No. 20-1199

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the First Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Harvard College, the oldest and one of the most prestigious institutions in the United States, conducts a multi-faceted and complex admissions process to select the best and most-qualified candidates for admission to the university. As part of its process, Harvard considers race as one plus-factor out of many in considering a student's potential contribution to the admitted class. Harvard's method is a result of extensive research and consultation in accordance with this Court's precedents in *Regents of University of California v. Bakke* and *Grutter v. Bollinger.* The questions presented are:

(1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and

(2) whether Harvard's admissions policy penalizes Asian-American applicants, engages in racial balancing, overemphasizes race and rejects workable race-neutral alternatives in violation of Title VI of the Civil Rights Act.

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The opinion of the United States District Court for the District of Massachusetts granting judgment for defendant-respondent is reported at 397 F.Supp.3d 126. The opinion of the First Circuit affirming the district court is reported at 980 F.3d 157.

JURISDICTION

The First Circuit entered judgment on November 12, 2020. After timely filing, the petition for a writ of certiorari was granted. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "No State shall make or enforce any law which shall… deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

Universities are the cornerstone of a thriving society. They play vital social roles in educating future leaders and shaping the contours of civic duties and relationships. In order to fulfill these roles, the university environment must be one that fosters a robust exchange of ideas among students with a diverse array of backgrounds, opinions, and experiences. Diversity, as this Court has recognized again and again, is crucial.

At the heart of this case is whether universities can continue to pursue diversity. Harvard College appropriately incorporates this Court's precedents and

guidance in crafting an admissions policy that pursues a rich and complex conception of diversity for its student body. This Court should affirm that Harvard can pursue its academic mission.

STATEMENT

A. Factual background

1. Harvard College's Admissions Process

Each year, Harvard considers roughly 35,000 applications and admits a class of around 1,600 students. *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll.*, 980 F.3d 157, 165 (1st Cir. 2020) [hereinafter *SFFA*]. Harvard's application review process consists of six components: first, pre-application recruitment; second, "students' submission of applications;" third, a "first read" of application materials; fourth, applicant interviews with alumni and admissions officers; fifth, "subcommittee meetings of admissions officers to recommend applicants to the full admissions committee;" sixth, meetings of the full admissions committee to make final decisions. *Id*. Applicants submit "a great deal of information, including about their standardized test scores, transcripts, extracurricular and athletic activities, awards, parents' and siblings' educational information, parents' occupations and marital status, teacher and guidance counselor recommendations, intended field of study, personal statement, and additional supplemental essays or academic material." *Id*. at 166. Harvard allows but does not require students to provide their racial identity.

Harvard's admissions office assigns six numeric ratings scores to each applicant: academic, extracurricular, athletic, school support, personal, and overall ratings. *Id*. at 167. Higher numbers typically reflect a less favorable rating. For instance, "[a]n academic rating of '1' signifies 'summa cum laude' potential'" while an academic rating of 2 signifies "'magna cum laude' potential." *Id*. The personal rating "attempts to measure the positive effects applicants have had on the people around them and the contributions they might make to the Harvard community." *Id*. at 168. Admissions officers assign personal ratings largely based on "the applicant's admissions essays, teacher and guidance counselor recommendations, accomplishments, and alumni interview report." Ratings of one in any category are very rare and "predictive of admission" for most students. *Id*.

Prior to advancing an applicant to the committee stage, admissions officers assign them an overall rating that "takes all information into account and is not a formulaic weighting of the other ratings." *Id* at 169. After assigning these scores, admissions officers sitting on subcommittees recommend applicants for consideration before the full admissions committee. Based on these recommendations, the full forty-member admissions committee votes on which applications to accept. Finally, the committee winnows down its tentative admits to its final admitted class. This final winnowing stage is called the "lop process." *Id*. at 170.

Harvard requires its admissions offers to undergo extensive training "on evaluating applicants and how to consider race." *SFFA*, 397 F.Supp.3d 126, 139 (D. Mass. 2019). Admissions officers receive "an annual training from Harvard's general counsel that covers the permissible use of race in the admissions process." *Id*. Further, new admissions officers are subject to substantial quality control measures, having their first fifty to one hundred application files reviewed "by a more senior admissions officer" who provides feedback and trains the new officer. *Id*.

2. Harvard's Use of Race in Admissions

Harvard uses a system of "tips" in its admissions process. These tips are "plus factors that might tip an applicant into Harvard's admitted class." 980 F.3d at 170. These tips include, but are not limited to, "outstanding and unusual intellectual ability, unusually appealing personal qualities, outstanding capacity for leadership, creative ability, athletic ability, legacy status, and geographic, ethnic, or economic factors." *Id*. Race is considered in addition to these other tip factors. However, Harvard instructs its admissions officers to only consider race when assigning an applicant's overall rating, making subcommittee recommendations, making full committee decisions, and lopping candidates. Admissions officers assign all five of the individual ratings without reference to a candidate's race.

Admissions officers are instructed to only ever consider race as a "positive attribute." 397 F.Supp.3d at 146. Further, race does not have any "specified value in the admissions process." *Id*. at 147. Instead, admissions officers consider race and apply tips in the unique context of each individual applicant and with an eye towards Harvard's "expansive view of excellence." *Id*. at 144. In addition to information about individual applicants' race, admissions officers also have access to "one-pagers" that "provide a snapshot of various demographic characteristics of Harvard's applicant pool and admitted class and compares them to the previous year." 980 F.3d at 170-71. Harvard's admissions office use these reports for three purposes: "(1) to assess how well [Harvard's] diversity recruitment efforts… were working; (2) to manage [Harvard's] yield rates; and (3) to avoid drop offs in students with particular characteristics due to inadvertence or lack of care." *Id.* at 189.

Harvard's use of race in admissions is the product of years of study and practice. Beginning in 2012, Harvard's Office of Institutional Research conducted several analyses of Harvard College's admissions process. *Id*. at 172. Following these analyses, Harvard convened the "Committee to Study the Importance of Student Body Diversity," or the Khurana Committee, to "explain the benefits Harvard derives from diversity, including racial diversity, as required by Supreme Court precedent." *Id*. at 172-73. The Khurana Committee identified four broad goals that are served by the Harvard's pursuit of student

body diversity: "(1) training future leaders in the public and private sectors as Harvard's mission statement requires; (2) equipping Harvard's graduates and Harvard itself to adapt to an increasingly pluralistic society; (3) better educating Harvard's students through diversity; and (4) producing new knowledge stemming from diverse outlooks." *Id*. at 186.

Harvard also convened multiple committees to study race-neutral alternative admissions policies. Most significantly, the Smith Committee issued an extensive report concluding that the race-neutral alternatives proposed by SFFA "will not work at Harvard at this time." *Id*. at 179. As the Committee reported, Harvard already engages, and has engaged, in significant efforts to foster student body diversity beyond its use of race in admissions. The College "engages in extensive and multifaceted outreach efforts" designed to solicit a diverse applicant pool. 397 F.Supp.3d at 134. In addition, Harvard provides "exceptionally generous financial aid." 980 F.3d at 180. The College has also previously experimented with eliminating early action admissions because it believed its early action program "disproportionately benefited affluent applicants." *Id*. at 179. After making this change for the classes of 2012 through 2015, however, the College concluded that eliminating its early action program actually reduced matriculation rates among some groups of Hispanic and African American students. The Committee also recommended that the issue be revisited again in 2023.

B. Procedural background

On November 17, 2014, Students for Fair Admissions, Inc. (SFFA) brought a lawsuit challenging Harvard's admissions practices, alleging they were racially and ethnically discriminatory in violation of Title VI of the Civil Rights Act of 1964. *SFFA v. President & Fellows of Harvard College*, 261 F.Supp.3d 99, 102 (D. Mass. 2017). Harvard filed a motion to dismiss for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). *Id.* The district court dismissed Harvard's motion on June 2, 2017, finding that SFFA had sufficiently established associational standing. *Id.* at 111. After a bench trial, the district court granted judgment in favor of Harvard, finding that Harvard had a substantial and compelling interest in student body diversity and that its admissions policy was narrowly tailored to that interest. 397 F.Supp.3d at 192-93. The district court also held that Harvard did not engage in impermissible racial balancing, did not use race as a mechanical plus factor, and properly considered race-neutral alternatives. *Id.* at 197, 199-200. Finally, the district court held there was insufficient statistical evidence to establish that Harvard intentionally discriminated against Asian Americans. *Id.* at 203. The First Circuit affirmed the district court's judgment, 980 F.3d at 204, and SFFA petitioned the Supreme Court for a writ of certiorari.

