No. 06-1202

IN THE

Supreme Court of the United States

JOHN DOE, A MINOR, BY HIS MOTHER AND NEXT FRIEND, JANE DOE,

Petitioner,

v.

KAMEHAMEHA SCHOOLS/
BERNICE PAUAHI BISHOP ESTATE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF
THE CENTER FOR EQUAL OPPORTUNITY
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DOUGLAS R. COX
Counsel of Record
MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
Counsel for Amicus Curiae

QUESTION PRESENTED

Amicus curiae will address the following question:

Whether 42 U.S.C. § 1981 permits private schools to admit students on a racially exclusive basis when those admissions policies favor historically disadvantaged racial groups.

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BRIEF OF THE CENTER FOR EQUAL OPPORTUNITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Amicus curiae The Center for Equal Opportunity ("CEO") is a not-for-profit organization whose goals include education, research, and public advocacy concerning racial preferences in school admissions and other government services. CEO advocates the cessation of racial, ethnic, and gender discrimination by all public and private entities and has participated as amicus curiae in numerous U.S. Supreme Court cases relevant to the analysis of this case. *See, e.g.*, Brief for Center for Equal Opportunity et al. as *Amici Curiae* Supporting Petitioners, *Gratz v. Bollinger*, *Grutter v. Bollinger*, 539 U.S. 244, 539 U.S. 306 (2003) (Nos. 02-516, 02-241); Brief for Center for Equal Opportunity et al. as *Amici Curiae* Supporting Petitioner, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818). CEO believes that its in-depth knowledge of race-based schooling programs will aid the Court in understanding the issues raised in the petition for a writ of certiorari.[1]

STATEMENT

In *Rice v. Cayetano*, 528 U.S. 495 (2000), this Court held that a classification based on "Native Hawaiian" ancestry—"any descendant of the aboriginal peoples inhabiting the Hawaiian Islands . . . in 1778," *id.* at 509—was a *racial* classification. *Id.* at 517. This case concerns the Kamehameha Schools, which employ a virtually identical racial classification in their admissions decisions, considering and admitting

[1] Pursuant to this Court's Rule 37.6, amicus states that no person or entity other than The Center for Equal Opportunity, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties; the requisite consent letters have been filed with the Clerk per Rule 37.2(a).

all qualified applicants within the racially-defined class before admitting *any* applicant outside the class. It is undisputed that the Schools' "Native Hawaiians first" admissions policy operates in effect as a categorical bar to the admission of students who are not "Native Hawaiians." In the decision below, a bare majority of an *en banc* panel of the Ninth Circuit concluded that this race-exclusive admissions policy is "nondiscriminatory" and therefore does not violate Section 1981. That decision conflicts with numerous decisions of this Court and, accordingly, warrants this Court's review. *See* SUP. CT. R. 10(c).

1. The Kamehameha Schools existed several years before the end of the Hawaiian monarchy, and decades before Hawaii attained statehood, and since their founding, have adhered to an admissions policy that rigidly excludes all who do not qualify, racially, as "Native Hawaiians." Pet. App. 172a.

In 1884, Princess Bernice Pauahi Bishop passed away having established a testamentary trust for the establishment of the Kamehameha Schools. *Id.* at 173a. She directed the Trustees to "devote a portion of each years[']income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood." *Id.* Charles R. Bishop, her widower and the chairman of the Schools' first board of trustees, interpreted his late wife's will to mandate that "Hawaiians have the preference" in admissions. *Id.* at 174a. He explained that, "Mrs. Bishop intended that, in the advantages of her beneficence, those of her race should have preference," and that this policy should not be altered, unless Native Hawaiians failed to apply for admission. *Id.* at 7a.

