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

BRIEF FOR RESPONDENT

WILLIAM F. LEE
FELICIA H. ELLSWORTH
ANDREW S. DULBERG
MICHELLE LISZT SANDALS
HANNAH E. GELBORT
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

DIANE E. LOPEZ
Vice President and General Counsel
ARA B. GERSHENGORN
HARVARD UNIVERSITY
OFFICE OF THE GENERAL COUNSEL
1350 Massachusetts Avenue
Cambridge, MA 02138

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
CLAIRE H. CHUNG
ANDRES C. SALINAS
SPENCER L. TODD
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

DEBO P. ADEGBILE
RISHITA APSANI
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

QUESTIONS PRESENTED

1. Whether the Court should overrule *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*, 579 U.S. 365 (2016).

2. Whether the district court and the court of appeals properly applied this Court's precedents in concluding, based on detailed findings of fact entered after a three-week trial, that Harvard does not engage in racial balancing, does not overemphasize race in its admissions decisions, does not currently have workable race-neutral alternatives to accomplish its educational goals, and does not discriminate against Asian-American applicants.

CORPORATE DISCLOSURE STATEMENT

Respondent President and Fellows of Harvard College is a non-profit corporation with no parent corporation, and no public company owns any interest in it.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 20-1199

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

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

BRIEF FOR RESPONDENT

INTRODUCTION

Harvard College seeks an exceptional student body diverse in many dimensions. Decades of experience and careful study have led Harvard to conclude that diversity "'lead[s] to greater knowledge'" for everyone, "'as well as the tolerance and mutual respect that are so essential to the maintenance of our civil society.'" JA1287. To achieve that objective, Harvard individually evaluates every applicant, assessing not only academic potential and other skills, but all the ways applicants might contribute to one another's educational experience given their backgrounds, talents, interests, and perspectives.

This Court has consistently held that universities conducting such holistic review need not ignore that a person's race—like their home state, national origin, family background, or interests—is part of who they are, and that in seeking the benefits of a diverse student body, universities may consider race as one among many factors provided they satisfy strict scrutiny. Justice Powell's controlling opinion in *Regents of University of California* v. *Bakke* recognized that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S. 265, 313 (1978). Building a class of students whose diverse backgrounds foster the "atmosphere of 'speculation, experiment and creation'" that is "essential to the quality of higher education," he wrote, "clearly is a constitutionally permissible goal for" universities. *Id.* at 311-312. Decades later, in *Grutter* v. *Bollinger*, the Court "endorse[d] Justice Powell's view," reaffirming that the benefits of diversity in "preparing students for work and citizenship" are "not theoretical but real." 539 U.S. 306, 325, 330-331 (2003). Another decade on, the Court again recognized the importance of student-body diversity in "'promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races.'" *Fisher* v. *University of Texas at Austin*, 579 U.S. 365, 381 (2016) ("*Fisher II*").

Those decisions were correct then and remain correct today. Our Constitution promises "equal protection of the laws." U.S. Const. amend. XIV, §1. It does not require us to disregard the commonsense reality that race is one among many things that shape life experiences in meaningful ways. And nothing in the text or history of the Fourteenth Amendment suggests that

universities must uniquely exclude race from the multitude of factors considered in assembling a class of students best able to learn from each other. The Framers of the Fourteenth Amendment understood that race may be considered to advance overriding governmental objectives, rejecting more absolute language SFFA would have preferred, and both state and federal authorities at the time enacted race-conscious measures to promote African Americans' equal participation in society. Under that original understanding—which SFFA makes no attempt to address, much less refute—the narrowly tailored consideration of race that *Bakke*, *Grutter*, and *Fisher* allow is readily permissible.

SFFA seeks to equate universities' limited consideration of race with the odious Black Codes and their progeny that Justice Harlan correctly denounced in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and this Court rightly rejected in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). SFFA's comparison is utterly inapt. The laws in *Plessy* and *Brown* excluded and separated African Americans solely on the basis of race, relegating them to an inferior caste for no reason other than race. This Court has had no difficulty distinguishing those laws from a university admissions program that "focuse[s] on each applicant as an individual" and considers race as "simply one factor weighed with others." *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701, 722-723 (2007).

Lacking support in history and precedent, SFFA resorts to a false narrative. To impugn *Bakke*, *Grutter*, and *Fisher*, SFFA misrepresents Harvard as obsessing over race to pursue racial balance, ignoring race-neutral alternatives, and intentionally discriminating against Asian-American applicants—discrimination that, if it occurred, Harvard would revile. But there

was a trial in this case. SFFA's allegations were resoundingly rejected. Following exhaustive discovery, expert analysis, and testimony from 21 fact witnesses, the lower courts found "no evidence" of discrimination against Asian-American applicants "whatsoever." Pet.App.261; *see* Pet.App.80. Affording "no deference to Harvard," Pet.App.62, the lower courts found Harvard uses race only "in a flexible, non-mechanical way" and only "as a plus factor in the context of individualized consideration of each and every applicant." Pet.App.242 (quotation marks omitted); *see* Pet.App.68. The evidence refuted SFFA's charge of racial balancing—for which SFFA offered no expert testimony—and proved SFFA's proposed alternatives unworkable. At every turn, SFFA's attacks founder on the findings below.

Harvard has repeatedly studied and continues to evaluate the importance of student-body diversity to its educational objectives and whether a race-conscious admissions process remains necessary to achieve them. But as the district court observed, "we are not there yet." Pet.App.270. And far from hastening the day when consideration of race is no longer necessary, overruling *Bakke*, *Grutter*, and *Fisher* would undermine a critical tool for helping shape students well prepared to lead us there.

STATEMENT

SFFA's critique of this Court's precedents and Harvard's compliance with them rests on assertions that failed the crucible of trial and careful scrutiny by the court of appeals. The courts' findings of fact establish the following.

A. Harvard's Mission And Pursuit Of Diversity

Harvard seeks to educate "'citizens and citizen-leaders'" through the "'transformative power of a liberal arts and sciences education.'" Pet.App.108. As a highly selective college where students live and study together, Harvard's curriculum and residential-life programs are designed to expose students to "'new ideas, new ways of understanding, and new ways of knowing,'" in and outside the classroom. JA1285; JA1291.

Essential to that mission is building classes of students from all over the world who bring different backgrounds and experiences—"different academic interests, belief systems, political views, geographic origins, family circumstances, and racial identities." Pet.App.108. The district court found the evidence "clear" at trial that Harvard's "heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community." Pet.App.107-108. Because people learn better in a genuinely diverse environment, particularly at a college like Harvard where 97% of students live on campus for four years, this approach has long been a cornerstone of Harvard's philosophy. Pet.App.29-31; JA1295-1296.

"Race is one piece of Harvard's interest in diversity," Pet.App.59-60, and the lower courts found that Harvard has identified concrete educational objectives to achieve by considering race as one factor among many in admissions, Pet.App.58; Pet.App.239-240; *cf.* JA820-822. For students of color, adequate representation mitigates feelings of alienation and isolation that can inhibit learning. JA823; JA912-913. More broadly,

a diverse student body "'enhances the education of all of [Harvard's] students'" by preparing them to "'assume leadership roles in the increasingly pluralistic society into which they will graduate.'" Pet.App.151-152 (quoting JA1396). The district court found that Harvard reached the "credible and well-reasoned conclusion" that those benefits of diversity are "'essential to [Harvard's] pedagogical objectives and institutional mission.'" Pet.App.109-110.

B. Harvard's Admissions Process

Harvard's admissions program entails a "time-consuming, whole-person review process where every applicant is evaluated as a unique individual" based on a complete picture of the applicant's potential contributions to the class. Pet.App.113-114. Academic excellence, though "necessary," is only one factor. Pet.App.111. Of 35,000 applicants competing for 1,600 spots in the class of 2019, 2,700 had perfect verbal SAT scores; 3,400 had perfect math SAT scores; more than 8,000 had perfect GPAs. Pet.App.110-111. Test scores and grades alone therefore cannot decide admissions, nor would that be consistent with Harvard's educational goals. Harvard considers many other attributes to identify students who not only show testing aptitude but also bring distinctive perspectives, talents, and interests to campus. Pet.App.114; Pet.App.131-132.[1]

The process is structured but never formulaic. A complete application file includes a transcript, standardized test scores, and recommendation letters; an

[1] Although SFFA devotes much attention to century-old discrimination against Jewish applicants (Br.12-14), the district court found that history has "limited relevance, if any, to the claims at issue." Pet.App.311 n.18; *see* Dist.Ct.Dkt.574.

overview of the applicant's high school; information about extracurricular activities, athletic participation, honors, and prizes; student essays; the applicant's indication of intended major and career; family and demographic information; and reports from alumni or staff interviews. Pet.App.115; Pet.App.118. Many files include additional recommendation letters and academic or artistic work. Pet.App.115.

Initially, a "first reader" makes a tentative assessment by rating an applicant in four areas: academic, extracurricular, athletic, and personal. Pet.App.122-123. As the district court found, these numerical ratings provide a "preliminary" "starting point" for the Admissions Committee's later consideration of the applicant; applicants are not admitted or denied based on these ratings. Pet.App.123.

The academic rating reflects not only grades and test scores, but also recommendation letters, academic prizes, submitted academic work, the strength of the applicant's high school, and other indications of intellectual achievement. Pet.App.123. A top rating might indicate "*summa cum laude* potential, a genuine scholar, and near-perfect scores and grades (in most cases) combined with unusual creativity and possible evidence of original scholarship." Pet.App.123-124. Recognizing that an applicant's potential academic contributions may not be fully or accurately captured by test scores and grades, Harvard also considers "subjective … elements," Pet.App.262-263—for example, an applicant whose recommendation letter describes "'the most gifted writer [the teacher] has ever taught,'" even if the applicant's scores seem less than remarkable, JA1556; *see* JA1559.