SUMMARY OF ARGUMENT

I. The doctrine of *stare decisis* counsels strongly in favor of reaffirming *Grutter*. *First*, *Grutter* was correctly decided and well-reasoned. The *Grutter* Court's ruling that student body diversity is a compelling government interest flows directly from pre-existing First Amendment principles of academic freedom. Moreover, *Grutter*'s diversity rationale was in line with the Court's desegregation line of cases, emphasizing the vital principles of equality and inclusion. Beyond *Grutter*'s consistency with prior precedent, it was also consistent with the original understanding of the Fourteenth Amendment. Framers of the Fourteenth Amendment intended it to ensure meaningful equality for Black Americans, not create a formalistic bar on all race-based classifications. *Grutter* incorporates this original understanding.

Second, *Grutter* has had significant positive impacts in the real world and has informed judicial decision-making in numerous valuable ways. *Grutter* enabled universities to effectively pursue student body racial diversity, which has had enormous benefits both on and off campuses. Universities using race-conscious admissions have improved their educational environments, improved their students' experiences, and better prepared their students to serve their communities. Furthermore, *Grutter*'s jurisprudential effect has been overwhelmingly positive. Subsequent judicial opinions, both in this Court and lower federal courts, have been informed by *Grutter*'s

twin principles of judicial restraint and diversity. *Grutter* has enabled courts to recognize the social and educational value of diversity, while emphasizing the need for judicial deference both to academic institutions and to state governments. Critically, *Grutter* has created a workable standard determining when affirmative action policies survive strict scrutiny. The *Grutter* factors built upon a pre-existing workable standard this Court developed in the employment context. They have been applied consistently and predictably by both this Court and lower courts. *Third*, *Grutter* created substantial reliance interests that militate against overturning. Schools have relied on *Grutter* when constructing their affirmative action policies. These policies are essential to these schools' ability to comply with licensing requirements and have become central to how these schools achieve their institutional purposes.

II. Harvard's use of race-conscious admissions does not violate Title VI of the Civil Rights Act because it is consistent with *Grutter* and *Fisher*. *First*, Harvard's admissions policy serves a compelling government interest. Harvard's admissions system pursues clearly-identified, concrete, and specific goals that flow from student-body diversity. These goals are in lockstep with the Court's requirements for a compelling government interest, and closely resemble objectives that the Court previously approved in *Grutter* and *Fisher*. Furthermore, Harvard does not pursue student-body diversity solely in terms of race, but rather aims to admit students with a

wide range of identities, experiences, and perspectives. *Second*, Harvard's race-conscious admissions is narrowly tailored to achieve its goals for student-body diversity. Harvard does not use quotas, nor does it engage in any form of racial balancing. Further, Harvard's review of applicants is flexible and individualized, using race as only one potential plus factor among myriad considerations. Harvard also carried its burden to show that there are presently no workable race-neutral alternatives that would the College to achieve both its goals for diversity and its reputation for excellence. Moreover, Harvard has committed itself to periodically reviewing its use of race in admissions in order to satisfy *Fisher*'s requirement that universities engage in constant deliberation. Finally, Harvard's admissions policy does not unduly burden students who do not receive a race-based tip because no applicant, no matter their race, is foreclosed from consideration for any seat in Harvard's admitted class. These conclusions are all the result of extensive factual findings by the District Court and are therefore entitled to considerable deference by this Court.

III. Harvard's admissions policy does not discriminate against or penalize Asian American applicants in violation of Title VI. Pursuant to *Grutter*, Harvard's race-conscious admissions policy has already survived strict scrutiny as a non-facially neutral policy. SFFA's additional claim – that Harvard also intentionally discriminates against Asian American applicants – should be analyzed as a challenge to a race-neutral admissions

policy. As such, SFFA bore the burden to prove a prima facie case of intentional discrimination under the Court's *Arlington Heights* standard. *First*, SFFA failed to prove that Asian American applicants are disparately impacted by Harvard's admissions policy compared to similarly situated white applicants. *Second*, SFFA failed to provide any evidence of discriminatory intent on the part of Harvard's admissions officers. Consequently, SFFA failed to carry its burden under *Arlington Heights*. Again, these are factual conclusions reached by the District Court after its review of the totality of the evidence. Because these findings were not clearly erroneous, they should not be disturbed.

ARGUMENT

I. STARE DECISIS FACTORS NECESSITATE REAFFIRMING *GRUTTER*.

Overturning precedent should not be done lightly. The doctrine of stare decisis "is an established rule to abide by former precedents," in order to "keep the scale of justice even and steady." 1 W. Blackstone, *Commentaries on the Laws of England* 69 (1765). The value of stare decisis is twofold. First, it promotes predictability through preventing "arbitrary discretion" in judging. Alexander Hamilton, *The Federalist No. 78*, at 399 (Bantam Books 1982). Second, it fosters legitimacy and trust in the legal system by serving the "constitutional ideal [of] the rule of law." *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). Because stare decisis plays an

important role in a democratic society, to "overrule an important precedent is serious business." Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944). Judges cannot overrule precedent they merely dislike, as that would subject litigants to the arbitrary whims of judges. At the same time, stare decisis is not an "inexorable command," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009), and constitutional decisions are more susceptible to overruling. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Even with constitutional decisions, overturning precedent requires something "over and above the belief that the precedent was wrongly decided." *Allen v. Cooper*, 140 S.Ct. 994, 1003 (2020). It "demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Valid justifications fall into three general categories: the opinion's quality of reasoning and whether it was correctly decided, the judicial or real-world impacts of the decision, and the reliance on the opinion. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring in part). None of these justifications weigh in favor of overturning *Grutter* because the opinion (1) was decided correctly, (2) has had positive real-world and judicial impacts, and (3) implicates strong reliance interests that would be greatly disrupted.

A. *Grutter* was correctly decided and reasoned.

Judges are bound to follow precedent. The belief that an opinion was wrongly decided, absent more, is not enough to warrant overturning. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992). Instead, an opinion

must not just be wrong but "egregiously wrong." *Ramos*, 140 S.Ct. at 1414 (Kavanaugh, J., concurring in part). In evaluating an opinion's reasoning, courts can examine its consistency with earlier precedent as well as subsequent legal developments. *Id.* at 1405. *Grutter* does not depart from the general body of case law coming before it. Instead, the opinion not only directly relied on Justice Powell's opinion in *Bakke* but was also jurisprudentially consistent with the Supreme Court's doctrine on academic freedom and the Court's diversity rationale for integration. Furthermore, subsequent legal scholarship confirms that affirmative action is consistent with the original understanding of the Fourteenth Amendment.

1. The Grutter Court properly applied pre-existing principles of academic freedom.

The logic of *Grutter* directly follows from an early line of cases that expounded on the value of academic freedom. In *Grutter*, Justice O'Connor's majority opinion deferred to academic institutions' expertise and judgment in determining that diversity was an important goal to pursue for promoting educational outcomes. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) ("[A school's] educational judgment that such diversity is essential to its educational mission is one to which we defer."). According to the Court's reasoning, judges should recognize that these determinations require "complex educational judgments in an area that lies primarily within the expertise of the university." *Id.* Although the *Grutter* Court actively scrutinized the university's *methods* of pursuing

diversity, it deferred to the university's judgment in their *decision* to pursue diversity.

Grutter is in good company. The Court has long recognized that academic freedom is an important value that educational institutions promote. Academic freedom is not only of "paramount importance," but also directly connects to "a countervailing constitutional interest, that of the First Amendment." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978). Because academic freedom is closely tied to the First Amendment, this value is important for a "free society" as a whole. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring). Truly obtaining academic freedom requires "the exclusion of governmental intervention in the intellectual life of a university." *Id.*

Just as the majority opinion in *Grutter* deferred to school administrators on how to craft their educational goals, the Court has long recognized schools' autonomy to determine their educational structure and mission in a variety of contexts. For instance, the Court has acknowledged the suitability of schools to decide for themselves on issues ranging from academic performance to employment decisions to student fees. S*ee, e.g.*, *Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978) (academic performance); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (grading); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 593-96, 604 (1967) (employee decisions); *Bd. of Regents of Univ. of Wis. Sys. v.*

Southworth, 529 U.S. 217, 221 (2000) (student activity fees).

