling * * * interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325; see Pet. App. 56-61.

Petitioner acknowledges that this Court has "approved" "the educational benefits of 'student body diversity'" as a compelling interest. Pet. 37 (quoting *Fisher I*, 570 U.S. at 314-315). And petitioner does not

appear to challenge the court of appeals' holding that Harvard has complied with this Court's precedents by identifying "specific, measurable goals it seeks to achieve by considering race in admissions." Pet. App. 58; see *id.* at 31-35, 57-61.

2. Instead, "the heart of [petitioner's] challenge" under *Grutter*, Pet. App. 61, and the crux of its disagreement with the court of appeals' application of *Grutter* (Pet. 36-43), is petitioner's assertion that Harvard's consideration of race is not narrowly tailored. The court of appeals properly rejected that contention, which is refuted by the district court's factual findings upheld on appeal. Pet. App. 61-79.

a. The district court's findings establish that Harvard's approach comports with the requirement that race be considered only in a contextual, not mechanical, manner. See *Fisher* v. *University of Texas*, 136 S. Ct. 2198, 2208-2210, 2207 (2016); *Gratz*, 539 U.S. at 271-272. The court found that Harvard's admissions program uses race "in a flexible, nonmechanical way," considering it 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 noted that, "[l]ike the University of Michigan Law School in *Grutter*, Harvard 'engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.'" *Ibid.* (quoting *Grutter*, 539 U.S. at 337). "[T]his individualized consideration," the court explained, "is afforded to applicants of all races" and "adequately ensures that all factors that may contribute to student body diversity are meaningfully considered." *Ibid.* (quoting *Grutter*, 539 U.S. at 337) (brackets omitted). And the court found

that Harvard's use of race is limited and "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.* at 253 (citation omitted).

The court of appeals reached the same conclusion based on its own extensive review of the record. Pet. App. 68-72. The court reasoned that Harvard "considers race as part of a holistic review process" and "does not weigh race so heavily that it becomes mechanical and decisive in practice." *Id.* at 68. And the court emphasized that "[t]he impact of Harvard's use of race on the makeup of its class is less than the one at issue in *Grutter*." *Id.* at 69.

b. The district court's factual findings upheld on appeal also support the conclusion that Harvard does not engage in racial balancing. See *Grutter*, 539 U.S. at 329-330 (quoting *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)). The court found that Harvard does not employ "any racial quotas and has not attempted to achieve classes with any specified racial composition." Pet. App. 204. The court determined that, in "treat[ing] every applicant as an individual," Harvard does not "'define diversity as some specified percentage of a particular group merely because of its race or ethnic origin.'" *Id.* at 248 (quoting *Fisher I*, 570 U.S. at 311) (citation omitted). The court further found that the racial composition of Harvard's admitted class has varied from year to year "in a manner inconsistent with the imposition of a racial quota or racial balancing." *Id.* at 205.

The court of appeals reviewed the record and determined that the evidence supported the same conclusion. Pet. App. 63-67. The court noted that "[t]he amount by which the share of *admitted* Asian American applicants

fluctuates is greater than the amount by which the share of Asian American *applicants* fluctuates," which is "the opposite of what one would expect if Harvard imposed a quota." *Id.* at 64. And the court rejected petitioner's contention that admissions officers' awareness of the demographic composition of the emerging class of admitted students reflected in the one-pagers proved that its admissions process is not narrowly tailored. *Id.* at 65-67. As the court observed, this Court in *Grutter* rejected a similar argument alleging that an institution's "consultation" of similar "'daily reports'" that "ke[pt] track of the racial and ethnic composition of the class" rendered its process not narrowly tailored. *Id.* at 65 (quoting *Grutter*, 539 U.S. at 336).

c. Both courts below also faithfully followed this Court's direction to conduct a "careful judicial inquiry" into whether Harvard "could achieve sufficient diversity without using racial classifications." *Fisher I*, 570 U.S. at 312. The courts properly determined that Harvard considered race-neutral alternatives and concluded that none offered a workable way to achieve its compelling interest. Pet. App. 73-79, 256-260.

The district court chronicled in detail the various alternatives that Harvard considered. Pet. App. 208-220. Those alternatives included eliminating early-action admission, eliminating ALDC tips, augmenting recruitment efforts and financial aid, admitting additional transfer students, eliminating consideration of standardized-test scores, and imposing "place-based quotas" (*e.g.*, to admit "the top student from each high school class or zip code"). *Id.* at 216; see *id.* at 208-216. The court also addressed simulations that petitioner offered to model the effects of those alternatives. *Id.* at 217-220. The court found that "Harvard ha[d] demon-

strated 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." *Id.* at 220. The court of appeals also examined the evidence and likewise concluded that "Harvard ha[d] met its burden * * * to show that it ha[d] carefully considered all alternatives" and had "concluded that they are not workable and would undercut its educational objectives." *Id.* at 74; see *id.* at 37-42, 73-79.