The extracurricular rating assesses the applicant's potential to contribute outside the classroom. A top rating might indicate "national-level, professional or other truly unusual achievement that suggests an applicant may be a major contributor at Harvard." Pet.App.124. The athletic rating summarizes the applicant's potential athletic contributions. Pet.App.125.

The personal rating reflects a preliminary "assessment of what kind of contribution the applicant would make to the Harvard community based on their personal qualities," including "integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit." Pet.App.125. SFFA denigrates those qualities as "subjective" (Br.14-15) but nowhere explains how an admissions program could evaluate an applicant as a whole person without accounting for them. *Cf.* Pet.App.132 (Harvard believes "'the "best" freshman class is more likely to result if [it] bring[s] evaluation of character and personality into decisions'" (quoting JA1559)).

As the district court found, first readers do not consider race in assigning these initial ratings. Pet.App.138; JA721-722.

The first reader then assigns a "school support rating," indicating the strength of teacher and guidance counselor recommendations, and a preliminary "overall" rating, which reflects the reader's "impression of the strength of the application, taking account of all information available at the time." Pet.App.126. In assigning the overall rating, readers may give "tips" for qualities that "do not lend themselves to quantifiable metrics," including for unusual intellectual ability; strong personal qualities; outstanding creative or athletic ability; or backgrounds that expand the socioeconomic,

geographic, racial, or ethnic diversity of the class. *See* Pet.App.127. Readers may also give such tips to recruited athletes, legacy applicants, applicants on the Dean's or Admissions Director's interest lists, and children of faculty and staff ("ALDCs"). Pet.App.25. First readers typically send the applications of competitive candidates to subcommittee chairs, who also assign preliminary ratings. Pet.App.128; Pet.App.16. Regional subcommittees meet to decide whom to recommend to the full committee. Pet.App.129.

The full 40-person Admissions Committee convenes over several weeks. Pet.App.130-131. In these meetings, applicants' preliminary ratings "fade into the background," JA670, as the Committee discusses candidates and makes decisions based not on ratings, but on the entirety of the information in the applicants' files. Pet.App.130-131. Any admissions officer can raise any applicant for discussion, and the full 40-person Committee openly discusses applicants and votes. *Id.*

During the process, the Dean and Director of Admissions periodically review one-page summaries—colloquially referred to as "one-pagers"—containing characteristics of the applicant pool and tentatively admitted class, including academic interests, geographic region, citizenship status, socioeconomic circumstances, gender, race, and legacy and recruited-athlete status. Pet.App.135. Information from the one-pagers is occasionally shared with the Admissions Committee, but as the district court found, it is never used to pursue racial quotas or balancing. Pet.App.136; Pet.App.139. Rather, it is used to forecast yield rates; evaluate the effectiveness of efforts to recruit diverse students; and identify anomalies in the representation of students with certain characteristics, including race. Pet.App.65-67; Pet.App.136-137. If such anomalies ex-

ist, "the Admissions Committee may decide to give additional attention to applications" from that group to ensure any significant decline is not "due to inadvertence or lack of care." Pet.App.136; Pet.App.66.

Because "different racial groups historically accept offers to attend Harvard at differing rates," information about the racial makeup of the tentatively admitted class helps determine how many students can be admitted without overfilling the class. Pet.App.137. If, after the Committee has made tentative decisions, the expected yield might exceed the roughly 1,600 available spots, the Committee reduces the admitted class by discussing candidates on a potential "lop" list that notes several characteristics of each applicant, which may include race. Pet.App.133.

Overall, Harvard seeks to admit the best freshman class based on all the ways each applicant might contribute, rather than focusing narrowly on test scores and grades. Pet.App.131-132.

C. Findings Below

SFFA took exhaustive discovery over several years. Harvard produced tens of thousands of pages of documents, including data on more than 200,000 applicants spanning six admissions cycles and 480 individual application files—most hand-picked by SFFA. During a 15-day bench trial, 21 fact witnesses testified, including 13 current or former Harvard employees called by SFFA and eight students and alumni who testified about the critical ways a diverse class contributed to their educational experiences. Harvard presented two experts. Ruth Simmons, the daughter of sharecroppers and former president of Smith College and Brown University, testified to "the extraordinary benefits that

diversity in education can achieve, for students and institutions alike." Pet.App.107 n.3. David Card, a Nobel laureate economist, presented statistical evidence.

SFFA offered no expert to contest President Simmons's testimony, instead avowing that "[d]iversity and its benefits are not on trial here." JA548. SFFA presented statistical evidence from Peter Arcidiacono and testimony on race-neutral alternatives from Richard Kahlenberg. Pet.App.166; Pet.App.208-209.

The district court evaluated the witnesses' credibility and made meticulous findings of fact. Based on careful application of this Court's precedents, the court entered judgment for Harvard. The First Circuit independently reviewed the record and affirmed. Both courts concluded that the evidence refuted every key premise of SFFA's complaint.

1. No Discrimination Against Asian-American Applicants

The district court found "no evidence of any racial animus whatsoever" toward Asian-American applicants and "no evidence" that "any particular admissions decision was negatively affected by Asian American identity." Pet.App.261. After its own "careful review of the record," the First Circuit affirmed that finding. Pet.App.9; Pet.App.79-98.

The facts found by the lower courts overwhelmingly confirmed that ruling. Asian-American applicants "are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes, up from 3.4% in 1980." Pet.App.264; *see* Pet.App.85 (number of admitted Asian-American applicants "has been steadily increasing for decades"). Although SFFA hand-picked hundreds of application files

to review, SFFA did not identify a single Asian-American applicant who was even arguably discriminated against. Pet.App.169; Pet.App.264. The district court found the testimony of Harvard's admissions officers—all called by SFFA—"consistent, unambiguous, and convincing" that "there was no discrimination against Asian American applicants with respect to the admissions process as a whole and the personal ratings in particular." *Id.* To the contrary, "[n]ot one of them had seen or heard anything disparaging about an Asian American applicant despite the fact that decisions were made collectively and after open discussion about each applicant." *Id.* The First Circuit agreed, adding that "[t]he nature of Harvard's admissions process"—involving open discussion in a 40-person committee—"offset any risk of bias." Pet.App.83.[2]

The courts found that the statistical evidence similarly showed no discrimination against Asian-American applicants. To start, both SFFA's and Harvard's experts agreed that descriptive statistics had only limited probative value. Pet.App.181. For example, SFFA's expert presented an "Academic Index Decile Analysis" (Pet.App.179)—which SFFA continues to emphasize—purporting to show "racial disparities in admission rates among similarly qualified applicants." Br.23-24;

[2] The lower courts discredited SFFA's reliance on prior inquiries about Harvard's admissions program. The 1990 report of the U.S. Department of Education's Office of Civil Rights concluded that "Harvard did not discriminate against Asian American applicants to its undergraduate program." Pet.App.156 (quoting JA1389); *see* Pet.App.83. Likewise, the district court found the rudimentary models developed by Harvard's Office of Institutional Research were "entitled to little weight" and were never "presented or understood as evidence of discrimination." Pet.App.144-145; *see* JA728-729.

JA1793-1794. But Professor Arcidiacono acknowledged that data of the sort in his decile analysis could not provide "evidence of discrimination." CAJA2183. Rather, he explained, the data merely suggested "patterns" that might or might not be "real." *Id.* Moreover, as the district court found, the "Academic Index" omits numerous indicia of academic potential that Harvard considers, Pet.App.179; it is a construct used by the Ivy League to monitor athletic recruiting and plays no role in admissions decisions, JA601; JA897-898. The court thus concluded the decile analysis "likely over emphasizes grades and test scores and undervalues other less quantifiable qualities and characteristics that are valued by Harvard and important to the admissions process." Pet.App.181.

The courts, like the experts, accordingly placed principal weight on the parties' regression models and concluded they showed no discrimination against Asian-American applicants. Pet.App.85-98; Pet.App.203; Pet.App.263-265. Harvard's model, which the district court found more accurately reflected the actual admissions process, Pet.App.197-203, showed that Asian-American identity had no statistically significant effect on the probability of admission. Pet.App.197; *see* Pet.App.50. Even under SFFA's model, which took no account of the Committee's evaluation of personal qualities and other factors Harvard considers, the courts found Asian-American ethnicity had a nearly "undetectable" effect "on a year-by-year basis"—statistically significant in only "one of the six years analyzed." Pet.App.96. In all other years, the effect was "indistinguishable from zero." *Id.*

Further, the courts found that SFFA's model carried a significant risk of omitted variable bias—meaning it would incorrectly attribute to race the

effects of other variables missing from the model—because it excluded many factors important in the admissions decision, including personal ratings, intended career, and parental occupation. Pet.App.199-201. As a result, the court found it possible that the "slight" effect of Asian-American identity under SFFA's model "would be positive" if the model accounted for omitted variables. Pet.App.203. Moreover, Arcidiacono excluded ALDCs from his regression model despite the strong association between ALDC status and likelihood of admission. Pet.App.197-198; Pet.App.25. He even "acknowledge[d] that Asian American ALDCs are not discriminated against"—making it especially improbable, as the district court found, that Harvard would discriminate against *non*-ALDC Asian-American applicants. Pet.App.200; *see* CAJA2349-2353.

With no evidence of discrimination in admissions outcomes, SFFA stressed Arcidiacono's finding of a negative relationship between Asian-American identity and the personal rating. But the lower courts found Arcidiacono's personal-rating model weak, in that it could explain only a small "portion of the variation in personal ratings." Pet.App.89-90 (citing "evidence of poor fit"); *see* JA1804. Moreover, the district court found, the model "likely suffers from considerable omitted variable bias," Pet.App.190, meaning that it did not account for important race-correlated variables and therefore "likely overstate[d]" the effects of race. Pet.App.190-192; *see* Pet.App.245-246. Indeed, when it came to Arcidiacono's models of the academic and extracurricular ratings—which found a *positive* effect of Asian-American identity—Arcidiacono attributed that effect to the omission of "unobservable characteristics that correlate with race" from his models. Pet.App.195-196. Both lower courts concluded that the same

analysis applied to his model of the personal rating. Pet.App.89-93; Pet.App.190-194.