Prior to *Grutter*, Justice Powell's decision in *Bakke* picked up on this doctrine of academic freedom and applied it to a university's decision to use affirmative action. In doing so, *Bakke* "fit well into the existing First Amendment doctrinal universe." James G. Wilson, *Taking Stare Decisis Seriously: A Cautionary Tale for a Progressive Supreme Court*, 10 J. JuRis. 327, 360 (2011). Justice O'Connor followed along this well-trod jurisprudential path. *See* Neal Kumer Katyal, *The Promise and Precondition of Educational Autonomy*, 31 Hastings Const. L.Q. 557, 563 (2003) ("The discussion of academic freedom in *Grutter*... was not some afterthought, shorn of history or precedential support.").

2. Grutter's diversity rationale was in line with the Court's precedents.

In addition to relying on established First Amendment reasoning about academic freedom, *Grutter*'s reasoning emphasized the benefits of diversity. This also fits well with existing precedent. Although Justice Powell in *Bakke* rejected a remedial justification for affirmative action, 438 U.S. at 307, both *Bakke* and *Grutter* accepted the diversity and integrative rationale discussed in the desegregation line of cases. Moreover, *Grutter* references *Brown v. Board of Education*, suggesting that the Court was consciously placing *Grutter* in line with those cases. 539 U.S. at 331.

Two cases leading up to *Brown* expound on the vital principles of equality and integration that formed the basis

for the *Brown* decision and subsequent integration cases. In *McLaurin v. Okla. State Regents for Higher Educ.,* a case rejecting certain conditions of segregation imposed upon a Black student seeking a graduate degree, the Court affirmed that diversity in education was necessary to prepare students to be leaders in society. 339 U.S. 637, 641 (1950) ("Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates."). That same year, the Court rejected the University of Texas Law School's decision to exclude a Black student because legal training "cannot be effective in isolation from the individuals and institutions with which the law interacts" and so preventing a Black student from being educated in a racially diverse group of peers would prevent him from receiving a "substantially equal" education. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

In both *McLaurin* and *Sweatt*, the Court directly addressed the need for integration in educational environments in order to properly educate and create future leaders. The *Grutter* Court similarly recognized the importance of training leaders exposed to high quality

education that accepts the "heterogeneous" nature of society. 539 U.S. at 332. Just as the *McLaurin* Court demanded that a student who desired to be "a leader and trainer" receive equal education to his peers, 339 U.S. at 641, so, too, did the *Grutter* Court note that "the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 332 (citations omitted). The *Sweatt* Court understood that if "a substantial and significant segment of society [were] excluded" from education, students could not be prepared for the real world. 339 U.S. at 634. In *Bakke*, the Court referred to *Sweatt* as a precedent that supported the importance of diversity. 438 U.S. at 313-14. This is echoed by *Grutter*'s discussion of the need for cross-racial interactions in order to break down stereotypes and improve real-world relationships. 539 U.S. at 330.

Brown also played a role in the *Grutter* Court's reasoning. Justice O'Connor directly compared affirmative action programs *Brown*, using *Brown* as a justification for the twenty-five-year sunset provision. 539 U.S. at 345. The *Grutter* Court also acknowledged the connection between diversity, high-quality education, and real-world prospering by referencing *Brown*, affirming that "education…is the very foundation of good citizenship." *Id.* at 331 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). The *Grutter* Court understood the importance of *Brown* and the integration line of cases and built on that reasoning to create a comprehensive and constitutional understanding of diversity as a compelling interest.

3. As an original matter, Grutter is consistent with the original understanding of the Fourteenth Amendment.

Constitutional meaning is fixed and does not change as society changes. *South Carolina v. United States*, 199 U.S. 437, 448 (1905) ("The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."). Thus, one way to determine whether a constitutional opinion was correctly decided is to look to original meaning. Although not explicitly addressed, subsequent scholarship shows that *Grutter* incorporates a proper originalist understanding of the Fourteenth Amendment. Affirmative action is consistent with both the purpose of the Fourteenth Amendment and accepted practices at the time of ratification.

The purpose of the Fourteenth Amendment was to ensure not just de jure equality for Black Americans but de facto equality as well. With that in mind, the framers "intended that the Fourteenth Amendment would empower, assist or directly benefit black Americans." Andre Douglas Pond Cummings, Grutter v. Bollinger, *Clarence Thomas, Affirmative Action and the Treachery of Originalism: The Sun Don't Shine Here in This Part of Town*, 21 Harv. Blackletter L.J. 1, 96 (2005). After the ratification of the Thirteenth Amendment, Black Americans continued to be treated as second-class citizens. Thus, the Fourteenth Amendment was meant to "mak[e] sure that Whites would not, despite the [T]hirteenth [A]mendment, continue to

confine Blacks to an inferior position." John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 728 (1974). An early case interpreting the Fourteenth Amendment confirmed this purpose, requiring that "the spirit and meaning of the amendment… be construed liberally." *Strauder v West Virginia*, 100 U.S. 303, 307 (1880). Affirmative action is consistent with the Fourteenth Amendment's purpose because it produces a more-equal society by exposing students to a diverse array of beliefs and backgrounds.

Legislative actions after ratification also demonstrate that color-based treatment does not inherently violate the Fourteenth Amendment. Originalist scholars have listed a variety of laws passed by the post-ratification Congress which treated Black Americans preferentially. Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 478, 556-58 (1998). These laws included extending special treatment to emigrants from Africa as well as providing additional federal assistance to Black Americans via the Freedmen's Bureau. *Id.* "This history strongly suggests that the framers of the [A]mendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups." Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985); s*ee also* Siegel, *supra*, at 556 ("[T]he Reconstruction era Congresses produced a vast array of laws treating blacks preferentially, indicating its view that federal affirmative

action violated no constitutional norms."). Thus, *Grutter*'s reasoning stands firmly within the originalist framework.

B. *Grutter* positively impacts the real-world and informs judicial decision-making.

In addition to the quality of the reasoning itself, an important stare decisis factor is the opinion's subsequent impact. If an opinion has created negative consequences, either in the real-world or in the courts, that weighs in favor of overturning it. *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring in part). *Grutter*'s real-world impact has been positive: pursuing diversity through affirmative action programs benefits both the academic environment and society more broadly. Additionally, *Grutter* has not complicated judicial decision-making. Unlike opinions the Court has overturned in the past, *Grutter* is not "a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855. Rather, subsequent judicial opinions have incorporated *Grutter*'s reasoning to clarify doctrines of judicial restraint and federalism as well as the value of diversity. Moreover, the logic of *Grutter* serves as a workable tool for analyzing affirmative action programs.

1. Diversity improves real-world outcomes.

Justice O'Connor's reasoning relied on two primary benefits of diversity. First, diversity benefits the students and universities at the institutional level because it "promotes learning outcomes" and ensures that "classroom discussion is livelier," 539 U.S. at 330. Second, *Grutter* supported the practice of affirmative action because it led to broader quality in leadership and

integration at the societal level. *Id.* ("[S]kills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."); *see also* Cynthia Estlund, *Taking* Grutter *to Work*, 7 Greenbag 215, 218 (2004) ("*Grutter* thus stands for two diversity rationales: a familiar Powellesque appeal to the instrumental value of differences within an institution devoted to learning, and a newer integration argument that is informed by both history and the needs of civil society."). Subsequent research studying affirmative action demonstrates that it does improve outcomes in both the educational and societal context.

Affirmative action improves the educational environment because diversity fosters better cross-cultural exchange, classroom dialogue, and exposure to new ideas and backgrounds. The Court was correct that diversity in schools helps "enrich the discussions and exchanges… that are so important to a good college education." Gary Orfield, *Introduction* to *Diversity Challenged: Evidence on the Impact of Affirmative Action* 1, 15 (Gary Orfield & Michal Kurlaender, eds., 2001). Additionally, the data confirm that diversity does "lead to more meaningful classroom conversations." Meera E. Deo, *Affirmative Action Assumptions*, 52 U.C. Davis L. Rev. 2407, 2432 (2019). For instance, faculty members surveyed at law schools consistently reported that classroom diversity improved student learning by making complex topics more memorable and applicable. Meera E. Deo, *Faculty*

Insights on Educational Diversity, 83 Fordham L. Rev. 3115, 3138 (2015). Ultimately, diversity on campus provides a host of benefits including improving "critical thinking" and "overall satisfaction with college." Julie J. Park, W*hen Diversity Drops: Race, Religion, and Affirmative Action in Higher Education* 15 (2013).