3. Finally, the district court found, as a factual matter, that Harvard does not engage in intentional discrimination against Asian-American applicants. The court of appeals assumed, without deciding, that Harvard bore the burden of disproving discrimination and concluded that "Harvard ha[d] carried" that burden. Pet. App. 80. Both courts credited the testimony of Harvard's admissions officials consistently disavowing any intent to discriminate. *Id.* at 82-83, 120, 138, 190. And both courts closely scrutinized the parties' quantitative evidence and determined that it did not demonstrate intentional discrimination. *Id.* at 47-50, 85-98, 165-208, 260-266. As the court of appeals noted, petitioner's own preferred statistical model showed only an "almost undetectable" negative effect of Asian-American identity that did not support a finding of intentional discrimination. *Id.* at 96. And petitioner "did not present a single admissions file that reflected any discriminatory animus." *Id.* at 246.

4. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals. Instead, in arguing that Harvard's admissions program does not satisfy strict scrutiny (Pet. 36-43),

petitioner principally asks this Court to revisit the lower courts' factual determinations. For example, a central premise of the petition is that Harvard intentionally "discriminates against Asian Americans" by awarding them lower personal ratings based on racial stereotypes. Pet. 12; see Pet. 3, 12-17, 20, 27, 30-31, 37-39. But the lower courts found, as a factual matter, that "Harvard did not intentionally discriminate against Asian Americans." Pet. App. 98. Petitioner similarly seeks to relitigate the lower courts' findings that Harvard does not "engage[] in racial balancing," "use[s] race as a mere plus" factor, and could not achieve its goals through "workable race-neutral alternatives." Pet. 37, 39, 41-42 (emphases omitted).

Those factual contentions do not warrant review. This Court ordinarily "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). And "under what [the Court] ha[s] called the 'two-court rule,' the policy has been applied with particular rigor when [the] district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). This Court thus will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (citation omitted).

Petitioner has made no such showing here. Indeed, petitioner fails even to acknowledge the deference due to the lower courts' findings, which rested in part on the lower courts' extensive analysis of the parties' disputes about the appropriate econometric methodology for

constructing statistical models of the effects of Harvard's admission process. See Pet. App. 47-50, 85-98, 165-208, 260-266. And to the extent petitioner seeks to frame the petition as a claim that the court of appeals misapplied this Court's precedents to the facts found by the district court, that too "is a quintessential example of the kind that [the Court] almost never review[s]." *Taylor* v. *Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring in the judgment). "A petition for a writ of certiorari is rarely granted when the asserted error" is "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Court should adhere to that settled practice here.

B. This Court Should Not Grant Review To Consider Overruling Its Precedents In This Area

Petitioner separately contends (Pet. 21-36) that the Court should grant review to overrule *Grutter* and hold that any consideration of race in admissions is categorically impermissible. In making that request, petitioner necessarily asserts that the Court should also overrule its decisions in *Bakke*, *Fisher I*, and *Fisher II*. That contention lacks merit, and this case would be an unsuitable vehicle for revisiting those precedents in any event.

1. Petitioner primarily contends (Br. 22-29) that *Grutter* should be overruled because it is "wrong." Pet. 22. But the principles that *Grutter* articulated are correct. The Court explained that the educational benefits of diversity may qualify as a compelling interest because a university may conclude that those benefits are "essential to its educational mission." 539 U.S. at 328. The educational benefits of diversity, including racial and ethnic diversity, include "better prepar[ing] students for an increasingly diverse workforce and society," "promot[ing] 'cross-racial understanding,'" and ensuring that "the path to leadership [is] visibly open to

talented and qualified individuals of every race and ethnicity." *Id.* at 330, 332 (citations omitted).

"The educational benefits of diversity identified in *Grutter* and *Fisher* are of critical importance to the United States." U.S. Amicus Br. at 5, *Fisher II*, *supra* (No. 14-981). Among other things, "[t]he government has a vital interest in drawing its personnel—many of whom will eventually become its civilian and military leaders—from a well-qualified and diverse pool of university and service academy graduates." *Ibid.*; see *id.* at 8-15. "[T]he '[N]ation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter*, 539 U.S. at 324 (citation omitted). This Court's decisions thus correctly recognize that securing the educational benefits that flow from such diversity is a sufficiently compelling interest to justify race-conscious measures that satisfy the stringent narrow-tailoring requirements set forth in *Grutter*, *Gratz*, and *Fisher*.