The Kamehameha Schools' policy of racial exclusion has not changed, even in the intervening century. *See* Kamehameha Schools, Questions and Answers About KS Admissions Policies, http://www.ksbe.edu/admissions/policy.html (last visited March 26, 2007) ("[T]he trustees recognized it

was Pauahi's intent to give Hawaiians a preference in admissions. . . . The preference policy has been adhered to by successor trustees for 114 years."). Candidates of Native Hawaiian ancestry enjoy a strong preference in admissions: Only after *all* qualified Native Hawaiian applicants have been admitted will the Schools admit *any* non-Native Hawaiians. The practical effect of such a bifurcated system is to prevent the admission of any student who lacks Native Hawaiian ancestry. Pet. App. 8a. Indeed, since 1962, exactly one non-Native Hawaiian has been admitted, and after that "'situation,'" the Schools' trustees took immediate action to prevent similar "'screw[ ] up[s].'" Pet. App. 75a (quoting Members of Trs. of Kamehameha Sch., *Kamehameha's Policy Will Remain*, HONOLULU ADVERTISER, July 27, 2002, and Rick Daysog, *Angry Ohana Grills Trustees*, HONOLULU STAR-BULLETIN, July 16, 2002); see also Pet. App. 30a n.10.

The Kamehameha Schools make clear that its "preference policy is *not* an affirmative action program, designed to mirror societal diversity within an institution." *Kamehameha Schools Admissions Policy Lawsuit*, http://www.ksbe.edu/lawsuit/summary.php (last visited Mar. 21, 2007) (emphasis added). Rather, as the district court found, the policy is directed at the entire population of Native Hawaiians living in Hawaii, and will remain in place at least until Native Hawaiians achieve educational and socioeconomic parity with non-Native Hawaiians. Pet. App. 203a.

2. Petitioner, who is not a Native Hawaiian, applied for admission to the Kamehameha Schools on four separate occasions but, despite being deemed a "competitive applicant," was repeatedly denied admission. Pet. App. 12a. Respondents do not dispute that their admissions requirement of "having some Native Hawaiian blood," *id.* at 178a, is one of race. And respondents concede that petitioner "would likely have been admitted" had their Ho'oulu Hawaiian Data Center been able to confirm that he had at least "one drop" of Native Hawaiian blood. *Id.* at 179a.

Petitioner filed suit, alleging that the Kamehameha Schools' admissions policy violated 42 U.S.C. § 1981. Respondents did not contest that the Kamehameha Schools' admissions policy is racially discriminatory, but argued that their policy of racial exclusion does not violate Section 1981 because it is rationally related to a legitimate remedial purpose. The district court agreed, holding that the Kamehameha Schools' efforts to "educat[e] Native Hawaiians to overcome the manifest imbalance resulting from socioeconomic and educational disadvantages" constituted a legitimate justification for their race-based admissions policy. Pet. App. 157a. A divided panel of the Ninth Circuit (Graber, Bybee, Beezer, JJ.) reversed.

3. The court of appeals granted rehearing *en banc* and, in an 8-7 decision, affirmed the judgment of the district court that the Kamehameha Schools' racially exclusive admissions policy did not violate Section 1981. The *en banc* majority concluded that petitioner's Section 1981 claim should be evaluated under the burden-shifting framework developed for Title VII claims. Pet. App. 18a (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Applying that framework, the majority determined that only its final step was at issue: Petitioner had indisputably demonstrated that the Kamehameha Schools consider Hawaiian ancestry in making admissions decisions, but the majority construed the Kamehameha Schools' "remedial admissions policy" as an "affirmative action plan[ ]" that sufficed as a "non-discriminatory rationale for their decisions;" the only question was whether the Schools' "affirmative action" program was invalid. *Id.* at 22a, 27a.

The *en banc* majority initially suggested that this Court's decisions in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), and *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979), would guide the assessment of the validity of the Kamehameha Schools' admissions policy. But the majority soon determined that this Court's test was inadequate to

the task and needed to be "modified" in order to give greater "deference to private educational decisionmakers" and also—and "[m]ore importantly"—to take into account the "significantly broader function" performed by schools (as compared to employers). Pet. App. 24a.

Modifying the first *Johnson* factor, the majority explained that "the external focus of the education mission renders unnecessary the requirement of proof of a 'manifest imbalance' *within* a particular school; the relevant population is the community as a whole." *Id.* at 26a. With regard to the second *Johnson* factor, the majority explained that the admissions policy should not "'unnecessarily trammel' the rights of students in the non-preferred class or 'create an absolute bar' to their advancement" "*within the community as a whole*." *Id.* at 26a. And as to the third *Johnson* limitation, the court concluded that the "admissions policy must do not more than is necessary to remedy the imbalance *in the community as a whole*." *Id.* (emphasis added). Applying this radically "modified" test, the majority determined that the Kamehameha Schools' admissions policy did not violate Section 1981. *Id.* at 27a-34a.