In addition, schools are social institutions that play a vital role in improving society as a whole. *See* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*,77 N.Y. Univ. L. Rev. 1195, 1223 (2002) ("[C]osmopolitan private colleges and universities[] are crucial sites in civil society for citizens of different walks of life to learn how to live together on terms of equality."). Affirmative action is one way they do this. Diversity in the university shapes students to be better leaders and community members. As Justice O'Connor observed, schools prepare leaders for a racially diverse society, encourage civic mindedness, and promote racial tolerance and understanding. 539 U.S. at 332. For instance, students who had a greater number of positive, informal interactions with a diverse group of peers scored higher in seventeen of twenty-four indicators for cultural awareness, democratic sensibilities, and "perspective-taking skills." Sylvia Hirtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, Rev. of Higher Educ. 185, 191 (2007). Other studies confirm these results. Diversity improves societal relationships because it "increases perceived diversity of ideas" and "decreases prejudiced attitudes." Nisha C. Gottfredson *et al.*, *The*

Effects of Educational Diversity in a National Sample of Law Students, 44 Multivariate Behav. Res. 305, 319 (2009). When it comes to professional schools, diversity is also necessary to train students to serve the communities they are entering. A study of more than 20,000 medical school graduates found that racially diverse medical schools allowed graduates to feel better prepared to care for minority patients. Somnath Saha *et al.*, *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in U.S. Medical Schools*, 300 J. Am. Med. Ass'n 1135, 1140 (2009). *Grutter*'s proclamation that diversity is a compelling interest allows affirmative action programs in schools and professional institutions to have positive effects that reverberate throughout society.

2. Grutter *continues to inform judicial opinions.*

An opinion's impact on later cases matters. When considering the jurisprudential effect of an opinion, its "consistency and coherence with other decisions" is important. *Ramos*, 140 S.Ct. at 1415 (Kavanaugh, J., concurring in part). If courts choose to ignore or limit an opinion, that opinion may need to be reconsidered. This is not the case for *Grutter.* The reasoning in *Grutter* has not been ignored, rather, it has continued to infuse jurisprudence. Two principles that *Grutter* expounded on continue to be particularly relevant: (1) *Grutter*'s focus on deference and judicial restraint and (2) *Grutter*'s affirmation of diversity as a compelling interest.

Grutter's emphasis on deferring to the autonomy of independent institutions still informs this Court's

understanding of federalism. The Court affirmed the continued relevance of *Grutter* in *Schuette v. Coalition to Defend Affirmative Action,* where it held that states could pass laws forbidding affirmative action. 572 U.S. 291 (2014). The Court gave weight to the "democratic process," noting that the "First Amendment dynamics" of *Grutter* are best served to giving voters the power "to debate and then to determine" the best policy. *Id.* at 313. Thus, *Grutter*'s legacy helps strengthen the rights of states and the people to "persuade one another about solutions to improve race relations through regular democratic means." Adside II., *supra*, at 565. This, in turn, ensures judicial restraint and protects federalism and democracy.

Grutter also enabled courts to continue to recognize the value of diversity. Subsequent decisions in both the lower courts and the Supreme Court accept it as a compelling interest and extend *Grutter*'s logic. *See, e.g.*, *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003) (extending the compelling interest of diversity found in *Grutter* to diversity in metropolitan police departments); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007) ("[A] district may consider it a compelling interest to achieve a diverse student population.") (Kennedy, J., concurring); *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F.Supp.3d 254, 282 (S.D.N.Y. 2019) (finding it more likely than not that diversity in elementary and secondary school classrooms was a compelling interest); *Finch v. City of Indianapolis*, 886 F.Supp.2d 945, 973 (S.D. Ind. 2012) (stating that

municipal government has a compelling interest in diversity); *City of Providence v. AbbVie, Inc.*, 2020 WL 6049139 (S.D.N.Y.) ("There is an obvious social value in promoting diversity within the ranks of the legal profession."). In light of these opinions, *Grutter* continues to play an active role in judicial decision-making.

3. Grutter *created a workable standard for evaluating affirmative action policies.*

Lower courts should be able to consistently apply a precedent's reasoning. If the "central rule [of an opinion] has been found unworkable," it is more susceptible to overruling. *Casey*, 505 U.S. at 855. In the wake of the Court's decision in *Bakke*, lower courts needed guidance on how to treat diversity as a compelling interest. Joel K. Goldstein, *Beyond* Bakke*:* Grutter-Gratz *and the Promise of* Brown, 48 St. Louis U. L.J. 899, 901 (2004). *Grutter* provided that guidance by expounding on what factors courts should consider when subjecting an affirmative action policy to strict scrutiny. *Grutter* does not invent these factors out of whole cloth. In an earlier case, *United States v. Paradise*, the Court created a test for determining the validity of remedial affirmative action programs in the labor market. The test had four prongs: "[T]he necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." 480 U.S. 149, 171 (1987) (citation omitted). The Court in *Grutter*

essentially adopts the first two prongs of the *Paradise* test. By adapting a test that was already demonstrably workable, *Grutter* eliminated the confusion stemming from *Bakke* and created a test that courts have been able to consistently apply.

Grutter adapts the first two prongs of *Paradise.* The first prong of *Paradise* is that the relief must be necessary and effective. *Grutter* requires that defendants show necessity through the "compelling interest" test. In order to establish that the policy is effective, defendants must show that the policy "fit th[e] compelling goal… closely" and that there are no alternative-remedies. 539 U.S. at 333. *Grutter* also requires that the affirmative action policy be "flexible" and "non-mechanical," *Id.* at 336, 334, paralleling *Paradise's* second prong, the "flexibility and duration" of the program. 480 U.S. at 171. *Grutter* provides guidance on what that means. First, quotas and strict numerical analyses would be a mechanical form of affirmative action and not allowed. *Grutter* also clarifies that race can be considered as a plus factor as part of a flexible and individually-tailored analysis. *C.f.*, *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (upholding a flexible approach to remedy underrepresentation of minorities that allowed consideration of race and gender). The affirmative action policy must also be limited in duration. *Grutter*, 539 U.S. at 342-43. This not only matches the second prong of the *Paradise* test but also is part of traditional narrow tailoring tests in the context of race-conscious decision-making. *See, e.g.*, *City of Richmond*

v. J. A. Croson Co., 488 U.S. 469 (1989) (plurality opinion) (striking down a law aimed at promoting minority businesses because it had no time limit or process for reevaluating the legislation).

Grutter's modification of the *Paradise* factors can be consistently applied by the lower courts. The Court immediately demonstrated the workability in *Gratz*, showing that *Grutter* was a test that did not simply rubber stamp all affirmative action policies but closely scrutinized them under the modified *Paradise* test. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down an affirmative action program because it was not narrowly tailored). Lower courts have been able to follow *Grutter*'s guidance. *See, e.g., Smith v. Univ. of Washington*, 392 F.3d 367, 375-76 (9th Cir. 2004) (relying on *Grutter* to uphold an affirmative action policy that withstood strict scrutiny); *Cavalier ex rel Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 260-61 (5th Cir. 2005) (applying strict scrutiny to strike down a school's admissions policy). Moreover, lower courts have recognized the relationship between *Grutter* and *Paradise* and have used *Grutter* to aid in their narrow tailoring analysis in other contexts. *See, e.g.*, *W. States Paving Co. v. Wash. State Dept. of Transp.*, 407 F. 3d 983, 993-95 (9th Cir. 2005) (using *Grutter* to expound on the *Paradise* factors); *Kohlbeck v. City of Omaha*, 447 F. 3d 552, 555-57 (8th Cir. 2006) (same). *Grutter* crafted a workable standard that has benefited judicial decision-making.

C. Significant reliance interests necessitate reaffirming *Grutter*.

Courts should be hesitant to overturn an opinion if strong reliance interests would be disrupted. Litigants and citizens must be able to rely on opinions and this reliance underscores the value of stare decisis. Disrupting "settled expectations" threatens the fabric of society and the judicial process. *Pearson*, 555 U.S. at 233. Overturning *Grutter* would disrupt "settled expectations" because schools as well as other institutions have based their approaches to diversity on the guidance of *Grutter*. Moreover, the progress made due to affirmative action in promoting diversity and integration in schools would be nearly erased, harming minorities, educational institutions, and society as a whole.

Schools that relied on the guidance in *Grutter* when crafting their affirmative action policies would be harmed. For instance, in order for law schools to maintain and receive accreditation, they must demonstrate a commitment to diversity. Ann Mallatt Killenbeck, *Bakke, with Teeth: The Implications of* Grutter v. Bollinger *in an Outcomes-Based World*, 36 J.C. & U.L. 1, 8 (2009) (referencing the diversity requirements). If *Grutter* were overturned, law school accreditation would be threatened. This is not just true of law schools. Accrediting standards across the spectrum of disciplines, from business to journalism, now require commitment to diversity. *Id.* at 42. Schools that relied on *Grutter* and the Court's line of affirmative action cases would be forced to expend

enormous amounts of money and resources to completely re-work their admissions programs in order to continue to demonstrate commitment to diversity absent affirmative action. This draws resources away from other important endeavors such as faculty hiring, building renovations, curriculum development, scholarships, and the host of other activities that schools perform.