In short, the district court concluded that "no credible evidence … corroborates" SFFA's central allegation of discrimination against Asian-American applicants. Pet.App.264.

2. Harvard's Flexible Consideration Of Race As One Factor Among Many

The district court concluded that "Harvard's admissions program 'bears the hallmarks of a narrowly tailored plan'" because "'race [is] used in a flexible, nonmechanical way' and considered '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). Giving "no deference to Harvard," the First Circuit agreed. Pet.App.62; Pet.App.67-73.

The district court found that 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"; that it gives the same "individualized consideration … to applicants of all races"; and that it "ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." Pet.App.242 (quotation marks omitted). Race, the court found, "has no specified value in the admissions process and is never viewed as a negative attribute." Pet.App.139. SFFA challenged those findings on appeal, but the First Circuit concluded that SFFA's arguments were "not supported by the evidence." Pet.App.68.

In the limited ways race may be considered, the courts found that Harvard's "tip" for race benefits only

applicants who are highly competitive—enough to be "selected for admission to a class that is too small to accommodate more than a small percentage of those qualified." Pet.App.210-211; *see* JA1559. Race "never becomes the defining feature of applications," Pet.App.253 (quotation marks omitted), and "is not decisive" even for candidates with the highest academic ratings, Pet.App.70. Even among "the top 10% most academically promising applicants to Harvard in terms of standardized test scores and GPA," the First Circuit observed, Harvard "rejects more than two-thirds of Hispanic applicants and slightly less than half of all African American applicants." Pet.App.70. The evidence also showed that race-based tips are "not disproportionate to the magnitude of other tips" and "not nearly as large" as those approved in *Grutter*. Pet.App.254-255.

3. No Racial Balancing

The lower courts found that "Harvard does not have any racial quotas and has not attempted to achieve classes with any specified racial composition." Pet.App.204; *see* Pet.App.64. SFFA's expert pointedly declined to "offer expert testimony on racial balancing." Pet.App.208; *see* JA897. SFFA relied instead on the racial makeup of Harvard's classes to attempt to support its charge of racial balancing, but the courts found that "the racial composition of Harvard's admitted classes has varied in a manner inconsistent with" racial balancing. Pet.App.205; *see* Pet.App.64.

The courts also found that Harvard's "one-pagers" did not support SFFA's arguments. The courts found that Harvard includes race among other characteristics on one-pagers for the permissible purposes of guarding against inadvertent drop-offs in representation of

minority applicants, assessing the effectiveness of its diversity recruitment efforts, and avoiding "overenrolling [the] freshman class because students from some racial groups historically matriculate at higher rates than others." Pet.App.251-252; *see* Pet.App.65-66. "Throughout the process," the courts found, "Harvard remains committed to its holistic evaluation," and "[e]very applicant competes for every seat." Pet.App.248; Pet.App.251.

4. No Workable Race-Neutral Alternatives

Finally, the courts concluded that none of SFFA's asserted race-neutral alternatives, "individually or in combination," would allow Harvard to "achieve its educational mission without significant consequences to the strength of its admitted class," Pet.App.212, and that if Harvard abandoned consideration of race as one among many factors, representation of African-American and Hispanic students would significantly decline, Pet.App.210.

As the lower courts found, Harvard had already implemented or attempted many of SFFA's proposals. Pet.App.208-220. For example, Harvard has extensive outreach programs to encourage minority students to apply and matriculate. Pet.App.111-113; Pet.App.214-215; JA1563. Harvard also "provides exceptionally generous financial aid," Pet.App.214, with approximately 90% of Harvard students paying "the same or less in tuition as they would at a state school," Pet.App.74-75. As the courts found, expanding those measures would not meaningfully improve minority representation. Pet.App.38-39; Pet.App.214-215. SFFA suggested eliminating Early Action, but Harvard had already done so from 2007 to 2011, reinstating it because racial diversity suffered. Pet.App.41; Pet.App.212. Based on

the expert testimony, the district court likewise found that eliminating tips for ALDCs, admitting more transfer students, and eliminating consideration of standardized testing also would not meaningfully improve diversity, and that using place-based quotas was unworkable. Pet.App.213-217.

In 2017, Harvard established a committee to evaluate race-neutral alternatives with the benefit of scholarly research and the expert analyses from this case. Pet.App.152-153; JA1309. After considering 13 alternatives, including those proposed by SFFA, the committee concluded that none would currently allow Harvard to achieve the educational benefits of diversity while maintaining its standards of excellence. Pet.App.35-42; Pet.App.153; JA1307-1325. The committee recommended in April 2018 that Harvard reexamine that conclusion in five years, in 2023, Pet.App.153; JA1325, and Harvard has begun preparing to do so. Harvard also "regularly monitor[s], evaluate[s], and adjust[s]" its diversity efforts through student surveys and other means. JA1301.

SFFA emphasized a single purported alternative, "Simulation D," that would radically increase tips for low-income applicants and eliminate tips for LDCs. Pet.App.75; *see* Br.33-34. But the district court found that proposal inadequate on several grounds, including that modeling predicted it would "significant[ly]" diminish the strength of Harvard's classes "across multiple dimensions" and cause a 30% decline in African-American representation in Harvard's incoming class. Pet.App.219-220; *cf.* CAJA1585. The court of appeals reiterated that the evidence "proved that Simulation D was not a workable alternative." Pet.App.76. Implementing it would require "sacrifices on almost every dimension important to [Harvard's] admissions

process," including in the academic, extracurricular, personal, and athletic ratings, *id.*—not, as SFFA contends (Br.34), just a "slight decrease in average SAT scores."

Based on all these findings, both courts held unequivocally that Harvard's "limited use" of race in admissions satisfies strict scrutiny. Pet.App.98; *see* Pet.App.270.

SUMMARY OF ARGUMENT

The Court should preserve *Bakke*, *Grutter*, and *Fisher*. Those precedents fully align with the Framers' understanding of the Fourteenth Amendment and the text they chose. Contemporaneous measures, state and federal, show that the generation of legislators who adopted the Fourteenth Amendment also embraced measures that took race into account far more expansively than the narrow consideration *Bakke*, *Grutter*, and *Fisher* permit—measures that benefited not only the recently emancipated, but African Americans more generally. SFFA's inability to refute that history alone defeats its challenge.

Moreover, *Bakke*, *Grutter*, and *Fisher* uphold *Brown* in every conceivable way. Emphasizing the importance of education in democratic society, *Brown* held that excluding Black children from schools "solely on the basis of race" violates the Equal Protection Clause. 347 U.S. at 493. That holding established the guiding principle of this Court's jurisprudence prohibiting classification "for no reason other than race." *Bakke*, 438 U.S. at 307 (Powell, J.). In stark contrast, *Bakke*, *Grutter*, and *Fisher* authorize no categorical exclusion of anyone based on race, and relied on the importance of education that *Brown* underscored to

permit limited consideration of race as one factor among many to achieve broad diversity that benefits everyone.

Bakke, *Grutter*, and *Fisher* were also correct to recognize that race may—like many factors—shape one's background in ways that contribute to student-body diversity. That conclusion reflects commonsense reality, not stereotype. By contrast, the harms SFFA posits were refuted at trial and have nothing to do with the Court's precedents. *Bakke*, *Grutter*, and *Fisher* do not allow discrimination against Asian-American applicants, and the holistic review they permit has enabled Harvard to assemble a genuinely diverse student body to provide an educational experience that fulfills its mission.

Harvard's admissions program fully complies with the Court's holdings in *Bakke*, *Grutter*, and *Fisher*. SFFA's contrary arguments were thoroughly rejected by the courts below, which found emphatically that Harvard does not discriminate against Asian-American applicants and uses race only as this Court's precedents permit. While SFFA tries to relitigate those claims a third time—badly distorting the facts in the process—SFFA does not identify any error, much less "'a very obvious and exceptional showing of error,'" that could justify overturning those "'concurrent findings.'" *Exxon Co.* v. *Sofec*, 517 U.S. 830, 841 (1996).

The Court should affirm.[3]

---

[3] Harvard reiterates its jurisdictional argument that SFFA lacks Article III standing. *See* Opp.36-38; Harvard Supp.Cert.Br.10-11.

ARGUMENT

I. *BAKKE*, *GRUTTER*, AND *FISHER* SHOULD STAND

Constitutional analysis begins with "the language of the instrument," *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824), and "history … inform[s] the meaning of constitutional text," *New York State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111, 2130 (2022). Yet SFFA makes no argument that *Bakke*, *Grutter*, and *Fisher* contradict the Fourteenth Amendment's text or original understanding and cites no historical evidence save one legislator's out-of-context statement about a different bill, years removed from the Fourteenth Amendment's ratification. That omission by itself is dispositive. *Bakke*, *Grutter*, and *Fisher* correctly applied the Fourteenth Amendment, as informed by history, and SFFA's "disagreement" does not establish any "egregious[]" error warranting overruling. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

The additional stare decisis factors likewise support preserving *Bakke*, *Grutter*, and *Fisher*. Stare decisis has "enhanced force" here because Harvard is a private university subject to Title VI of the Civil Rights Act of 1964, *Kimble* v. *Marvel Entertainment*, 576 U.S. 446, 456 (2015), and correcting errors in statutory interpretation is ordinarily Congress's task, *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring in part). Moreover, *Bakke*, *Grutter*, and *Fisher* have had significant positive "real-world effects," *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part), allowing generations of students, and the Nation, to obtain the benefits that come from student bodies reflecting many different backgrounds and experiences. Reversing course would "unduly upset reliance interests" of the

numerous universities that conduct holistic admissions consistent with this Court's standards. *Id.*