ARGUMENT

I. THE NINTH CIRCUIT'S REPUDIATION OF THIS COURT'S DECISIONS IN *RUNYON* AND *MCDONALD* WARRANTS THIS COURT'S REVIEW

"In *Runyon*, the Court considered whether § 1981 prohibits private schools from excluding children who are qualified for admission, solely on the basis of race. [The Court] held that § 1981 did prohibit such conduct. . . ." *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (citing *Runyon v. McCrary*, 427 U.S. 160 (1976)).

Respondents acknowledge that petitioner was denied admission to the Kamehameha Schools solely because he lacks Native Hawaiian ancestry, Pet. App. 179a, and nowhere dispute that the requirement of "having some Native Hawai-

ian blood," *id.* at 178a, is one of race. *E.g.*, *Rice v. Cayetano*, 528 U.S. 495, 515 (2000). They have, in terms, stipulated that they currently administer and enforce a policy of "excluding children who are qualified for admission, solely on the basis of race." *Patterson*, 491 U.S. at 171. *Runyon* held that this course of conduct "amounts to a classic violation of § 1981." 427 U.S. at 172. And later that same day, this Court made absolutely clear that Section 1981 protects "'all persons,'"—"whites as well as nonwhites." *McDonald v. Santa Fe Trail Transp.*, 427 U.S. 273, 287 (1976) (quoting 42 U.S.C. § 1981). The decision below cannot be reconciled with these controlling precedents, and the *en banc* majority's suggestion that Congress subsequently amended Section 1981 (amazingly, without altering its text) to permit racial discrimination in favor of Native Hawaiians is specious.

A. *Runyon* and *McDonald* Make Clear That Any Private-School Admissions Policy That Excludes Qualified Candidates On The Basis of Race Violates Section 1981

1. In *Runyon*, the Court addressed the following question: "whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes." 427 U.S. at 168. Two black students' applications for admission to two private secondary schools had been rejected, the schools explained, because the schools were not racially integrated and accordingly admitted only white students. *Id.* at 164-66. The Court held that Section 1981 "reaches purely private acts of racial discrimination" and operated to bar the racially exclusive admissions policies—the failure to "offer[ ] services on an equal basis to white and nonwhite students"—practiced by the private schools party to the litigation. *Id.* at 170, 172-73. Indeed, the Court concluded, the schools' racial[ly] exclusi[ve] practice[s]" exemplified "a classic violation" of the statute. *Id.* at 172.

Even though, just as in *Runyon*, petitioner's complaint alleged a violation of Section 1981 based on the Kamehameha Schools' policy of excluding qualified children solely on the basis of their race, Pet. App. 179a, the *en banc* majority nevertheless reached the surprising conclusion that "*Runyon* is inapposite." *Id.* at 27a. The court of appeals concluded that Section 1981 does not prohibit racially preferential admission policies that are designed to remedy "specific, significant imbalances in educational achievement" affecting what it described as "historically disfavored and underachieving minorities." *Ibid*. This limitation on the scope of Section 1981 was to be inferred from the fact that "[t]he Civil Rights Act was passed specifically with the plight of African-Americans in mind." *Ibid*. Thus, the majority reasoned, the result in *Runyon* could be explained by the fact that, unlike the Kamehameha Schools' "Native Hawaiians first" admissions policy, the "whites-only" policies in issue in *Runyon* did not seek to remedy, but rather exacerbated the "imbalances . . . *disfavoring* African-Americans." *Id.* at 27a. "*Runyon*, then, involved a straightforward case of discrimination, not a remedial policy." *Id.* at 17a; *see also* Br. in Opp'n 17 (drawing distinction between "invidious racial discrimination by private educations institutions" and "race-conscious measures adopted for the legitimate purpose of remedying harm to a minority group").

Of course, *Runyon* itself drew no distinction between "invidious" and "remedial" programs of discrimination. *Runyon* asked only whether "§ 1981 prohibits private . . . schools from denying admission to prospective students because they are Negroes." 427 U.S. at 168. The Court concluded that because "neither school offered services on an equal basis to white and nonwhite students" the case presented "a classic violation" of the statute. *Id.* at 168, 172-73.