If *Grutter* were overturned, equality interests would be detrimentally impacted. At law schools, for instance, much of the progress made towards crafting diverse classes would disappear, because "affirmative action is responsible for nearly all of the diversity currently seen in the law student population generally and at every law school of even moderate selectivity." Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What do Racial Preferences Do?*, 75 U. Chi. L. Rev. 649, 697 (2008); *see also* Miranda Massie, *Litigators and Communities Working Together:* Grutter v. Bollinger *and the New Civil Rights Movement*, 6 Afr.-Am. L. & Pol'y Rep. 236, 239 (2004) (eliminating affirmative action would "resegregate legal education in America"). At the university level as well, affirmative action accounts for much of the diversity in the student populations at selective schools. Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 Rev. Econ. & Stat. 712, 719 (2012). Students currently rely on institutions of higher education to educate and prepare them for a diverse world. If *Grutter* were overturned,

schools would no longer be able to fulfill their institutional purpose. This would not only harm educational quality but the status of racial minority groups in society as a whole: "[W]ithout affirmative action in admissions, some groups would be relegated to outsider status or second-class citizenship in a racially stratified society." Rachel F. Moran, Bakke*'s Lasting Legacy: Redefining the Landscape of Equality And Liberty In Civil Rights Law*, 52 U.C. Davis L. Rev. 2569, 2608 (2019); *see also* Nathan Glazer, *We are All Multiculturalists Now* 151-51 (1997) (pointing out that affirmative action is necessary to remedy the persistent discrimination and segregation that limits equal opportunity). Returning to racial segregation in academic institutions is unacceptable. It violates the expectations of every citizen who values diversity and opportunity and would substantially harm minority racial groups. This is antithetical to not just the purpose of universities but the premise of the Fourteenth Amendment itself. The reliance interests in *Grutter* strike at the heart of our constitutional values: accomplishing the promise of equality for all.

II. HARVARD'S USE OF RACE-CONSCIOUS ADMISSIONS IS LAWFUL UNDER *GRUTTER* AND *FISHER*.

The protections afforded by Title VI of the Civil Rights Act are coextensive with those afforded by the Equal Protection Clause. *See Bakke*, 438 U.S. at 287; *Alexander v. Sandoval*, 532 U.S. 275 (2001). The Equal Protection Clause requires that race-based classifications imposed by programs receiving federal funding must, just

like government-imposed racial classifications, survive strict scrutiny. *See Grutter*, 539 U.S. at 326; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). This means that Harvard College's admissions policy complies with Title VI only if it is narrowly tailored to achieve a compelling government interest. *See Grutter*, 539 U.S. at 326 ("[Racial classifications imposed by government] are constitutional only if they are narrowly tailored to further compelling governmental interests."). The strict scrutiny inquiry exists to distinguish race-based classifications that "are benign or remedial" from those that are "motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493. By tailoring its use of race in admissions to the goal of enhancing student body diversity, Harvard has carried its burden "to prove 'that the reasons for any [racial] classification are clearly identified and unquestionably legitimate.'" *Fisher v. Univ. of Tex. at Austin* [*Fisher I*], 570 U.S. 297, 310 (2013) (quoting *Croson*, 488 U.S. at 505).

Crucially, a "district court's findings of fact, 'whether based on oral or other evidence, must not be to set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.'" *June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2121 (2020) (quoting Fed. Rule Civ. Proc. 52(a)(6)). Thus, "[w]here 'the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of

fact, it would have weighed the evidence differently.'" *Id*. (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). The District Court reviewed the totality of the evidence, correctly applied this Court's precedents, and arrived at a reasonable finding that Harvard's admissions policy is lawful under Title VI.

A. Harvard has a compelling interest in student body diversity.

In *Fisher I*, this Court held that the only compelling interest universities may pursue with race-conscious admissions is "the benefits of a student body diversity that 'encompasses a… broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" 570 U.S. at 314-15. *Fisher I*'s ruling confirmed *Grutter*'s unambiguous holding that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 329; *see also Bakke*, 438 U.S. at 311-12 (holding that "the attainment of a diverse student body" is a "constitutional goal for an institution of higher education."). Thus, Harvard satisfies the compelling interest prong of the strict scrutiny inquiry if its use of race in admissions serves the goal of promoting student body diversity. Further, Harvard's goals must be sufficiently concrete and precise, and must define student body diversity with reference to more than just race. Harvard's admissions policy meets both of these requirements.

1. Harvard has identified "concrete and precise" goals flowing from student body diversity.

Universities must do more than "assert[] an interest in diversity writ large." *Fisher v. Univ. of Tex. at Austin* [*Fisher II*], 136 S.Ct. 2198, 2211 (2016). Harvard must assert goals that are "concrete and precise" rather than "elusory and amorphous" in order to "permit judicial scrutiny of the policies adopted to meet them." *Id*. Importantly, the Court has granted deference to universities in formulating their academic goals and priorities. *See Fisher I*, 570 U.S. at 310 ("*Grutter* concluded that the decision to pursue 'the educational benefits that flow from student body diversity' that the university deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*."). In view of this deference and the approved goals in *Grutter* and *Fisher*, Harvard has carried its burden to identify sufficiently concrete goals flowing from student body diversity.

a. *Harvard has identified four specific goals flowing from student body diversity that are served by race-conscious admissions.*

In 2016, Harvard's Khurana Committee produced "an extensive and thoughtful examination of the benefits of diversity to Harvard College," *SFFA*, 397 F.Supp. at 152, which identified four goals that the College's race-conscious admissions policy served: "(1) training future leaders in the public and private sectors as Harvard's mission statement requires; (2) equipping Harvard's

graduates and Harvard itself to adapt to an increasingly pluralistic society; (3) better educating Harvard's students through diversity; and (4) producing new knowledge stemming from diverse outlooks." *SFFA*, 980 F.3d at 186. The Committee found that these objectives are served by exposing students to "people of different backgrounds, races, and life experiences [and] teaching students to engage across differences through immersion in a diverse community." *SFFA*, 397 F.Supp. at 134. Additionally, the Committee stated that "Harvard's efforts to enroll a diverse student body" help to "broaden the perspectives of teachers [and] expand the reach of the curriculum and the range of scholarly interests." *Id*. These findings contributed to the Committee's broader conclusion that "student body diversity – including racial diversity – is essential to [Harvard's] pedagogical objectives and institutional mission." *Id*. at 152.

b. *Harvard's objectives are at least as concrete and precise as those approved of in* Fisher *and* Grutter*.*

In *Fisher II*, the University of Texas identified four "educational values it [sought] to realize through its admissions process: the destruction of stereotypes, the 'promotion of cross-racial understanding,' the preparation of a student body 'for an increasingly diverse workforce and society,' and the 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.'" 136 S.Ct. at 2203. Likewise, in *Grutter*, the University of Michigan Law School claimed that its race-conscious admissions policy

functioned to "promote[] cross-racial understanding, help[] to break down racial stereotypes, and enable[] [students] to better understand persons of different races." *Grutter*, 539 U.S. at 330. Like the Universities of Texas and Michigan, Harvard has implemented race-conscious admissions with the goal of preparing its students to be leaders, workers, and contributing members of society. Additionally, similar to UT's goal of promoting "cross-cultural understanding" and UM's aim of "enabl[ing] students to understand persons of different races," Harvard emphasized its desire to improve its students' ability to communicate across difference. Furthermore, the Khurana Committee linked student body diversity to the quality of curricula and scholarship that Harvard's faculty produces. In doing so, Harvard added another layer of clarity and precision to its interest in student body diversity.

c. *Harvard's objectives are consistent with those the Court has recognized as valid aims flowing from student body diversity.*

The Court has consistently approved of the objectives reflected in Harvard's four stated goals. First, the Court has long recognized Harvard's interest in preparing future leaders. *See, e.g., Sweatt*, 369 U.S. at 634 (holding that law schools are a "proving ground for legal learning and practice"); *Grutter*, 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every

race and ethnicity."). Second, Harvard's goal of equipping its graduates for an "increasingly pluralistic society" is consistent with the Court's recognition of the role education plays in preparing students for citizenship. *See, e.g.*, *Grutter*, 539 U.S. at 332 ("Effective participation by members of all racial and ethnic groups in the civil life of our Nation is essential…."); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("This Court has long recognized that 'education… is the very foundation of good citizenship.'") (quoting *Brown*, 347 U.S. at 493). Harvard's third and fourth stated goals – to better educate its students and to "produce new knowledge stemming from diverse outlooks" – are at the heart of Justice Powell's ruling in *Bakke* that "[t]he atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body." 438 U.S at 312.