A. *Bakke*, *Grutter*, And *Fisher* Are Correct

1. Text And History Refute SFFA's View

The constitutional text and history resoundingly support *Bakke*, *Grutter*, and *Fisher*. SFFA contends that those cases transgressed a requirement of color-blindness enshrined in the Fourteenth Amendment. But absolute neutrality has never been a universal constitutional principle, either at the time of ratification or in the Court's jurisprudence. The Congress that adopted the Fourteenth Amendment rejected the "absolutis[t]" view SFFA prefers (Br.51) and authorized numerous measures that benefited African Americans in the aftermath of the Civil War. Against that backdrop, this Court's far narrower holdings permitting consideration of race as one factor in an individualized decision are readily permissible.

a. The Fourteenth Amendment prohibits States from denying any person "the equal protection of the laws," U.S. Const. amend. XIV, §1, and Title VI "'proscribe[s] only those racial classifications that would violate the Equal Protection Clause,'" *Alexander* v. *Sandoval*, 532 U.S. 275, 280-281 (2001); *accord Bakke*, 438 U.S. at 287 (Powell, J.) (Title VI prohibits classifications "that would violate the Equal Protection Clause"). Although the Fourteenth Amendment was designed "'to eliminate racial discrimination,'" *Shaw* v. *Hunt*, 517 U.S. 899, 907 (1996), it was never intended to disregard the imperative of equal participation in society. The principal "evil to be remedied" was the "gross injustice and hardship" faced by African Americans after the Civil War, *Slaughter-House Cases*, 83 U.S. 36, 81

(1872), including the "'Black Codes'" some States had enacted to restrict African Americans' participation "'in common life as ordinary citizens,'" *United States* v. *Vaello Madero*, 142 S. Ct. 1539, 1548 (2022) (Thomas, J., concurring).

The constitutional text reflects that understanding. An early proposal prohibited any differentiation on account of race: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 83 (1914). But the Framers rejected that language, choosing instead to guarantee "equal protection" rather than prohibit all distinctions based on race. Kull, *The Color-Blind Constitution* 68-69 (1998).

The Framers of the Fourteenth Amendment also authorized numerous race-conscious measures. For example, the same Congress that adopted the Fourteenth Amendment enacted the Freedmen's Bureau Act of 1866, authorizing aid to African Americans in areas from education to land distribution. *See* Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 761-762 (1985). Opponents objected that the Act disregarded "the great principle, equality before the law," for it did not make "the freedmen equal before the law, but superior." *Id.* at 763-764. President Johnson vetoed two versions of the bill, contending they aided "one class or color of our people more than another." 5 *A Compilation of the Messages and Papers of the Presidents* 3596-3603, 3620-3624 (Richardson ed., 1914). But Congress overrode his second veto, rejecting the criticism that any racial preference violates equal protection. Schnapper, 71 Va. L. Rev. at 775; *see McDonald* v. *City*

of Chicago, 561 U.S. 742, 770-778 (2010) (consulting history and legislative debates to interpret Fourteenth Amendment).

In 1867, the very next Congress appropriated funds to aid "destitute colored people" in the District of Columbia—without regard to prior enslavement—to be administered by the Freedmen's Bureau. Resolution of Mar. 16, 1867, 15 Stat. 20; *see* Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2369 (2002). Congress also enacted legislation to protect bounties owed to African-American servicemen who had enlisted in Union forces, Act of Mar. 29, 1867, 15 Stat. 26, rebuffing objections to the measure as "class legislation" "applicable to colored people and not … to the white people," Cong. Globe, 40th Cong., 1st Sess., 79 (1867).

Following ratification, States likewise enacted race-conscious laws. In a law prohibiting government-licensed businesses from discriminating based on "race, color or previous condition," South Carolina required that when a "colored or black" plaintiff claimed a violation, the burden would "be on the defendant … to show that the same was not done in violation" of the law. 1870 S.C. Acts No. 279, §§1, 7, at 386-388. Kentucky enacted legislation authorizing a county superintendent to aid Black "paupers," including "all colored persons" in the county who qualified as destitute. 1871 Ky. Acts ch. 1340, §§2, 7, at 273-274.

Critically, many of these contemporaneous race-conscious measures focused on education. For the Freedmen's Bureau, education "was the foundation upon which all efforts to assist the freedmen rested." Foner, *Reconstruction: America's Unfinished Revolution*,

1863-1877, at 144 (1988). In the years around the Fourteenth Amendment's adoption, the Bureau "educated approximately 100,000 students, nearly all of them black," regardless of "degree of past disadvantage." Schnapper, 71 Va. L. Rev. at 781. The Bureau's efforts, moreover, focused on establishing educational infrastructure that would last into the future, as the Commissioner "'refused to spend Bureau money on [school] buildings unless they were on sites secured by deed for [Black] education forever.'" *Id.* at 781 n.147 (first brackets in original) (quoting Bentley, *A History of the Freedmen's Bureau* 174 (1955)). The Reconstruction Congress also helped establish Black colleges to foster "'a genuine republicanism in the southern States.'" Foner, *supra*, at 146-147.

Thus, while the Court in *Brown* found the Fourteenth Amendment's history "inconclusive" as to segregation in public education, 347 U.S. at 489-490, given legislation in some States after ratification predicated on the (incorrect) view that separate schools could be "equal," in this case, the history is anything but inconclusive; a strong record of legislation, state and federal, clearly refutes SFFA's "rule of racial neutrality" (Br.60). SFFA addresses none of this history. *Cf. Hosanna-Tabor Evangelical Lutheran Church* v. *EEOC*, 565 U.S. 171, 183 (2012) (consulting historical "background"); *Gamble* v. *United States*, 139 S. Ct. 1960, 1996 (2019) (Gorsuch, J., dissenting) (rejecting interpretation unsupported by "the text of the Constitution, its original public meaning, structure, or history"). SFFA's only nod to "'historical meaning'" (Br.50) is one snippet of post-enactment legislative history—one senator's remark in defense of a civil rights bill protecting African Americans years after ratification. 2 Cong. Rec. 4076, 4083 (1874); *see* Act of Mar. 1, 1875, 18 Stat.

335-337. This certainly does not overcome the collective understanding of the 39th Congress that chose "equal protection" over language SFFA would have preferred and authorized numerous race-conscious measures incompatible with SFFA's absolutist view.

b. Lacking historical support for its interpretation, SFFA attempts to extrapolate it from Justice Harlan's dissent in *Plessy* and the Court's opinion in *Brown*. Br.51. SFFA's reliance is badly misplaced.

Plessy upheld a law that required separate train accommodations for white and black passengers. 163 U.S. at 540-541. In stating that "[o]ur constitution is color-blind," Justice Harlan vividly illustrated that the Constitution tolerates "no superior, dominant, ruling class of citizens" and no "regula[tion] [of] the enjoyment by citizens of their civil rights solely upon the basis of race." *Id.* at 559 (dissent). The law contravened that rule by treating Black people as "inferior and degraded," *id.* at 560—"exclud[ing]" them from white train coaches "alone on grounds of race," *id.* at 557, thereby propagating the "caste" system the Fourteenth Amendment's Framers sought to discard, *id.* at 559. Justice Harlan nowhere suggested that any consideration of race is ineluctably improper.

Brown overruled *Plessy* and invalidated segregation in public schools. The Court held that "segregation of children in public schools solely on the basis of race" deprives Black children of "equal educational opportunities." 347 U.S. at 493. The Court rested that holding on the importance of elementary and secondary education in providing "the very foundation of good citizenship." *Id.* Separating school children "solely because of their race" generated "feeling[s] of inferiority" and undermined "'the motivation of a child to learn,'" denying

Black children the "'benefits they would receive in a racial[ly] integrated school system.'" *Id.* at 494.

Brown thus struck down what the Court finally recognized, 60 years after *Plessy*, to be in effect a form of Black Code like those the Reconstruction Congress sought to eliminate. No equivalence can sincerely be drawn between the segregation *Brown* rightly condemned and a university's limited consideration of race among many characteristics to assemble a diverse class with many different backgrounds.

To the contrary, *Bakke*, *Grutter*, and *Fisher* uphold *Brown* in every way. Like *Brown*, those decisions relied on the overriding importance of education. *Grutter*, 539 U.S. at 331-333; *Bakke*, 438 U.S. at 311-313 (Powell, J.). Like *Brown*, those decisions focused on the "intangible" dimensions of education. 347 U.S. at 493. *See Grutter*, 539 U.S. at 330, 332; *Bakke*, 438 U.S. at 311-314 (Powell, J.). And, like *Brown*, the Court's decisions in *Bakke*, *Grutter*, and *Fisher* prohibit racial classifications that decide admissions "solely on the basis of race," *Brown*, 347 U.S. at 493, permitting only limited use of race as one of several factors to build classes of diverse backgrounds and experiences, *Grutter*, 539 U.S. at 334. As Justice Powell explained, an admissions program that "exclude[s]" an applicant from consideration for any seat in the class "solely because of his race" would violate equal protection. *Bakke*, 438 U.S. at 305.

Quoting the plurality in *Parents Involved*, SFFA recasts (Br.1, 6, 47, 51) *Brown* as denying "'any authority … to use race as a factor in affording educational opportunities.'" But the *Parents Involved* plurality derived that quote from counsel's argument in *Brown*, *see* 551 U.S. at 747, and the next question in the *Brown* argument clarified—as did the Court's opinion—that race

was "the only reason" Black children were denied attendance, Tr. of Oral Arg. in *Brown*, at 7-9 (Dec. 9, 1952), not merely "a factor." This Court has repeatedly understood *Brown* the same way, *see Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971); *Freeman* v. *Pitts*, 503 U.S. 467, 485 (1992), as did Justice Powell in denouncing preferences "for no reason other than race," *Bakke*, 438 U.S. at 307 (citing *Brown*).