2. The Ninth Circuit's conclusion that Section 1981 prohibits racially exclusionary policies when those policies disfavor historically disadvantaged minorities, but permits iden-

tical terms of exclusion when those terms favor minority groups, is at war with this Court's decision in *McDonald*—a decision handed down on the *same day* as *Runyon*, and which holds, as the *en banc* majority recognized, that "§ 1981 . . . prohibits discrimination against white people, as well as against nonwhites." Pet. App. 17a (citing *McDonald*, 427 U.S. at 296.

In *McDonald*, three employees were charged with stealing from their employer; two of the employees, who were white, were discharged, while the other employee, who was black, was retained. 427 U.S. at 276. The white employees brought suit under Section 1981 and Title VII alleging that they had been discharged because of their race. *Id.* The employer's central argument in defense was that the protections of Title VII and Section 1981 were unavailable to white persons. The Court unambiguously rejected that contention. With regard to Title VII, the Court held that the statute "prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [the retained employee] white." *Id.* at 280. Addressing Section 1981, the Court held that it was not limited "to the protection solely of nonwhites," but rather proscribe[s] discrimination in the making or enforcement of contracts *against, or in favor of, any race*." *Id.* 273. "[*A*]*ll* persons," "whites as well as nonwhites" are protected with equal force. *Id.* at 286, 287.

The crabbed view of *Runyon* suggested by the *en banc* majority (and now respondents) as proscribing only "invidious" discrimination against historically disadvantaged minority groups cannot be reconciled with *McDonald*. The unmistakable teaching of *McDonald* is that Section 1981 protects all persons of *every* race from racial discrimination in contracts. Indeed, *McDonald* cites *Runyon* as support for the proposition that Section 1981 reached beyond "the immediate plight of the newly freed Negro slaves" to prohibit "racial discrimination against white persons" as well. 427 U.S. at

296. *McDonald* thus makes very clear that to change the facts of *Runyon* such that the private schools excluded white persons instead of black is not to change its result. Tellingly, respondents' brief in opposition nowhere even cites, let alone attempts to distinguish, *McDonald*.

3. But even if *McDonald* had never been decided, *Runyon* itself makes clear that the Kamehameha Schools' "Native Hawaiians first" admissions policy violates Section 1981. The "Native Hawaiians first" policy excludes on the basis of their race not just white non-Native Hawaiians, but, with equal force, *African-American* non-Native Hawaiians. On this point, *Runyon* could not be more clear: "§ 1981 prohibits private . . . schools from denying admission to prospective students because they are Negroes." 427 U.S. at 168.

B. Congress Has Not Amended Section 1981 To Permit Racial Discrimination In Favor Of Native Hawaiians

As an alternative ground for upholding the respondents' "Native Hawaiians first" admissions policy, the *en banc* majority held that the 1991 "reenactment" of Section 1981 somehow amended the statute (without modifying the pertinent statutory text) to permit "a preference for Native Hawaiians, in Hawaii, by a Native Hawaiian organization." Pet. App. 38a. Other congressional enactments concerning Native Hawaiians, the argument goes, demonstrate that when Congress "reenacted" Section 1981 in 1991, it did not intend to proscribe racial discrimination favoring *that* race. This assertion is demonstrably incorrect. Indeed, even respondents have abandoned the notion that it suffices as an alternative ground for affirmance. Br. in Opp'n 26-27 (arguing only that Section 1981 should be interpreted "in harmony with Congress's other enactments dealing with Native Hawaiians" in which Congress expressed "approval for remedial programs such as the Kamehameha Schools'"). In any event, it could

not possibly justify the *en banc* majority's departure from *Runyon* and *McDonald* for at least three reasons.

First, Congress did not, in 1991, *reenact* Section 1981 at all. Congress *amended* the statute, first, to include post-contract-formation conduct within its ambit, *see* 42 U.S.C. § 1981(b), and second, to codify the holding of *Runyon* that the statute applies to private actors, *see id.* § 1981(c). Congress left the provision here at issue—Section 1981(a)—untouched. The majority's rote citations to the canon that Congress is presumed to be aware of existing legislation when it enacts new legislation, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), thus do not advance their argument. As respondents themselves recognize, Br. in Opp'n 18, this Court's "role is limited to interpreting what Congress . . . *has done*." *Patterson*, 491 U.S. at 188 (emphasis added).