2. Harvard's admissions policy pursues student body diversity with reference to a multitude of identities and experiences, only one of which is race.

Student body diversity may not be defined by "race alone" but must "encompass[] 'all factors that may contribute to student body diversity.'" *Parents Involved*, 551 U.S. at 722. Unlike in *Parents Involved*, where the Court disapproved of a "limited notion of diversity [that] view[ed] race exclusively in white/nonwhite terms," *id*. at 723-24, Harvard defines student body diversity through a wide range of individual characteristics. Based on trial testimony, the District Court found that "Harvard values

and pursued many kinds of diversity within its classes, including different academic interests, belief systems, political views, geographic origins, family circumstances, and racial identities." 397 F.Supp.3d at 133. The District Court concluded, based on Harvard's efforts "to create opportunities for interactions between students from different backgrounds and with different experiences to stimulate both academic and non-academic learning," that Harvard's commitment to diversity writ large was highly credible. *Id*. at 134.

B. Harvard's consideration of race in admissions is narrowly tailored to achieve its specific goals flowing from student body diversity.

Grutter and *Fisher* require that, in addition to serving a compelling interest, race-conscious admissions policies must be narrowly tailored to achieve the precise goals a university has identified. In order to be narrowly tailored, Harvard's admissions policy must meet five requirements: first, it cannot use quotas or otherwise engage in racial balancing; second, it must engage in individualized, nonmechanical consideration of applicants; third, it must be time-limited; fourth, Harvard must determine that there are no workable race-neutral alternatives; fifth, Harvard's admissions policy must not unduly burden applicants for whom race is not a plus factor. Harvard satisfies all five requirements.

1. *Harvard's admissions policy employs neither a quota nor racial balancing.*

Racial quotas in admissions are categorically impermissible. *See Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system…."). Quotas "impose a fixed number or percentage which must be attained or which cannot be exceeded." *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986). Quota systems "insulate the individual from comparison with all other candidates for the available seats." *Bakke*, 438 U.S. at 495. The use of quotas in admissions thus "amount[s] to outright racial balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 330. However, Harvard may set "a permissible goal" for student body diversity, so long as the goal "'require[s] only a good-faith effort… to come within a range demarcated by the goal itself.'" *Id*. at 335 (quoting *Sheet Metal Workers*, 478 U.S. at 495). Harvard's goal for student body diversity must also "permit[] consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'compete[s] with all other qualified applicants.'" *Id*. (quoting *Johnson*, 480 U.S. at 638).

Harvard does not set a concrete numerical or percentage goal for enrollment by different racial groups. Indeed, year-by-year variation in the share of Harvard's admitted students belonging to different racial groups is inconsistent with a quota or racial balancing scheme. During the period of 2009 to 2018 on which SFFA asked the First Circuit to focus, "[t]he amount by which the share

of admitted Asian American applicants fluctuates is greater than the amount by which the share of Asian American applicants fluctuates." *SFFA*, 980 F.3d at 188. The same is true of African American and Hispanic applicants. *Id*. As the First Circuit concluded, "this is the opposite of what one would expect if Harvard imposed a quota." *Id*. at 188-89. Were Harvard implementing a quota or engaging in racial balancing, fluctuations in the racial demographics of the applicant pool would be greater than fluctuations in the demographics of admitted students.

Moreover, Harvard's use of one-pagers, which report the racial composition of the class, during the admissions process is consistent with *Grutter*'s ruling that "'some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323). Harvard's admissions officers testified that they use numerical reports during the admissions process for three reasons: "(1) to assess how well [Harvard's] diversity recruitment efforts… were working; (2) to manage [Harvard's] yield rates; and (3) to avoid drop offs in students with particular characteristics due to inadvertence or lack of care." *SFFA*, 980 F.3d at 189. In *Grutter*, this Court approved the use of "daily reports" for precisely these purposes. 539 U.S. at 336 (approving of the University of Michigan's use of "'daily reports,' which keep track of the racial and ethnic composition of the class"). Harvard uses one-pagers to ensure that its use of race in admissions is narrowly tailored to achieving its goals for student body diversity.

1. Harvard engages in flexible, individualized consideration of applicants using race as one plus factor.

Grutter required that "truly individualized consideration demands that race be used in a flexible, nonmechanical way." 539 U.S. at 334. This means that "an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id*. This Court re-emphasized individualized consideration in *Parents Involved*, stating that applicants must be judged "as an individual, and not simply as a member of a particular racial group." 551 U.S. at 722. Harvard's admissions policy is a paradigm example of individualized applicant evaluation and considers race as only one plus factor in a holistic and flexible system of review.

Harvard considers race in an individualized and contextual manner. Unlike the policy the Court struck down in *Gratz*, there is no fixed value that is awarded to applicants based on their racial identity. *See*, *Gratz*, 539 U.S. at 271-72. Instead, "race may act as a tip or plus factor when making an admissions decision." *SFFA*, 397 F.Supp.3d at 146. Further, race may only be used as a positive factor in evaluating an applicant. Admissions officers "are not supposed to, and do not intentionally, take a student's race directly into account when assigning ratings other than the overall rating." *Id*. Thus, race

functions only as a "factor of a factor of a factor" in Harvard's broader admissions review. *Fisher II*, 136 S.Ct. at 2207.

Unlike in *Parents Involved*, race is never "determinative standing alone" for Harvard's applicants. 551 U.S. at 723. SFFA's experts found that "Harvard rejects more than two-thirds of Hispanic applicants and slightly less than half of all African American applicants who are among the top 10% most academically promising applicants…." *SFFA*, 980 F.3d at 191. Thus, even among the most highly qualified African American and Hispanic applicants, race is not determinative of their admissions outcome. Moreover, admitted students of every racial group are far from "minimally qualified." *Gratz*, 539 U.S. at 266 ("'[V]irtually' all [underrepresented minority applicants] who are minimally qualified are admitted…."). As the District Court pointed out, "a majority of admitted applicants from every major racial group scores in the 2 range on Harvard's academic ratings." *SFFA*, 397 F.Supp.3d at 199. Clearly, all admitted students demonstrate comparably high levels of academic potential.

2. Harvard exhaustively considered race-neutral alternatives and carried its burden to show that none are workable.

In order for a race-conscious admissions policy to be narrowly tailored, "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." *Fisher I*, 570 U.S. at 312. However, "[n]arrow tailoring does

not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. Nor must universities "choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id*. Harvard has shown that the race-neutral policies proffered by SFFA, many of which are logistically infeasible, would result in a reduction in student body diversity as well as a decline in other academic values Harvard prioritizes.

Harvard's Smith Committee, titled the "Committee to Study Race Neutral Alternatives in Harvard College Admissions," exhaustively considered each of the alternatives proposed by SFFA. *SFFA*, 397 F.Supp.3d at 153. SFFA's first proposed alternative, eliminating early action admissions, was already implemented by Harvard for the classes of 2012 to 2015, and resulted in "decreasing matriculation rates among some categories of African American and Hispanic applicants." *Id*. at 179. SFFA's second proposed alternative is to remove preferences for "ALDCs," or applicants who are "recruited Athletes, Legacies, on the Dean's or Director's interest list, or Children of faculty and staff." *Id*. at 138. The District Court credited Harvard's expert's testimony that this alternative, in combination with removing any racial preferences, "would cause African American enrollment to decline from 14% to 5% and Hispanic enrollment to decline from 14% to 9%." *Id*. at 178. In addition to these stark reductions in student body diversity, eliminating ALDC preferences would impede several of Harvard's other institutional

goals. For instance, eliminating Harvard's preference for the children of faculty and alumni "would adversely affect Harvard's ability to attract top quality faculty and staff and to achieve desired benefits from relationships with its alumni." *Id*. at 180.