2. In any event, this Court always "demand[s] a 'special justification,' over and above the belief 'that the precedent was wrongly decided,'" before reversing one of its decisions. *Allen* v. *Cooper*, 140 S. Ct. 994, 1003 (2020) (citation omitted). That demand for a special justification reflects the Court's recognition that *stare decisis* is a "foundation stone of the rule of law." *Ibid.* (citation omitted). Petitioner has identified no such special justification here. To the contrary, traditional *stare decisis* considerations strongly support adhering to *Grutter*.

First, *Grutter* has in no sense become an "outlier." *Janus* v. *American Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2482 (2018). *Grutter* ratified the principles articulated 25 years earlier in

Justice Powell's pathmarking opinion in *Bakke*, which formed the basis for the *Bakke* Court's reversal of the portion of the lower court's judgment prohibiting consideration of race in admissions. *Grutter*, 539 U.S. at 325; see *id.* at 322-323. And no decision of the Court has called *Grutter* into doubt or cabined its holding that the educational benefits of a diverse student body may qualify as a compelling interest justifying limited consideration of race in university admissions. Cf. *Janus*, 138 S. Ct. at 2483-2485. Petitioner disagrees with that holding (Pet. 22-25), but identifies no subsequent legal development calling it into question.

Second, *Grutter* has not proven "unworkable." Pet. 29 (citation omitted). Petitioner offers no evidence that this Court or lower courts have struggled to apply *Grutter*'s teachings. And this Court's other decisions applying *Grutter*'s framework have provided additional guidance about the contours of the standard *Grutter* prescribed. See *Fisher II*, 136 S. Ct. at 2207-2208, 2210-2214; *Fisher I*, 570 U.S. at 310-315; *Gratz*, 539 U.S. at 269-276.

Third, and most importantly, *Grutter* has engendered widespread reliance. In the quarter-century before the Court issued that decision, "[p]ublic and private universities across the Nation" had already "modeled their own admissions programs on Justice Powell's" opinion in *Bakke*. *Grutter*, 539 U.S. at 323. Since *Grutter* "endorse[d]" Justice Powell's approach, 539 U.S. at 325, that reliance has only grown. See, *e.g.*, Brown University, et al. C.A. Amicus Br. 1.

Revisiting this Court's settled precedent in the specific context of Harvard's admissions process would place the disruption of those reliance interests in stark relief. Harvard's approach has been a point of reference in decisions addressing other institutions' policies since

Bakke. There, Justice Powell cited Harvard's process as "[a]n illuminating example" of how a school's compelling interest in student-body diversity can be pursued without quotas or racial balancing. 438 U.S. at 316; see *id.* at 316-317, 321-324 (reproducing detailed description of Harvard's then-current approach). The Court in *Grutter* likewise found a comparison to "Harvard's flexible use of race as a 'plus' factor" to be "instructive" and upheld the University of Michigan Law School's admissions policy because it resembled "the Harvard plan" in relevant respects. 539 U.S. at 335; see *id.* at 335-337, 339. Conversely, *Gratz* held invalid Michigan's undergraduate admissions policy based in part on dissimilarities between it and Harvard's approach. See 539 U.S. at 272-273. Those decisions have invited colleges and universities to rely on the permissibility of a holistic, flexible approach like Harvard's as a benchmark in structuring their own admissions policies. It would profoundly unsettle expectations to declare retroactively that such reliance subjects those institutions to Title VI liability.

Finally, petitioner's contention (Pet. 30-32) that intentional discrimination against Asian Americans warrants revisiting *Grutter* is a non sequitur. Nothing in *Grutter* sanctions such "intentional[] discriminat[ion]" (Pet. 30), much less "segregation" (Pet. 32), based on race. Here, for example, both lower courts made clear that, although Harvard's acknowledged consideration of race in pursuit of diversity is consistent with *Grutter*, Harvard would have violated Title VI if it had actually engaged in intentional discrimination based on anti-Asian stereotypes. Pet. App. 80, 260-266.

3. In any event, this case is not an appropriate vehicle for reconsidering *Grutter*. Like *Bakke*, *Gratz*, and *Fisher*, *Grutter* was a suit (a) brought by individual

university applicants, (b) against a state university subject to the Equal Protection Clause, and (c) focused on allegations that the university's acknowledged consideration of race to increase diversity was unlawful. This case differs in each of those respects, and each of those distinctions would complicate this Court's review.

a. First, petitioner, a nonprofit membership organization, has relied on associational standing to bring suit "solely as the representative of its members." *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). Substantial questions exist as to whether petitioner's claims are justiciable, and this Court would have an "independent obligation" to address those questions if it granted certiorari. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 499 (2009). The district court held that petitioner had standing to seek prospective relief because some of its members had submitted affidavits attesting that they had been rejected by Harvard and were "able and ready" to seek to transfer if Harvard's policies changed. Pet. App. 345 (citation omitted). But it is unclear from the existing record whether the claims of petitioner's original members, who had applied and been denied admission when the suit was commenced seven years ago, remain live, or whether its *current* members face an "actual or imminently threatened" denial of admission, *Earth Island*, 555 U.S. at 492; see *id.* at 494-496; *Gratz*, 539 U.S. at 260-262.