Second, even assuming Congress reenacted, rather than amended, Section 1981, respondents offer no sound basis for concluding that Congress intended to graft upon the statute an exception for discrimination in favor for Native Hawaiians. Congress purportedly "reenacted" the *exact same text*. As this Court explained in *McDonald*, that text "was meant, *by its broad terms*, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, *any race*." 427 U.S. at 295 (emphasis added). It simply does not follow from the fact that "Congress was repeatedly enacting remedial measures aimed exclusively at Native Hawaiians," Br. in Opp'n 27, that Congress meant so substantially to alter Section 1981's unambiguous command of nondiscrimination. In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court instructed that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id.* at 551. There is nothing on the face of the statutes compiled by the *en banc* majority that render them incom-

patible with a statute forbidding purposeful racial discrimination in the formation and performance of contracts.[2]

Finally, if the mere existence of a statute that purports to confer benefits on a particular racial group is sufficient to withdraw that group from the strictures of Section 1981, there would soon be little left of the Nation's oldest civil rights law. For example, as the panel opinion pointed out, there are many minority-focused research and assistance programs passed by Congress. Pet. App. 138a-39a; *see, e.g.*, Minority Access to Research Careers Program, 42 U.S.C. §§ 241, 285k, 288, 288a (1988). But this Court recently made clear that discrimination on the basis of race remains impermissible, even if the favored group has been singled out for favorable treatment by Congress in other contexts. *See Gratz*, 539 U.S. at 275-76 (finding that an admissions program that favored "underrepresented" minority groups violated Section 1981).

Runyon and *McDonald* "remain[ ] the governing law in this area." *Patterson*, 491 U.S. at 175. Yet the Ninth Circuit—at respondents' urging—stubbornly ignored the plain import of those decisions. Such studied indifference to this Court's precedents warrants certiorari and, indeed, summary reversal. *See Gonzales v. Thomas*, 547 U.S. 183, 183 (2006) (finding summary reversal appropriate where error "is obvious in light of" a prior decision of this Court); *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting from a summary reversal) (acknowledging the appropriateness of summary reversal when "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error").

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2 In this regard, respondents' reliance (at 28) on unenacted bills is badly misplaced. This Court has repeatedly recognized that "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (internal quotation omitted).

II. THE NINTH CIRCUIT'S "MODIFIED-TITLE VII" FRAMEWORK CONFLICTS WITH THIS COURT'S DECISIONS

In *Gratz v. Bollinger*, 539 U.S. 244 (2003), this Court held that a programmatic system of racial preferences in a university admissions process violated Section 1981 because it was "not narrowly tailored to achieve respondents' asserted compelling interest in diversity . . . ." *Id.* at 275. *Gratz* thus held explicitly that racial preferences in contracts, including "a contract for educational services," violate Section 1981 unless they survive strict scrutiny. *Id.* at 276 n.23.

The Ninth Circuit, however, distinguished *Gratz* on the basis that the Kamehameha Schools are neither a state actor nor the recipient of federal funds. Pet. App. 21a, 53a. Echoing *Patterson* (an employment discrimination case), the court of appeals applied the burden-shifting framework of *McDonnell Douglas*, 411 U.S. at 792, (and its corollary that a valid race-conscious affirmative action program constitutes a nondiscriminatory basis for a challenged action, *see Weber*, 443 U.S. at 208), to petitioner's Section 1981 claim.

Assuming that the Ninth Circuit was correct to apply (in this education discrimination case) Title VII standards rather than strict scrutiny—and as petitioner suggests (at 15-17), sound bases exist for rejecting that assumption—the *en banc* majority's avowed "modifi[cation]" of that standard broke sharply from this Court's decision in *McDonnell Douglas* and subsequent decisions that describe the parameters of a valid affirmative action program that qualifies as a nondiscriminatory rationale for apparently discriminatory behavior. *See*, *e.g.*, *Weber*, 443 U.S. at 208. Indeed, the very fact that the *en banc* majority felt compelled to "[a]djust[ ]" and "modif[y]" its chosen legal standard to further "take[ ] into account the inherently broad and societal focus of the educational endeavor" should have strongly signaled that it had strayed too

far from this Court's precedents in search of its desired outcome. Pet. App. 26a.