SFFA's third alternative was to expand its recruitment efforts and augment financial aid. Again, however, Harvard's actual experience with expanded financial aid demonstrated that it "has already reached, or at least very nearly reached, the maximum returns in increased socioeconomic and racial diversity that can reasonably be achieved through outreach and reducing the cost of a Harvard education." *Id*. at 180. *See also SFFA*, 980 F.3d at 193 (noting that "later changes to [Harvard's financial aid] program had little to no effect on the racial makeup of Harvard's applicants or admitted class"). SFFA's fourth alternative, admitting more transfer students, would not contribute substantially to student body racial diversity because Harvard's transfer applicants "are, on average, less diverse and less qualified than applicants to its freshman class." *SFFA*, 397 F.Supp.3d. at 180. SFFA's fifth alternative, to eliminate consideration of standardized test scores, would require Harvard to ignore a metric that it "considers ... to be reflective of academic or intellectual strength ...." *Id*. Thus, this change would ask Harvard to considerably compromise its "reputation for excellence" in exchange for insubstantial gains in student body diversity. *Grutter*, 539 U.S. at 339.

SFFA's sixth alternative is to implement place-based quotas, "such as admitting a top student from each high school class or from each zip code." *SFFA*, 397 F.Supp.3d at 181. As the District Court found, this proposal is practically infeasible because Harvard admits far fewer students than there are U.S. high schools and zip codes. *Id*. Additionally, the District Court concluded based on expert testimony that Harvard "could not achieve comparable racial diversity through such a program without a significant decline in the academic strength of its class." *Id*. at 200. Most importantly, Harvard strives to achieve a diverse student body along a wide range of metrics. As this Court stated in *Fisher II*, in reference to using class rank as the sole criteria for admissions, "privileging one characteristic above all others does not lead to a diverse student body." 136 S.Ct. at 2213. Thus, a place-based quota system would require Harvard to compromise both its academic standards and its student body diversity broadly defined.

SFFA finally suggests a combination of race-neutral alternatives, "Simulation D," in which "Harvard would eliminate its consideration of race, eliminate LDC tips, and increase the tip for low-income applicants." *SFFA*, 980 F.3d at 193. Harvard's analysis of Simulation D, which the District Court credited, showed that "African American representation in Harvard's admitted class would decrease by about 32% ...." *Id*. at 194. As the First Circuit held, "[a]mple testimony in the record, including from Harvard students and alumni, supported" the finding that "the dramatic decline in diversity under Simulation D

could adversely affect the educational experience at Harvard and increase feelings of isolation and alienation among Harvard's students." *Id*. at 194-95. This finding was squarely in line with this Court's concern in *Fisher II* about the feelings of isolation experienced by racial minority UT students under a race-neutral admissions policy. *See Fisher II*, 139 S.Ct. 2212. In addition to these significant changes in student body racial diversity, implementing Simulation D would result in a decline in the quality of Harvard's admitted students as judged by the College's ratings system. Not only would the average SAT score of an admitted student fall by 64 points, "but the fraction of applicants with academic, extracurricular, personal, and athletic ratings of 1 or 2 would decrease by more than 10%." *SFFA,* 980 F.3d at 194. Furthermore, as previously noted, removing preferences for LDC applicants would negatively impact a range of other institutional and academic values that Harvard has chosen to prioritize, like maintaining positive alumni relations.

3. Harvard satisfies the requirement that race-conscious admissions be time-limited by periodically reviewing its admissions policy.

In *Grutter*, the Court held that "race-conscious admissions policies must be limited in time." 539 U.S. at 342. This "durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id*. In *Fisher II*, the Court did not mention a sunset provision, but

instead emphasized that UT bears an "ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies." 136 S.Ct. at 2215. Thus, the essential requirement the Court has placed on universities engaging in race-conscious admissions is that they regularly review the efficacy and necessity of their policies. Harvard has clearly met this requirement over the last ten years through research by the Office of Institutional Research and the Ryan, Khurana, and Smith Committee's rigorous investigations. Furthermore, the Smith Committee concluded its review by recommending "that Harvard reexamine the issue in five years." *SFFA*, 397 F.Supp.3d at 152.

4. Harvard's admissions policy does not unduly burden non-underrepresented minority applicants.

In *Grutter*, the Court held that race-conscious admissions may not "unduly burden individuals who are not members of the favored racial and ethnic groups." 539 U.S. at 341. The Court concluded that the University of Michigan did not unduly burden such individuals because its admissions policy conducted an "individualized inquiry into the possible diversity contributions of all applicants ...." *Id*. Put differently, the undue burden requirement turns on whether applicants who do not receive a race-based tip are "foreclosed from all consideration for that seat simply because [they are] not the right color or had the wrong surname." *Bakke*, 438 U.S. 318. If they are not, then their "qualifications would have been weighed fairly and

competitively, and [they] would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id*. Applicants with underrepresented racial identities, like African American and Hispanic applicants, may receive racial tips in their applications. Yet Harvard's explicit policy does not foreclose any applicant from consideration from any seat solely on the basis of their race. As discussed previously, Harvard engages in flexible and individualized review of applicants using race as just one plus factor among many. As such, its admissions policy does not unduly burden non-favored applicants in any sense the Court meant in *Grutter* and *Bakke*.

III. HARVARD'S ADMISSIONS POLICY DOES NOT DISCRIMINATE AGAINST, PENALIZE, OR UNDULY BURDEN ASIAN AMERICAN APPLICANTS.

Title VI only creates a private right of action for claims of intentional discrimination, not disparate impact. *See Sandoval*, 523 U.S. at 275; *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act,… is unconstitutional solely because it has a racially disproportionate impact."); *Bakke*, 438 U.S. at 287 ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."). A party challenging a facially neutral policy bears the initial burden of proving a prima facie case of disparate impact and discriminatory intent. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). By contrast, policies based

on explicit racial classifications are not facially neutral and thus trigger strict scrutiny on their face. *See Parents Involved*, 551 U.S. at 720 ("[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.").

SFFA's claim that Harvard intentionally discriminates against Asian American applicants should be reviewed as a challenge to a facially neutral policy. Under this standard, SFFA clearly failed to meet its burden to prove a prima facie case of intentional discrimination. However, even if the lower courts were correct in treating SFFA's claim as a challenge to a non-facially neutral policy, Harvard has still carried its elevated burden to prove that its admissions policy survives strict scrutiny. Again, the District Court's evidentiary findings need only be "plausible in light of the record viewed in its entirety." *Anderson*, 470 U.S. at 573. After reviewing the evidence, the District Court concluded that Harvard does not intentionally discriminate against Asian American applicants in making admissions decisions. This ruling was plausible in light of the entire record. Therefore, whatever analysis this Court applies to SFFA's claim, the District Court's ruling should not be overturned.

A. SFFA's claim of intentional discrimination against Asian Americans should be analyzed as a race-neutral policy under *Arlington Heights*.

Harvard takes race into account when making admissions decisions, but its stated admissions policy does

not maintain any preference for white applicants over Asian American applicants. Harvard's use of race in admissions triggers *Grutter*'s strict scrutiny analysis, but the Court has never required universities to affirmatively demonstrate that their admissions policies do not disfavor one racial group more than others. The District Court seemed to suggest that this is the substance of *Grutter*'s undue burden inquiry, but that misunderstands *Grutter*. *See SFFA*, 397 F.Supp.3d, at 193-95. *Grutter*'s undue burden inquiry turns narrowly on whether an admissions policy performs individualized review of every applicant and does not prevent nonminority applicants from competing for every available seat. *See infra* Part I.B.5; *Grutter*, 539 U.S. at 341. In neither *Grutter* nor *Fisher* did the Court require universities to affirmatively prove that their admissions policies do not treat one racial group less favorably than others.

Therefore, SFFA's claim of intentional discrimination against Asian American applicants is distinct from its challenge to Harvard's use of race in admissions writ large. For instance, one of SFFA's central arguments is that Harvard discriminates against Asian American applicants in assigning personal ratings. *See SFFA*, 980 F.3d at 199. However, Harvard's policy does not allow admissions officers to take race into account when assigning personal ratings. *See SFFA*, 397 F.Supp.3d at 146. Thus, SFFA's claim is that a facially neutral component of Harvard's admissions process is, in practice, intentionally discriminatory. More broadly, SFFA's intentional

discrimination claim does not concern Harvard's use of race as a plus factor in admissions, but rather alleges intentional discrimination in Harvard's broader admissions scheme, the vast majority of which does not purport to take race into account.