The opinion for the Court in *Parents Involved* adhered to that understanding. *Parents Involved* invalidated school-assignment plans that classified students as "white or nonwhite" or "black or 'other,'" and assigned them to particular schools based on race. 551 U.S. at 709-710. Under those plans, the Court noted, "when race c[ame] into play," it was "decisive by itself"—*i.e.*, race was "*the* factor," *id.* at 723—much like the segregation policies in *Brown* "told [schoolchildren] where they could and could not go to school based on" race, *id.* at 747 (plurality). The Court contrasted that with permissible admissions programs that "focus[] on each applicant as an individual" and consider race as "simply one factor weighed with others in reaching a decision." *Id.* at 722-723 (opinion for the Court). That analysis fully harmonizes *Bakke*, *Grutter*, and *Fisher*, on the one hand, with *Brown* and *Parents Involved*, on the other, which together illustrate two very different sides of the line drawn by the Fourteenth Amendment.

2. *Bakke* And *Grutter* Correctly Held Diversity Is A Compelling Interest

As even SFFA eventually concedes (Br.51), "racial classifications are legal if they satisfy strict scrutiny." *See Adarand Constructors* v. *Pena*, 515 U.S. 200, 230 (1995) (mere fact of racial classification "says nothing about the ultimate validity of any particular law"). This

Court's repeated holdings that the educational benefits of student-body diversity are a compelling governmental interest justifying the narrowly tailored consideration of race in college admissions are correct, empirically sound, and consistent with precedent.

As SFFA acknowledges, we do not "live in a post-racial society" where "racial discrimination is a thing of the past." Br.49. Because, as *Grutter* recognized, "race unfortunately still matters," students of underrepresented races "are both likely to have experiences of particular importance to" a university's mission, "and less likely to be admitted in meaningful numbers on criteria that ignore those experiences." 539 U.S. at 333, 338. With that in view, *Bakke* and *Grutter* articulated three reasons for recognizing the benefits of student-body diversity in higher education as a compelling interest—all of which remain correct.

First, as *Brown* explained, "'education … is the very foundation of good citizenship.'" *Grutter*, 539 U.S. at 331 (quoting *Brown*, 347 U.S. at 493). It is "pivotal to 'sustaining our political and cultural heritage'" and "maintaining the fabric of society." *Id.* That is especially so in higher education because, as Justice Powell emphasized, "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation." *Bakke*, 438 U.S. at 312-313 (quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)). "[T]he path to leadership" must therefore "be visibly open to talented and qualified individuals of every race and ethnicity," to "cultivate a set of leaders with legitimacy in the eyes of the citizenry." *Grutter*, 539 U.S. at 332.

Second, the benefits for students of learning from a class of many diverse backgrounds are substantial. As

Grutter explained, genuine diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" 539 U.S. at 330. "'[T]radition and experience'" substantiated those benefits. *Id.* at 324. Research demonstrated that broad diversity "promotes learning outcomes" and "'better prepares students for an increasingly diverse workforce and society.'" *Id.* at 330. Major businesses attested that skills vital to the global economy "can only be developed through exposure to diverse people, cultures, ideas, and viewpoints," while military leaders explained that diversity in the officer corps is essential to national security. *Id.* at 330-331; *see also Bakke*, 438 U.S. at 313 & n.48 (Powell, J.) (student-body diversity allows students to "reexamine even their most deeply held assumptions about themselves and their world").

Third, diversity—including racial diversity—is indispensable to some universities' educational missions. As Justice Powell emphasized in *Bakke*, 438 U.S. at 311-312, and *Grutter* reiterated, universities have long occupied "a special niche in our constitutional tradition," imbued with a First Amendment freedom to make academic decisions and select student bodies that best realize their goals. 539 U.S. at 329; *see Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (determining "'who may be admitted to study'" is an "'essential freedom[] of a university'"). Thus, in *Grutter*, the law school made an "educational judgment" that diversity is "essential" to its mission because, with a critical mass of minority students, "racial stereotypes lose their force" and "nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." 539 U.S. at 319-320, 328.

Contrary to SFFA's assertion (Br.57-58), no precedent of this Court has questioned *Bakke* or *Grutter*. Indeed, *Parents Involved* looked to *Grutter* as the constitutional standard for permissible use of race and invalidated the school-assignment plans in that case for falling short of *Grutter*'s standard. 551 U.S. at 723. SFFA's other support (Br.57-58)—*Schuette* v. *Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014)—is even farther afield, as that case "[wa]s not about … the constitutionality, or the merits, of race-conscious admissions policies in higher education." *Id.* at 300 (plurality).

The findings and undisputed evidence below confirm the soundness of *Bakke*'s and *Grutter*'s factual underpinnings. *Cf.* Br.53-55. The lower courts found that "a heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community." Pet.App.107-108; *see* Pet.App.58-61. The courts credited Harvard's "thoughtful, rigorous study" (Pet.App.59) concluding that genuine diversity that meaningfully represents racial minorities promotes four goals: "training future leaders" throughout the world; equipping graduates for an "increasingly pluralistic society"; promoting "learning, empathy, and understanding"; and "producing new knowledge stemming from diverse outlooks." Pet.App.31-35. President Simmons likewise explained in unchallenged testimony that "coming in contact with difference[s]" among faculty and students, in classrooms and hallways, is invaluable to "challenging our assumptions" and "learn[ing] to listen to difference." JA990-992.

At trial, SFFA disclaimed any quarrel with these benefits. JA548. To attack *Grutter*'s "factual foundations,"

SFFA instead asserts that *Grutter* licenses Harvard to "obsess[]" over race and "screen out" Asian-American applicants. Br.58. But while SFFA is entitled to make whatever legal arguments it sees fit, SFFA is not entitled to its own facts. Applying strict scrutiny, the lower courts found categorically that there is "no evidence of any racial animus whatsoever or intentional discrimination," Pet.App.261, and that, despite hand-picking hundreds of admissions files, SFFA did not identify a single Asian-American applicant who was discriminated against, Pet.App.264; *see* Pet.App.165. The courts also found, reviewing a comprehensive record, that Harvard does not pursue racial balancing and considers race as one among many factors to assess each applicant's potential contributions to the class. Pet.App.63-73; Pet.App.247-256. Affording no deference to Harvard, the courts rejected SFFA's preferred alternatives as unworkable. Pet.App.73-79; Pet.App.256-260. That SFFA continues to profess a narrative that failed the rigorous factfinding below is no basis to question this Court's precedents.

SFFA's other critiques are likewise meritless. This Court's recognition of diversity as a compelling interest is fully consistent with the cases SFFA cites (Br.51), which involved the same categorical preferences "for no reason other than race," *Bakke*, 438 U.S. at 307 (Powell, J.), that distinguish *Brown* and *Parents Involved* from *Bakke*, *Grutter*, and *Fisher*. *Palmore* v. *Sidoti* held that denying custody to a parent in an interracial marriage for no ground "other than race" is unconstitutional. 466 U.S. 429, 432-433 (1984). The Court did not hold that "[p]rotecting a child's best interests" categorically "isn't compelling enough." Br.51; *see* 466 U.S. at 433. In *Wygant* v. *Jackson Board of Education*, the Court held that a school board cannot seek to alleviate the

effects of societal discrimination by protecting minority teachers from layoffs based solely on race. 476 U.S. 267, 270-271 & n.2, 274 (1986). Those cases reflect *Brown*'s defining principle that distinctions between citizens "'solely because of their ancestry'" are "'odious to a free people whose institutions are founded upon the doctrine of equality,'" *id.* at 273 (quoting *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967))—a principle with which *Bakke*, *Grutter*, and *Fisher* fully comport. *Supra* pp.27-28.[4]

SFFA is wrong to claim that *Bakke*, *Grutter*, and *Fisher* endorsed "pure racial stereotyping" (Br.52). Harvard considers whether race adds another dimension to otherwise highly qualified candidates precisely because minority students do *not* all "share" a monolithic "'experience of being a racial minority'" (Br.52-53). It is SFFA's demand that race should matter only when discussed in an applicant's essay that improperly elevates race to be "the defining feature of" applications, *Grutter*, 539 U.S. at 337, and assumes that an applicant's racial background can contribute to student-body diversity only if that student's race is so central to her identity that she chooses to write about it.

Acknowledging that race, among many other characteristics, is part of an applicant's background is not remotely the same as assuming that race "predict[s]" or "'determines how [individuals] act or think,'" Br.52. Only the latter is stereotyping that "'exacerbate[s] rather than reduce[s] racial prejudice.'" Br.54. *See Miller* v. *Johnson*, 515 U.S. 900, 914 (1995) (assuming that

[4] *Shaw*, too, is inapposite. There, the Court invalidated a redistricting plan that classified voters by race because it was not narrowly tailored to the asserted interest in complying with the Voting Rights Act. 517 U.S. at 901-902; 915; *cf.* Br.51.

"individuals of the same race share a single" interest impermissibly "use[s] … race as a proxy").

The evidence here illustrates that distinction. *See* Pet.App.33-34; JA1292-1293. And study after study confirms that racial diversity promotes learning, reduces prejudices, and increases tolerance. *See generally, e.g.*, Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. Educ. Res. 4 (2010); Engberg & Hurtado, *Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences*, 82 J. Higher Educ. 416 (2011). Those benefits redound to all students, not just "mostly" to "white students" (Br.53-54). SFFA's suggestion that these benefits could be replicated by "making students take a class" (Br.55) belittles the "intangible" aspects of education that *Brown*, *Bakke*, *Grutter*, and *Fisher* emphasized, *see supra* p.27, and again disregards the evidence below. As the record confirms, if students' contact with those unlike them were limited to "the page or … the screen, it would be far too easy to take short cuts in the exercise of empathy, to keep a safe distance from the ideas, and the people, that might make one uncomfortable." JA1289. Only by interacting with each other in and outside the classroom can students reap the substantial benefits of student-body diversity. *Id.*

3. *Bakke*, *Grutter*, And *Fisher* Correctly Applied Strict Scrutiny

SFFA's scattered argument (Br.55-57) that *Bakke*, *Grutter*, and *Fisher* require something less than strict scrutiny is wrong. *Grutter* "carefully examin[ed] the importance and the sincerity" of Michigan's explanation that it pursues the educational benefits of diversity by considering race as one factor in admissions. 539 U.S.

at 327, 330-331. The Court then examined purported race-neutral alternatives and found them unworkable because they "would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." *Id.* at 340. Similarly, *Fisher II* upheld the University of Texas's holistic process only after examining the university's "'reasoned, principled explanation' for its decision" to pursue "the educational benefits of diversity" and finding proposed race-neutral alternatives unworkable. 579 U.S. at 381-382. In neither case did the Court "largely defer[] to" the university (Br.55).