A. The Decision Below Disregards The Clear Command Of *McDonnell Douglas* That A Defendant Proffer A Nondiscriminatory Basis For Its Actions

The *en banc* majority purported to follow this Court's decision in *Patterson*, which applied the *McDonnell Douglas* burden-shifting framework to the plaintiff's Section 1981 employment discrimination claim. Pet. App. 18a (citing *Patterson*, 491 U.S. at 186). Like Title VII, Section 1981 prohibits intentional, purposeful discrimination on the basis of race. *See General Bldg. Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389-90 (1982). The familiar *McDonnell Douglas* burden-shifting framework is designed to "bring the litigants and the court expeditiously and fairly to this ultimate question." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). It initially requires the plaintiff to sustain a *prima facie* burden of demonstrating that "she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination," *id.*; if the plaintiff meets her *prima facie* burden, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the [candidate's] rejection," *McDonnell Douglas*, 411 U.S. at 802; should the defendant articulate a satisfactory explanation, the burden returns to the plaintiff to demonstrate that the stated rationale is pretextual, *Burdine*, 450 U.S. at 253. This Court has held that adherence to a valid affirmative action program suffices as a legitimate nondiscriminatory rationale for a rejection. *Johnson*, 480 U.S. at 626. When the defendant predicates a rejection on an affirmative action policy, the plaintiff may prove intentional discrimination by demonstrating either that the stated rationale is pretextual or that the affirmative plan is invalid. *Id.*

Respondents concede that petitioner satisfied his *prima facie* burden of demonstrating that his application for admission to the Kamehameha Schools was rejected under circumstances giving rise to an inference of discrimination. Pet. App. 22a. Indeed, respondents concede that if petitioner had been a member of the right racial group—Native Hawaiian—he would have been admitted. Pet. App. 12a. This shifted the burden to the Kamehameha Schools to articulate a "legitimate nondiscriminatory reason" for the rejection of petitioner's application for admission. *Burdine*, 480 U.S. at 253. The *en banc* majority concluded that respondents' interposition of its "Native Hawaiians first," "remedial admissions policy" sufficed as "a non-discriminatory rationale for their decisions." *Id.* at 22a. This conclusion—that a policy of racial exclusion suffices as a "*nondiscriminatory* rationale"—is plainly erroneous and disregards the central lessons of this Court's civil rights jurisprudence.

Few things could be clearer in the area of civil rights law than the fact that a policy of racial exclusion—whites-only, blacks-only, Hawaiians-only—is *not* nondiscriminatory. *See*, *e.g.*, *Blow v. North Carolina*, 379 U.S. 684, 685 (1965) (per curiam) (vacating conviction trespassing conviction predicated on black person's entry into a "whites only" restaurant because "the Civil Rights Act of 1964 forbids discrimination in places of public accommodation"); *Terry v. Adams*, 345 U.S. 461, 463-464 (1953) (striking down "white primary" "purposefully designed to exclude Negroes from voting"). A policy that pushes disfavored races to the back of a queue, serving favored races first—whites first, blacks first, Native Hawaiians first—is no less purposefully discriminatory than one that refuses to serve a disfavored race at all.

Respondents contend that any "race-conscious measure[ ] adopted for the legitimate purpose of remedying harm to a minority group," Br. in Opp'n 17, suffices to provide the nondiscriminatory rationale that *McDonnell Douglas* requires. Tellingly, however, they point to *no authority what-*

soever for this expansive proposition so central to their argument. This Court certainly has never sanctioned a policy of racial exclusion as a nondiscriminatory rationale, and, until the decision here under review, nor had any court of appeals. Rather, this Court has allowed only that certain *affirmative action* programs—those compliant with the dictates of *Weber* and *Johnson*—may suffice as nondiscriminatory rationales for a defendant's actions. But respondents emphatically disavow any such characterization of their admissions policy. *See Kamehameha Schools Admissions Policy Lawsuit*, *supra* ("Kamehameha's preference policy is *not an affirmative action program*") (emphasis added). That concession is absolutely fatal to respondents' defense of petitioner's Section 1981 claim. By disclaiming reliance on any affirmative action program, respondents have also disclaimed the *only* cognizable nondiscriminatory rationale for their actions.