As such, for purposes of evaluating SFFA's claim that Harvard intentionally discriminates against Asian American applicants, Harvard's admissions policy should be treated as facially neutral. The appropriate analysis is first to require that SFFA state a prima facie case of both disparate impact and discriminatory intent against Asian Americans. *See Arlington Heights*, 429 U.S. at 266. This means that SFFA bore the initial burden to demonstrate that Asian American applicants are accepted to Harvard at a lower rate than similarly situated white applicants. Further, these disparate admissions outcomes must be motivated, at least in part, by an intent to discriminate against Asian American applicants. *See id.* at 270-71. SFFA met neither burden.

B. If SFFA's claim is not reviewed as a challenge to a facially neutral policy, Harvard's admissions policy still survives strict scrutiny under *Grutter* and *Fisher*.

The District Court concluded that because Harvard takes race into account when making its admissions decisions, it is not a facially neutral policy for purposes of assessing SFFA's intentional discrimination claim. *See SFFA*, 397 F.Supp.3d at 189-90. As such, the court ruled that strict scrutiny applies to SFFA's claim. Per the First

Circuit, this finding "shift[s] the burden to Harvard to disprove intentional discrimination." 980 F.3d at 157. Under this analysis, because Harvard uses race in admissions, it must disprove one of the two prongs of a Title VI intentional discrimination: either disparate impact or discriminatory intent against Asian American applicants. *Id*. Despite applying this elevated burden, the District Court still found that Harvard had presented sufficient evidence to disprove intentional discrimination.

The District Court's finding of fact is entitled to deference; however, its requirement that Harvard disprove intentional discrimination misapplied *Grutter*. The use of race in admissions triggers strict scrutiny, which requires universities to demonstrate that their policy is narrowly tailored to achieve a compelling interest related to student body diversity. Strict scrutiny analysis has never required universities to affirmatively prove that they do not engage in invidious discrimination against one particular racial group. Should this Court conclude that Harvard's policy is not race neutral, and thus must survive strict scrutiny with respect to possible discrimination against Asian American applicants, the appropriate analysis is simply to subject the policy to *Grutter*'s strict scrutiny. As discussed in Part III, Harvard's admissions policy survives strict scrutiny under *Grutter*. Therefore, it has carried its burden to institute a lawful race-conscious admissions policy.

C. Under either standard, Harvard's admissions policy does not violate Title VI.

Under an *Arlington Heights* analysis, SFFA failed to prove that Asian American applicants are accepted at a lower rate than similarly situated white applicants. Further, they failed to prove that Harvard intentionally discriminates against Asian Americans. Therefore, SFFA has failed to carry its burden under *Arlington Heights*. Even under the District Court's elevated standard, Harvard successfully disproved SFFA's intentional discrimination claim.

1. The District Court's conclusion that statistical evidence does not show that Asian American applicants are disparately impacted by Harvard's admissions policy was not clearly erroneous.

The District Court concluded, based on its preferred model of Harvard admissions outcomes, that Asian American identity alone does not have a statistically significant impact on whether an applicant will be admitted. The court's selection of this statistical model was reasonable given its identification of three major flaws in SFFA's preferred model. First, the court determined that SFFA's model was significantly faulty due to its exclusion of a number of key variables that impact admissions outcomes. *See SFFA*, 397 F.Supp.3d at 174. These variables include applicant's personal rating, "intended career, staff interview indicator, and parental occupation." *Id*. All three of these variables play an important role in Harvard's admissions decisions and also correlate with race, creating

"a significant potential for omitted variable bias if excluded." *Id*.

SFFA argues that the District Court erred by including personal ratings in its preferred model because these ratings are themselves influenced by race. Upon its review of the totality of the evidence, however, the District Court ruled that "the personal rating was not influenced by race in a way that precluded its use" in the overall model of admissions. This ruling was clearly reasonable in light of the evidence. First, the court heard witness testimony that race is not considered in assigning personal scores. *SFFA*, 980 F.3d at 200. Second, the court credited expert testimony that SFFA's model of personal ratings "likely suffers from considerable omitted variable bias." *SFFA*, 397 F.Supp.3d at 170. Finally, there was substantial evidence that a number of omitted variables may be responsible for disparities in personal ratings between white and Asian American applicants.

Second, the court determined that SFFA's model was flawed because it excluded ALDCs. These students comprise thirty percent of Harvard's admitted students. Further, no model suggests that Asian American applicants within this group are less likely to be admitted than comparable white applicants. *Id*. at 173-74. ALDCs are evaluated through the same admissions process as all other applicants; thus, the court concluded that excluding such a large group of admitted students introduced large risk of error into SFFA's preferred model. Finally, the District Court concluded that SFFA's model was faulty

because it pooled admissions data from six different cycles rather than analyzing each admissions cycle independently. The court emphasized "the reality that the effect of various characteristics in the admissions process may change slightly between years, as Harvard's institutional interests or admissions policies shift or when the composition of the applicant pool changes." *Id*. at 174. The District Court's decision was supported by a lower standard error associated with the year-by-year model. *Id*.

Taken together, the District Court concluded that the most credible statistical model presented showed no significant difference between admissions rates among similarly situated white and Asian American applicants. In fact, the District Court found that race is used as a plus factor for some Asian American applicants. *Id*. at 178. Thus, based upon its review of the totality of the evidence, the District Court found that Harvard had demonstrated that Asian American applicants are not disparately impacted by its admissions policy as compared to white applicants. This factual conclusion was not clearly erroneous and thus should not be disturbed by a reviewing court. Based on this finding, SFFA has not met its burden to establish a prima facie case of disparate impact.

2. The District Court's conclusion that there is minimal evidence of discriminatory intent by Harvard's admissions office was not clearly erroneous.

Even if this Court concludes that Harvard's admissions policy disparately impacts Asian American students, the

District Court's conclusion that there was no evidence of discriminatory intent should not be disturbed. First, even if this Court concludes there is some statistical disparity between white and Asian American admissions rates, it is not nearly stark enough to give rise to an inference of discriminatory intent. The Court has ruled that, where there is a "clear pattern, unexplainable on grounds other than race," statistical evidence alone can suffice for a finding of intentional discrimination. *Arlington Heights*, 429 U.S. at 266. However, "such cases are rare" and require "a pattern as stark as that in *Gomillion* or *Yick Wo*." *Id*. Without such a pattern, "impact alone is not determinative, and the Court must look to other evidence." *Id*.

The two cases the Court cited, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), dealt with patterns of disparate impact that were exponentially more clear than even the most favorable reading of SFFA's model suggests. In *Yick Wo*, the city of San Francisco denied laundry permits to all 200 Chinese applicants and granted permits to all but one non-Chinese applicant. This was despite the fact that a majority of the city's laundromats were operated by Chinese owners. 118 U.S. at 358-59. Likewise, in *Gomillion*, the state of Alabama changed the borders of Tuskegee to remove nearly all Black voters from the city. 364 U.S. at 340. These patterns are vastly more severe than anything that could reasonably be concluded from the statistical evidence presented at trial.

Turning to non-statistical evidence, the District Court credited "consistent, unambiguous, and convincing" testimony by admissions officers that "there was no discrimination against Asian American applicants with respect to the admissions process as a whole and the personal ratings in particular ...." *SFFA*, 397 F.Supp.3d at 203. Second, "Harvard presented testimony from multiple admissions officers that its admissions process, though subjective, did not facilitate bias or stereotyping." *SFFA*, 980 F.3d at 196-97. Both the First Circuit and the District Court also noted that Harvard's admissions process "offset any risk of bias" by requiring applicants receive majority support of the forty-person admissions committee. *Id*. at 197. As this Court ruled in *Cooper v. Harris*, "[i]n assessing a finding's plausibility… the Court gives singular deference to a trial court's judgments about the credibility of witnesses." *Cooper v. Harris*, 137 S.Ct. 1455, 1461 (2017). Thus, because the District Court's ruling on discriminatory intent is considerably grounded in its determinations of witness credibility, it is entitled to a high degree of deference.

In view of these findings, it is clear that Harvard carried either burden this Court could apply. Harvard proved, to the satisfaction of the trier of fact, that it does not make admissions decisions with any intent to discriminate against Asian Americans. Had the District Court required SFFA to establish a prima facie case of discriminatory intent, SFFA clearly would have failed to carry its burden. Harvard has demonstrated that its use of

race is "benign or remedial" rather than employing racial classifications "motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493. The District Court did not err in finding that Harvard has not violated Title VI in its treatment of Asian American applicants.

CONCLUSION

For the foregoing reasons, the opinion of the court of appeals should be affirmed.

Respectfully submitted.

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** Petitioner and Respondent counsel jointly dedicate their briefs to the memory of Holden Thomas Tanner (YLS '21), a cherished mentor and an irreplaceable friend.*