To the extent SFFA objects to the limited deference *Grutter* extends to universities in defining their educational missions, that deference is supported by a long line of precedents, none of which SFFA challenges. *Grutter*, 539 U.S. at 324-325; *see also, e.g.*, *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 599, 646-648 (1819). That deference is patently unlike the specter SFFA invokes (Br.55) of schools defending segregation of students based solely on race in *Brown*, or a department of corrections requesting a "deferential standard of review" to justify racial classifications in prison, *Johnson* v. *California*, 543 U.S. 499, 509 (2005). Moreover, deferring to a university's judgment in defining its educational mission does not affect the level of scrutiny. As *Grutter* cautioned, its scrutiny "is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university," 539 U.S. at 328-329, and *Fisher I* confirmed that no deference tempers the searching scrutiny courts apply in determining whether consideration of race remains necessary, *Fisher* v. *University of Texas at Austin*, 570 U.S. 297, 314 (2013).

SFFA's criticism of *Grutter*'s approach to race-neutral alternatives likewise fails. SFFA insists on proof that "the marginal difference in racial diversity between" race-conscious and race-neutral admissions is necessary to achieve the benefits of diversity. Br.55 (emphasis omitted). But *Grutter* requires exactly that showing. 539 U.S. at 339. Moreover, because "[c]ontext matters when reviewing race-based governmental action," *id.* at 327; *see Adarand*, 515 U.S. at 228, purported race-neutral alternatives that compromise the educational benefits of student-body diversity or other institutional imperatives are not "workable." *Grutter*, 539 U.S. at 339-340; *see Fisher I*, 570 U.S. at 312 (race-neutral alternative should promote the compelling interest "about as well"). For similar reasons, narrow tailoring does not require universities to adopt one-size-fits-all alternatives like the "percentage plans" SFFA favors (Br.56). The district court found that such a plan would be completely unrealistic for Harvard. Pet.App.216; Pet.App.259. And whatever SFFA thinks about diversity at the handful of public universities that do not consider race (Br.55, 70), that says nothing about whether Harvard has workable race-neutral alternatives.[5]

At bottom, this case epitomizes the strict scrutiny *Bakke*, *Grutter*, and *Fisher* demand. The district court denied a motion to dismiss, denied summary judgment, and permitted SFFA to scour Harvard's files in search of evidence to substantiate its accusations. The court meticulously reviewed the evidence SFFA put forth, carefully heeding this Court's instruction that "no …

[5] Although Oklahoma and other States argue they have achieved adequate student-body diversity without considering race (Okla.Br.10), their argument is distorted, as university amici explain.

deference to a university [i]s permitted in undertaking the narrow tailoring analysis." Pet.App.230. The First Circuit then conducted its own "careful review of the record," Pet.App.9, and "g[a]ve no deference to Harvard" in concluding that Harvard satisfies strict scrutiny, Pet.App.62. No more is needed.

B. *Bakke*, *Grutter*, And *Fisher* Are Workable And Have Had Positive Impact

The profound educational benefits of diversity demonstrate the positive real-world consequences of this Court's precedents. *See* Brown Univ. C.A.Br. 3-8; Massachusetts C.A.Br.3-8. Approximately two-thirds of graduating seniors at Harvard reported that their college experiences strengthened their ability to relate to "people of different races, nations, and religions"; nearly 70% of students said they have "seriously questioned or rethought their beliefs about a race or ethnic group different from their own." JA1302. Harvard regularly assesses the educational benefits of diversity through qualitative measures, including student surveys. JA804-805; JA820-822; JA1301-1303. SFFA is notably silent about those benefits, which generations of students have enjoyed since *Bakke*.

By contrast, the harms SFFA posits (Br.62-65) are either imagined or unrelated to *Bakke*, *Grutter*, and *Fisher*. SFFA cites no evidence that *Grutter* has defied "'consistent application by the lower courts.'" *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009). And *Grutter* does not "make race 'outcome determinative'" (Br.61), but rather contemplates that race may be considered along with other attributes in a holistic review and may contribute to the selection of some highly qualified applicants, 539 U.S. at 339. While in some cases race may tip admission in candidates' favor, *Grutter*, 539 U.S. at

339, that does not mean race was the "'defining feature'" of the application (Br.61). And if SFFA is right (Br.61) that pursuing meaningful minority representation without a "'specified percentage'" is challenging, that shows only that strict scrutiny is working exactly as it should—difficult to satisfy.

SFFA invokes the bogeyman of discrimination against Asian-American applicants (Br.62-63), but the lower courts found in no uncertain terms that Harvard does not discriminate. Pet.App.79-98; Pet.App.261; Pet.App.264. If a university did discriminate against Asian-American applicants, that would violate equal protection, and nothing in *Grutter* would excuse it. There is no basis to think this Court's precedent has anything to do with the pernicious societal stereotypes Asian Americans face.

SFFA faults *Grutter* for allowing universities to consider applicants' personal qualities, such as "leadership," "maturity," "reaction to setbacks," and "courage" (Pet.App.19), which SFFA criticizes as "subjective criteria" that have disadvantaged Asian-American applicants (Br.63). But the record refutes SFFA's claim that those criteria penalize Asian-American applicants, *supra* pp.11-15; *infra* pp.43-46; and those characteristics are manifestly "pertinent elements of diversity," *Bakke*, 438 U.S. at 317 (Powell, J.), that are essential to understanding each applicant. In a fiercely competitive pool of applicants, a student should be able to stand out for overcoming struggles or unusual maturity, just as a student would stand out for excellent academic achievement, artistic talents, and the numerous other dimensions a university might value. As the lower courts found, Harvard does not consider race in evaluating those characteristics, and there is no evidence that stereotype plays a role. Pet.App.264; Pet.App.138-139.

Reported industry guidance to "appear 'less Asian'" on applications (Br.63) is appalling and misguided but again has nothing to do with *Grutter*. In the holistic review *Grutter* permits, Asian-American applicants are not disadvantaged by writing about "'the importance of [their] family'" or "'ethnic background'" or indicating that they want to major in "'math or the sciences'" (Br.63-64). In this case, for example, the training material provided to Harvard admission officers noted that a Vietnamese-American applicant's essay about her grandmother, which expressed a "compelling family history," was a positive factor weighing in favor of admission. JA1464-1466; JA1660. Similarly, a Chinese-American student testified, after reviewing her application file, that Harvard valued "the significance of growing up in a culturally Chinese home, of the kinds of work and responsibility that [she] took on from that." JA968-969.

SFFA provides no reason to think *Grutter* has anything to do with what SFFA wrongly describes as "segregation" on campuses. Br.64-65. Moreover, scrapping decades of precedents would be self-defeating: diminishing racial diversity on campuses by overruling this Court's precedents would likely *increase* the extent to which underrepresented minorities group together, "to gain validation" in "conditions of racial isolation." Jayakumar, *Why are all the black students* still *sitting together in the proverbial college cafeteria?*, Higher Education Research Institute at UCLA, at 3 (Oct. 2015), https://tinyurl.com/2k55c3cr. Nor does SFFA link a supposed decline in viewpoint diversity to *Bakke*, *Grutter*, or *Fisher*. Br.65. The notion that students with divergent views would be less likely to self-censor in a more homogeneous university environment makes no sense. To the contrary, as President Simmons

testified and SFFA pointedly declined to dispute, JA548, allowing universities to assemble student bodies diverse in many dimensions equips students to "'mediate … differences'" and "'conflicts in society,'" Pet.App.269 (quoting JA1020). That, not SFFA's distortion (Br.65), is *Grutter*'s "true aim," and it should be preserved.

C. Substantial Reliance Interests Are At Stake

Following this Court's precedents, large universities and small liberal arts colleges alike designed holistic admissions systems that pursue the benefits of student-body diversity. *See* Delaware Univ. Br., *Fisher II* (U.S. Nov. 2, 2015); Amherst Br., *Fisher II* (U.S. Nov. 2, 2015). In recent years, surveys have reported that 41.5% of universities, and 60% of universities that admit 40% or fewer of applicants, consider race to some degree. *See* Clinedinst, *2019 State of College Admission*, National Association for College Admissions Counseling 17 (2019), https://tinyurl.com/2c9c2cej; Espinosa et al., *Race, Class, & College Access: Achieving Diversity in a Shifting Legal Landscape*, American Council on Education 14-15 (2015), https://tinyurl.com/ye26uxpz.

Overruling *Bakke*, *Grutter*, and *Fisher* would cause substantial disruption. Universities have designed courses that "draw on the benefits of a diverse student body," JA1291, hired faculty whose research "is enriched by the diversity of the student body," JA1292-1294, and promoted their learning environments to prospective students who have enrolled based on the understanding that they could obtain the benefits of diversity of all kinds, *see* JA908-910. Those changes go far beyond administrative cost (Br.71). Were Harvard to adopt SFFA's preferred race-neutral alternative, for

example, the evidence showed that matriculants intending to study the humanities is predicted to drop by 14%, Pet.App.77, shifting Harvard's "strong curricular emphasis on the humanities," JA1293. Other universities have also explained how they have implemented curricula around a holistic admissions process that considers race among many other factors relating to student backgrounds. *See* Amherst *Fisher II* Br.34.