B. The Ninth Circuit's "Modified-Title VII" Framework Radically Departs From This Court's Affirmative Action Cases

Respondents' own view of their admissions policy notwithstanding, the *en banc* majority characterized the Kamehameha Schools' racially exclusionary admissions policy as an affirmative action program and proceeded to evaluate it under its ersatz version of the test set out in *Johnson*. Pet. App. 21a-27a. Specifically, the *en banc* majority "[a]djust[ed]" and "modified" the *Johnson* test to give the test an "external focus" the majority deemed appropriate to "the inherently broad and societal focus of the educational endeavor." Pet. App. 26a. Having tweaked the *Johnson* test to its liking, the majority inquired whether: (1) "imbalances in educational achievement presently affect the target population" in the "community as a whole," (2) the admissions policy "'unnecessarily trammel[ed]' the rights of students in the non-preferred class or 'create[d] an absolute bar' to their advancement" "within the community as a whole," and (3) the

policy is limited to "remedy[ing] the imbalance in the community as a whole." Pet. App. 26a.

In imposing on the *Johnson* test an "external focus," rather than simply applying the legal standard handed down by the Court, the Ninth Circuit obviously (and admittedly) departed from this Court's "traditional Title VII analysis." Pet. App. 33a. This alone is a sufficient basis for certiorari. *See* Sup. Ct. R. 10(c).[3] Moreover, in so doing the *en banc* majority disregarded the decisions of this Court that confirm that "remedial" racial preferences may lawfully be used only to remedy racial imbalances *within the unit administering the racially-preferential policy*.

In the public sector, this limitation on the use of remedial racial preferences is abundantly clear. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), this Court emphatically rejected the notion that findings of "societal discrimination" or even discrimination within an "*industry*" could provide a sufficient basis for a racial set-aside in municipal contracting. *Id.* at 497-98. *Croson* recognized that a majority of the Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), had rejected the notion that either a "historic deficit of traditionally disfavored minorities in medical school and the medical profession" or "the effects of societal discrimination" could justify a racial set-aside of seats in a medical school class. *See Croson*, 488 U.S. at 496 (quoting *Bakke*, 438 U.S. at 306). It further endorsed the

[3] In closely analogous contexts, other courts of appeals have been able to apply the *Weber* test without modification. *See, e.g.*, *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1556 (3d Cir. 1996) (en banc) (explicitly applying "the analytical framework for assessing the validity of an affirmative action plan as established in *Weber* and refined in *Johnson*") (internal citations omitted); *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 437-38 (10th Cir. 1990) (assessing a "race-conscious affirmative action" program under the factors laid out in *Johnson*). This disarray among the courts of appeals, over when, if ever, the *Weber* test is appropriately "adjusted" to yield an "external focus," provides an independent basis for a grant of certiorari. *See* Sup. Ct. R. 10(b).

conclusion of the plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 276 (1986), that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Croson*, 488 U.S. at 497 (quoting *Wygant*, 476 U.S. at 276); *Wygant*, 476 U.S. at 274 ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification."). To pass muster, the Court stated, the remedial racial preference needed to be tailored to the underrepresentation of "minorities qualified to undertake the particular task" "in the relevant market." *Croson*, 488 U.S. at 502; *see also Wygant*, 476 U.S. at 275 ("the proper comparison for determining the existence of actual discrimination by the school board was 'between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.'" (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977)).

And the proposition is no less clear in the private sector. As *Croson* recognized, discrimination in the employment context is demonstrated by "comparisons of the racial composition of an employer's work force to the racial composition of the relevant population." 488 U.S. at 501 (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337-338 (1977)). Accordingly, in *Weber*, the employer, Kaiser Aluminum & Chemical Corporation, justified its racial preference program by reference to "conspicuous racial imbalances in *Kaiser's* . . . craftwork forces" at its Gramercy plant. *Weber*, 443 U.S. at 198 (emphasis added).[4] Similarly, in *John-*

[4] Respondents' suggestion (Br. in Opp'n 21) that the affirmative action program approved in *Weber* "in part corrected *external* imbalances" is entirely mistaken. As the Court's opinion makes clear, the racial preference was to remain in effect "until the percentage of black skilled craftworkers *in the Gramercy plant* approximated the percentage of blacks in the local labor force." 443 U.S. at 199 (emphasis added). The program sought to remedy imbalances internal to the Gramercy plants—not imbalances within the local labor market, never mind imbalances in socioeconomic achievement throughout Louisiana.

son, the Court explained that "[i]n determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women *in the employer's work force* with the percentage in the area labor market or general population is appropriate . . . ." 480 U.S. at 631-632 (emphasis added). The fact that respondents are unable to cite a single case—from any court—that approves a racial preference designed to remedy racial imbalances outside the entity administering the preference fairly indicates both the novelty of respondents' legal theory and the great distance covered by its leap away from this Court's precedents.