Even if petitioner could overcome that gap in the record, its reliance on associational standing is complicated by Harvard's contention that petitioner does not adequately represent its members. See Br. in Opp. 37. Associational standing is an exception to the usual requirement that suits vindicating collective interests must be brought as class actions that satisfy the "special safeguards" of

Federal Rule of Civil Procedure 23. *International Union, United Auto., Aerospace, & Agric. Implement Workers of Am.* v. *Brock*, 477 U.S. 274, 288-289 (1986). One of the premises for that exception is that associations will "represent adequately the interests of all their injured members," such that a judgment against an association can "preclude subsequent claims by the association's members without offending due process." *Id.* at 290; see *Taylor* v. *Sturgell*, 553 U.S. 880, 892-898 (2008) (describing the due-process limits on nonparty preclusion). This Court has thus stated that, if it were "presented with evidence" of a "problem" with a particular association's ability to represent its members, the Court "would have to consider how it might be alleviated." *Brock*, 477 U.S. at 290. If the Court granted certiorari, therefore, it would have to consider Harvard's argument that petitioner cannot adequately represent its members because they do not "control, direct, or finance the organization" or petitioner's conduct of this litigation. Br. in Opp. 37.

b. Second, because Harvard is a private college, this case does not include any claim under the Equal Protection Clause. This Court has held that Title VI imposes the same limits as the Equal Protection Clause on the consideration of race in admissions. See *Grutter*, 539 U.S. at 343; *Gratz*, 539 U.S. at 276 n.23. But it would be odd to reconsider some of this Court's most significant equal-protection precedents in a case where the Equal Protection Clause does not apply. Among other things, that would require the Court to adjudicate the parties' debate about whether this case is properly governed by the "enhanced" version of *stare decisis* that applies in statutory cases, where (as with respect to Title VI) "Congress can correct any mistake it sees."

Kimble v. *Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015); compare Br. in Opp. 15 with Reply Br. 5-6.

c. Third, *Grutter* and this Court's other decisions addressing the use of race in admissions have involved challenges to a university's acknowledged consideration of race to increase student-body diversity. See *Grutter*, 539 U.S. at 313-316; see also *Fisher II*, 136 S. Ct. at 2205-2207; *Gratz*, 539 U.S. at 253-257; *Bakke*, 438 U.S. at 272-276. Harvard has such a policy, and one aspect of this case is petitioner's contention that Harvard's acknowledged consideration of race in a way that benefits certain applicants is inconsistent with those precedents—or, in the alternative, that those precedents should be overruled.

But this case also includes a very different claim that was absent from *Fisher*, *Grutter*, *Gratz*, and *Bakke*: Petitioner asserts that, quite apart from Harvard's acknowledged use of race in a way that *benefits* particular applicants (including "some Asian American applicants," Pet. App. 70), Harvard surreptitiously relies on racial stereotypes to *penalize* Asian Americans by assigning them lower personal ratings. Pet. 3, 12-17, 20, 27, 30-31, 37-39. Indeed, the court of appeals described that as petitioner's "central allegation." Pet. App. 57 n.23. That allegation is factually and legally distinct from petitioner's challenge to Harvard's acknowledged use of race as a plus factor. Most obviously, Harvard does not and could not argue that the alleged intentional discrimination against Asian Americans would be permissible under *Grutter*. And it would be anomalous to grant review to reconsider *Grutter* in a case where the plaintiff's most heavily pressed claim does not implicate *Grutter*'s holding.

Petitioner's claim of intentional discrimination against Asian Americans would also complicate the Court's consideration of petitioner's challenge to Harvard's acknowledged use of race in admissions. Although the two claims are distinct, petitioner often conflates them. For example, petitioner seeks to inject its allegations of surreptitious intentional discrimination into its arguments about *Grutter* and Harvard's acknowledged use of race as a plus factor. *E.g.*, Pet. 3, 30-32. The court of appeals noted the resulting confusion, observing that it is "not entirely clear" how petitioner's claims fit together. Pet. App. 57 n.23; see, *e.g.*, *id.* at 79 n.34.

d. Petitioner identifies no sound reason to grant review in light of these difficulties. Even if the Court were inclined to take the extraordinary step of reconsidering its precedents in this area, it should not do so in a case that presents these additional and unnecessary complications.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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