SFFA discounts those reliance interests on the ground that "no one has a legitimate interest in treating people differently based on skin color." Br.66. But *Bakke*, *Grutter*, and *Fisher* claim no such justification; they claim the universal interest in cultivating leaders who have learned from having wide exposure to diversity of all kinds.

Nor are those interests less substantial because *Grutter* expressed the aspiration that consideration of race "will no longer be necessary to further" student-body diversity 25 years hence. 539 U.S. at 343. By definition, this Court's precedents permit consideration of race only when no workable race-neutral alternative is available, as the courts found is the case here. Pet.App.73-79; Pet.App.256-260. In that circumstance, universities should be able to rely on this Court's precedents while "periodic[ally] review[ing]" available race-neutral alternatives. *Grutter*, 539 U.S. at 342. *Grutter*'s hope for a better future is not a warning that universities rely on *Grutter* at their peril.

II. HARVARD'S ADMISSIONS PROGRAM COMPLIES WITH THIS COURT'S PRECEDENTS

SFFA spent years attempting to prove its allegations, but it failed. The lower courts' extensive findings rejecting SFFA's claims are dispositive.

A. Harvard Does Not Discriminate Against Asian-American Applicants

SFFA's "central allegation" below was that Harvard intentionally discriminates against Asian-American applicants vis-à-vis white applicants. Pet.App.57 n.23; *see* JA470-474 (alleging that Harvard "intentionally discriminate[s]" against Asian-American applicants). But even though SFFA benefited from the district court's ruling that Harvard bears the burden of proof on this claim, SFFA's allegation was wholly disproven. *Supra* pp.11-15.[6] SFFA now tries a different tack, contending (Br.72) that Harvard's admissions process unduly burdens Asian-American applicants, seemingly irrespective of Harvard's intent, in favor of African-American and Hispanic applicants. However framed, SFFA's claim fails.

An applicant challenging a university's race-conscious admissions program asserts a right "to compete for admission on an equal basis." *Gratz* v. *Bollinger*, 539 U.S. 244, 262 (2003). *Grutter* considered whether the law school gave underrepresented minorities "'a significantly greater chance of admission than'" others, 539 U.S. at 317, and the *Fisher* plaintiff challenged consideration of race in "admissions decisions," Second Am. Compl. ¶165, No. 1:08-cv-00263, Dkt. 85 (W.D. Tex. Aug. 13, 2008). SFFA likewise argued at trial that discrimination means "[y]ou were denied admission." CAJA3520. SFFA must therefore show impermissible disparity in admissions outcomes. But as

[6] Although Harvard disagrees with that allocation of the burden of proof, *cf.* Pet.App.237-238 n.56, it is irrelevant, as both lower courts found that Harvard carried that burden. Pet.App.260-266; Pet.App.79-80 & n.34.

both lower courts found, the evidence overwhelmingly shows none.

First, no evidence suggested any bias whatsoever among admissions officers against Asian-American applicants. As the lower courts noted, "ample non-statistical evidence," Pet.App.97, including admissions officers' "consistent, unambiguous, and convincing" testimony, Pet.App.264, showed that "Harvard admissions officers did not engage in any racial stereotyping," Pet.App.97.

As for statistical evidence, Harvard's regression model—which the lower courts found both "more comprehensive" and more reflective of the actual admissions process than SFFA's model—showed Asian-American ethnicity had no effect on the chances of admission. Pet.App.199; *see* Pet.App.94-95. But even SFFA's model did not show any penalty against Asian-American applicants in admissions outcomes. Pet.App.203-204; Pet.App.95-97. As the First Circuit found, although SFFA's model indicated that Asian-American applicants are 0.34% less likely to be admitted than white applicants, that captures "*all* applicants" and fails to show that "being Asian American matters for the small subset of applicants who have a realistic chance of being admitted." Pet.App.95-96. Moreover, as the district court found, SFFA's model had a "significant potential" of overstating the effect of race because it omitted important race-correlated variables, thereby incorrectly attributing those variables' effects to race. Pet.App.201-203.

Even taking SFFA's model at face value, the courts found any effect of Asian-American identity was "almost undetectable on a year-by-year basis." Pet.App.96. SFFA's model found a statistically significant

negative effect in only "one of the six years analyzed," and in two years, it showed "a positive effect" of Asian-American identity on the chance of admission. *Id.* Those data fall far short of demonstrating any "undu[e] burden," Pet.App.263, let alone "intent by admissions officers to discriminate," Pet.App.203-204.

Shunning these dispositive findings, SFFA focuses on aggregate admission rates, particularly academic deciles measuring only test scores and GPA. Br.24, 72-73. But SFFA's expert acknowledged that aggregate data of the sort reflected in his decile analysis cannot provide evidence of discrimination. CAJA2183. Even when aggregate data "suggest[] the possibility of a penalty," CAJA2236, he conceded, only models that control for other important factors can reveal whether those patterns are "real," CAJA2183. *See also* CA-JA2347 (Arcidiacono conceding aggregate descriptive statistics "don't tell us or you anything about whether you were discriminating"); CAJA2834 (Card emphasizing the "enormous variation within" each racial group compared to the small difference between each racial group's averages). Moreover, much as SFFA tries to compare applicants of different racial groups based on academic deciles, high test scores and GPA are the least distinctive quality in Harvard's extraordinary applicant pool, and everyone who is admitted reflects academic excellence. Pet.App.110-111. Even looking at the full range of academic qualities Harvard considers, over 40% of applicants receive an academic rating of 1 or 2. CAJA2838. In seeking out candidates who reflect unusual strength in multiple dimensions, Harvard thus considers many other attributes in deciding whom to admit within its highly qualified applicant pool. CA-JA6037.

For similar reasons, SFFA's focus on overall admission rates fails. As SFFA acknowledges, non-ALDC Asian-American applicants are admitted "at the *same* rate" as non-ALDC white applicants, Br.73, and SFFA concedes there is no discrimination against Asian-American ALDC applicants, Pet.App.200. SFFA's assertion of discrimination instead rests on its assumption that Asian-American applicants should be admitted "at a *higher* rate than whites" because on average they get higher SAT scores and grades. Br.72-73. Again, that assumption disregards both the variation within each racial group around those averages and that Harvard considers a broad array of characteristics to pursue its educational goals.

SFFA fixates on the personal rating—one of six initial ratings considered preliminarily in the admissions process. But any disparity in that rating is irrelevant if it does not produce a disparity in admissions outcomes. And in any event, SFFA greatly exaggerates the alleged disparity. As the district court found, the statistical effect of Asian-American identity on the personal rating is "relatively minor," Pet.App.245, and likely overestimated given admissions officers' "credibl[e]" testimony "that they did not use race in assigning personal ratings," Pet.App.190. The lower courts further found that SFFA's personal-rating model could explain only a small "portion of the variation in personal ratings" due to important omitted variables, Pet.App.89-90; *see* JA1804, such as "race-correlated variation in teacher and guidance counselor recommendations," Pet.App.191-192; *see* Pet.App.245.

While the district court speculated that implicit bias could have played a modest role in the "slight numerical disparity" in personal ratings, Pet.App.245, the court rejected that possibility as "unsupported by any

direct evidence." Pet.App.194. And whereas SFFA suggests the court found "two 'possibilities'" (Br.74) for the slight disparity, the court in fact found "no credible evidence that corroborates the improper discrimination suggested by" SFFA's model, Pet.App.264.

SFFA disparages (Br.75) the courts' reliance on "Harvard's witnesses"—witnesses actually called by SFFA—but it is self-evident that the testimony of those accused of discriminating is highly relevant, and this Court in *Grutter* relied on admissions officers' testimony. 539 U.S. at 336; *see, e.g.*, *Harris* v. *Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 259-263 (2016). The district court correctly did the same in concluding that Harvard does not discriminate against Asian-American applicants.

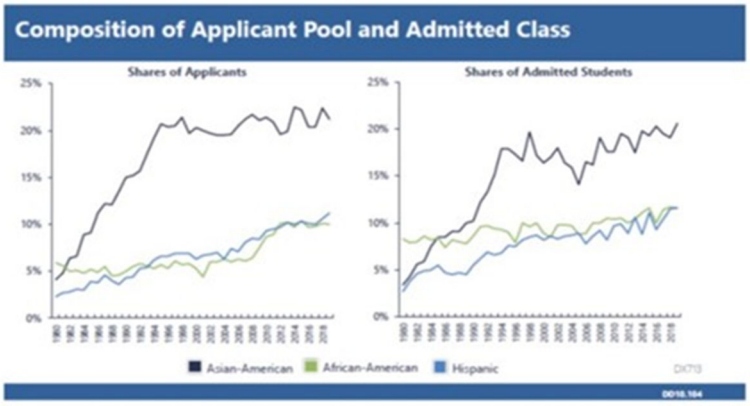
B. Harvard Considers Race Only As This Court's Precedents Permit

Applying strict scrutiny, the lower courts correctly held that Harvard's consideration of race is narrowly tailored to pursuing student-body diversity.

1. Harvard Does Not Engage In Racial Balancing

A university may not pursue racial balance or quotas by defining diversity "'as some specified percentage of'" a racial or ethnic group. *Fisher I*, 570 U.S. at 311. The lower courts found Harvard does not pursue any such balance. The First Circuit explained, for example (Pet.App.64), that "[t]he amount by which the share[s] of *admitted*" Asian-American, Hispanic, and African-American applicants fluctuates "is greater than the amount by which the share[s] of" those same groups of

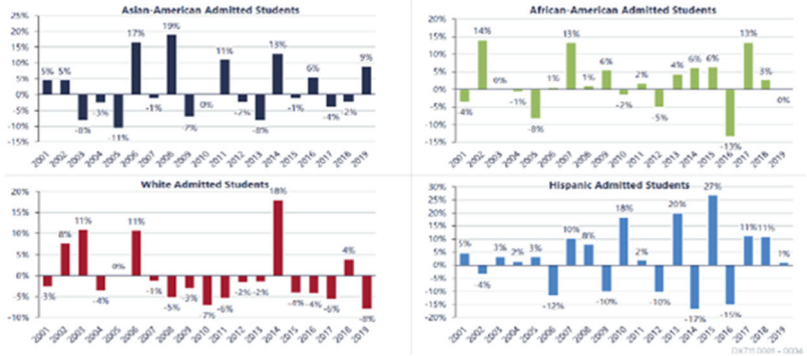
applicants fluctuates—the very "opposite of what one would expect" with a quota:



JA1820; Pet.App.204-208.