C. The Ninth Circuit's "Modified Title VII" Standard Effectively Overrules *McDonald* In The Education Context

On the Ninth Circuit's view, at least where private schools are concerned—*i.e.*, where the Ninth Circuit currently has deemed an "external focus" to be appropriate—the decision below permits a school to categorically bar white students from admission so long as: (1) the school incants a "remedial" intent to ameliorate a demonstrated "manifest" socioeconomic "imbalance" in achievement between whites and historically disadvantaged races; (2) the school is not the *only* school in the pertinent community, *i.e.*, there is at least one other school somewhere in the community open and available to white students; and (3) the school promises to end the policy of racial exclusion once the socioeconomic gap has been completely closed. Pet. App. 26a.

Private "white academies," on the other hand, remain impermissible under Section 1981 because such a school, it is assumed, could not possibly demonstrate that white persons suffer deficits in socioeconomic achievement—certainly not once the "community" is defined to encompass a large enough population. *See* Br. in Opp'n 18 ("its 'whites-only' admission policy . . . could have no legitimate purpose").

Under the *en banc* majority's reasoning, policies that categorically exclude white persons from private school on the basis of their race are "remedial" and permissible, while policies that categorically exclude nonwhites from private schools are "invidious" and impermissible. The decision below thus vitiates any and all effective limits upon private schools' discrimination against white students. A private school could set aside a fixed percentage of seats for historically disadvantaged minorities not in order to attain a diverse student body, *see Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), but rather to diminish in some measure the socioeconomic deficit of those races—in other words, precisely the type of set-aside this Court disapproved in *Croson*, *Wygant*, and *Bakke*. Indeed, under the Ninth Circuit's rule, members of historically disadvantaged races are at liberty to open segregated academies like the Kamehameha Schools.

The decision below thus destroys the fundamental promise of *McDonald* that Section 1981 would henceforth protect "whites as well as nonwhites." 427 U.S. at 286.

III. THE NOTION THAT "NATIVE HAWAIIAN" IS MERELY A "POLITICAL CLASSIFICATION" IS NOT AN AVAILABLE ALTERNATIVE GROUND FOR AFFIRMANCE

In a concurring opinion, Judge Fletcher offered that a "narrower ground" for upholding the Kamehameha Schools' admissions policy was that "Native Hawaiians" is "also a political classification." *Id.* at 39a-40a. Looking to this Court's holding in *Morton v. Mancari*, 417 U.S. 535 (1974) and Justice Stevens' dissent in *Rice v. Cayetano*, 528 U.S. 495, 528 (2000) (Stevens, J., dissenting), Judge Fletcher asserted that the "special relationship doctrine" "permits Congress to provide special benefits to Native Hawaiians," and that Congress had, in fact permitted the "Kamehameha Schools to give preferential treatment to Native Hawaiians." *Id.* at 41a, 43a, 44a.

In their brief in opposition, respondents nowhere suggest this "political classification" argument as an alternative

ground for affirmance. And "[i]t is not this Court's practice to consider arguments—specifically, alternative defenses of the judgment under review—that were not presented in the brief in opposition to the petition for certiorari." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 553 (1999).

In any event, the Court's decisions clearly foreclose Judge Fletcher's argument. This Court has explained that discrimination "because of [ ] ancestry or ethnic characteristics . . . is racial discrimination that Congress intended § 1981 to forbid." *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (footnote omitted). And in *Rice*, this Court addressed Hawaii's use of a virtually identical classification—descendants of people inhabiting the Hawaiian Islands in 1778—and rejected the argument that the classification was political rather than racial. 528 U.S. at 515 (provision "used ancestry as a racial definition and for a racial purpose"). The invocation of *Morton v. Mancari* must fail now as it did in *Rice*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Given the Ninth Circuit's clear and unjustified departure from this Court's decisions in *Runyon* and *McDonald*, the Court may wish to consider summary reversal.

Respectfully submitted.

DOUGLAS R. COX
Counsel of Record
MATTHEW D. MCGILL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
Counsel for Amicus Curiae

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