SFFA offered no expert testimony to support its claim of racial balancing. Pet.App.208. And as Harvard's expert demonstrated, the percentage change in year-to-year admission rates by race varies substantially:

***Figure 1*: Percent Change in Year-to-Year Admittance of Students by Race. [DD10 at 100; DX711].**



Pet.App.206.[7]

SFFA's reliance on one-pagers recycles arguments the lower courts rejected. Harvard uses one-pagers for several reasons, *supra* p.9, but SFFA challenges only one—Harvard's practice of identifying marked declines in admitted students with certain characteristics, including but not limited to race, to ensure that applicants in those groups were not inadvertently overlooked. Pet.App.250-252; Pet.App.65-67. As the lower courts noted, SFFA's argument is "foreclosed by *Grutter*," Pet.App.65; *see* Pet.App.250-251, where Michigan "frequently consult[ed]" "'daily reports'" on "the racial and ethnic composition of the class." 539 U.S. at 318. The Court held that permissible given the obvious relationship "'between numbers and achieving the benefits to be derived from a diverse student body,'" and the fact that "admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports." *Id.* at 336. Likewise, the First Circuit noted, a Harvard admissions officer testified without contradiction that declines in minority representation that are not due to lack of care "can't be avoided," no matter what the one-pagers say. Pet.App.65-66.

[7] SFFA's argument that the share of African-American admitted students varied less than the share of the African-American applicants "during the ten-year period before SFFA sued" (Br.76-77) cherry-picks an arbitrary time period. Selecting a different time period yields different data—for example, in the ten most recent years of data in the record, the share of African-American applicants and the share of African-American admitted students varied to the same degree. JA1769-1770.

2. Harvard Considers Race Flexibly As One Factor Among Many

No evidence supports SFFA's accusation that Harvard is "obsessed" with race (Br.78). A whole-person admissions program that is in some respect race-conscious "must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature." *Grutter*, 539 U.S. at 337. As both lower courts determined, Harvard's admissions program satisfies that standard.

The lower courts found Harvard considers race as "one factor among many," Pet.App.137, and pursues "all types of diversity, not just racial diversity," Pet.App.68. Race "has no specified value," Pet.App.139, and is always considered "contextual[ly]," Pet.App.68. The evidence was unequivocal that a race-based tip matters only for the small category of applicants so strong on multiple dimensions that they are serious candidates for admission. JA676; JA710. As SFFA acknowledges, no more than 25% of applicants "have a real shot at getting in[]" (Br.79), and "a large number of applicants … will be rejected without race ever becoming a factor," JA896. And the First Circuit explained that race is not decisive even for candidates in the highest academic decile, as "Harvard rejects more than two-thirds of Hispanic applicants and slightly less than half of all African American applicants" in the top 10% of that index. Pet.App.70.

For the small category of candidates for whom race may be a factor, Harvard gives a tip only after "'examin[ing]' the 'file of a particular … applicant,'" contrary to SFFA's contention (Br.79). This is true notwithstanding that Harvard may consider some applicants'

race "'regardless of whether [they] write about that aspect of their backgrounds or otherwise indicate that it is an important component of who they are'" (Br.14; *see* Br.78). Like many other aspects of an applicant's background (where they grew up, their intended major, and their family's socioeconomic conditions), an applicant's racial background can contribute to diversity whether or not the applicant writes about it. "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333.

Of course, race does not affect every individual uniformly. Admissions officers devote thoughtful attention in determining whether an individual who self-identifies as a member of any racial or ethnic group would contribute to the diversity of the class, based on "individual qualities or experience not dependent upon race but sometimes associated with it," *Bakke*, 438 U.S. at 324 (Powell, J.) (Appendix). Harvard never considers race to be a negative, Pet.App.139, and minority applicants of all racial backgrounds may receive a tip, regardless of whether they write about race or otherwise feature it in their application. In doing so, Harvard seeks to account for the many ways race may affect one's background, without presuming that such influence matters only when an applicant chooses to write about it.

SFFA's assertion (Br.14) that it "'defies the law of mathematics'" to say race is never a negative betrays SFFA's fundamental misunderstanding of the facts. Every competitive applicant has a mix of attributes Harvard believes would contribute to student-body diversity. Once a standard of excellence across many

dimensions has been met, "the question is how to admit not only individuals, but also an entire entering class of students who—in their collective variety—are likely to" produce a robust learning environment. JA1752. Thus, while admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra, *cf.* JA1555, that does not mean it is a "negative" not to excel at a musical instrument or that Harvard discriminates against those who do not excel at a musical instrument.

As in other admissions programs approved by this Court, Harvard's consideration of race has "meaningful, if still limited, effect." *Fisher II*, 579 U.S. at 384. The district court found "the magnitude of race-based tips is not disproportionate to the magnitude of other tips applicants may receive," Pet.App.255, for leadership, creativity, athleticism, maturity, and the capacity to contribute to socioeconomic or geographic diversity, Pet.App.127; JA1558-1560. The evidence showed that numerous factors, including intended career, high school and neighborhood variables, and teacher and guidance counselor ratings, explain far more about admissions outcomes than race. JA1811. As the lower courts found, race is not decisive even for most candidates in the top academic decile who seek admission to Harvard, *see* Pet.App.70, and has a comparable or more limited effect than in *Grutter* and *Fisher*, Pet.App.69; Pet.App.254.[8]

---

[8] Contrary to SFFA's contention (Br.78), the district court found that Harvard has long promoted socioeconomic diversity, giving tips to students from low-income families and offering "exceptionally generous" financial aid. Pet.App.214; *see* Pet.App.112-113. As for the absence of tips for religious denominations (Br.78), there was no evidence that such tips are needed for religious diversity to thrive.

That Harvard has not set a "sunset date" (Br.80) hardly suggests impermissibility. *Grutter* declined to authorize "a permanent justification for racial preferences," noting that race-conscious admissions policies "must be limited in time." 539 U.S. at 342. But *Grutter* does not require a firm deadline, and *Fisher II* emphasized universities' "ongoing obligation" to reflect on their admissions policies, *Fisher II*, 579 U.S. at 388—which Harvard has done, Pet.App.72-73, and continues to do, *see supra* p.18. And Harvard is not required to establish its own definition of "'critical mass'" (Br.80). *Fisher II* cautioned that a university "cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained." 579 U.S. at 381.

3. Harvard Currently Has No Workable Race-Neutral Alternative

The courts below correctly found that Harvard presently has no workable race-neutral alternative. Pet.App.73-79; Pet.App.208-220; Pet.App.256-260. "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," "[n]or does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Grutter*, 539 U.S. at 339. *Grutter* rejected proposed alternatives that would "require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." *Id.* at 340. Similarly, *Fisher II* found inadequate alternatives that did not "attain the benefits of diversity [UT] sought." 579 U.S. at 385.

The only purported alternative SFFA discusses suffers the same flaws. The lower courts rejected Simulation D because it would require "sacrifices on almost

every dimension important to [Harvard's] admissions process, including … academic excellence." Pet.App.76. The models predicted that Harvard would lose students with academic ratings of 1 or 2 by 17%, JA1775, and students with extracurricular, personal, and athletic ratings of 1 or 2 by more than 10%, Pet.App.76. Those are not "negligible differences" (Br.82), nor are they limited to "[s]light dips in average SAT scores" (Br.83).

Simulation D would also undermine Harvard's efforts to achieve the pedagogical benefits of diversity. In *Fisher II*, this Court reiterated the need for UT's consideration of race in admissions, noting a race-neutral regime forced "feelings of loneliness and isolation" on underrepresented students. 579 U.S. at 384. Under Simulation D, the share of admitted African-American students is predicted to drop by 32%, which would similarly "increase feelings of isolation and alienation" among minority students, "while limiting all students' opportunities to engage with and learn from students with different backgrounds from their own." Pet.App.77-78; *see* JA823. SFFA tries to obscure that effect by asserting that Simulation D would maintain racial diversity generally (Br.81), but Harvard does not view different ethnic and racial minorities "interchangeably," Pet.App.77 n.32. And to achieve comparable overall diversity under Simulation D, Harvard would have to give socioeconomic tips of disproportionate magnitude. Harvard's model predicted, for example, that to obtain combined African-American and Hispanic representation comparable to the 2019 class without consideration of race and ALDC tips, Harvard would have to give socioeconomic tips so large that they would "essentially automatically put[] in any applicant … with an average probability of admission." CAJA3077-3078.

Long before SFFA filed suit, Harvard implemented many of the programs SFFA has suggested as race-neutral alternatives. Harvard continues to study whether consideration of race is necessary to assemble a class comprising students of different backgrounds. But as the lower courts found, no alternative is presently workable. Until that changes, Harvard must be allowed to consider race as one of many characteristics in admissions to achieve the compelling benefits of student-body diversity.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

WILLIAM F. LEE
FELICIA H. ELLSWORTH
ANDREW S. DULBERG
MICHELLE LISZT SANDALS
HANNAH E. GELBORT
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

DIANE E. LOPEZ
Vice President and General Counsel
ARA B. GERSHENGORN
HARVARD UNIVERSITY
OFFICE OF THE GENERAL COUNSEL
1350 Massachusetts Avenue
Cambridge, MA 02138

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
CLAIRE H. CHUNG
ANDRES C. SALINAS
SPENCER L. TODD
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

DEBO P. ADEGBILE
RISHITA APSANI
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

JULY 2022