

No.

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
PAUHI BISHOP ESTATE, ET AL.

Respondents

*ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held that 42 U.S.C. § 1981, the Nation's oldest civil rights law, "prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students" on the basis of race. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976). Respondents admit that they run private, commercially operated, nonsectarian schools that categorically deny admission to children lacking "Hawaiian ancestry," such that their schools are openly segregated on the basis of race. Respondents further admit that petitioner was denied admission to those schools solely because he lacked Hawaiian ancestry.

The following questions are presented by the en banc decision of the Court of Appeals for the Ninth Circuit:

1. Whether respondents' racially exclusionary admissions policy is subject to the same strict scrutiny applied under Title VI of the Civil Rights Act of 1964, or instead is subject to the marginally less demanding scrutiny applied under Title VII of that Act.
2. Whether respondents' racially exclusionary admissions policy satisfies any level of scrutiny when children of the wrong race are foreclosed from all consideration, such that the policy acts as an *absolute and perpetual bar* to the admission of those children.
3. Whether Congress, without changing the text of § 1981 or otherwise indicating by legislation that it has repudiated the "fundamental national public policy" against racial discrimination in private education, could be said to have *specifically intended* to authorize respondents to operate a system of racially segregated schools.

PARTIES TO THE PROCEEDINGS

The petitioner, who was plaintiff and appellant in the lower courts, is John Doe. Petitioner instituted this action as a minor by his mother and next friend, Jane Doe; during the three years that the action was pending in the court of appeals, petitioner reached majority.

The respondents, who were defendants and appellees in the lower courts, are Kamehameha Schools/Bernice Pauahi Bishop Estate and its five trustees, namely, Constance H. Lau, Nainoa Thompson, Diane J. Plotts, Robert K.U. Kihune, and J. Douglas Ing. Petitioner sued the five trustees solely “in their capacities as Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate.” App. 212a.

Josephine Helelani Pauahi Rabago was denominated an “Intervenor” in the captions of the court of appeals’ opinions. *See* App. 1a, 109a. But Ms. Rabago filed no pleadings in the court of appeals, and neither of that court’s opinions refers to her in any manner. Therefore, petitioner believes that Ms. Rabago has no interest in the outcome of the petition, and he has notified the Clerk of that belief consistent with this Court’s Rule 12.6.

TABLE OF CONTENTS	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	14
I. In Applying Title VII Scrutiny Instead of the Stricter Title VI Scrutiny to Claims Asserted Under § 1981, the Court of Appeals Departed from this Court’s Decisions Construing § 1981	15
II. In Upholding a Racially Exclusionary Admis- sions Policy that Operates as an <i>Absolute and</i> <i>Perpetual Bar</i> to Children of the Wrong Race, the Court of Appeals Deviated Sharply from this Court’s Civil Rights Jurisprudence	17
III. In Concluding that Congress “Specifically Intended” to Authorize KSBE to Operate a System of Racially Segregated Schools, the Court of Appeals Repudiated “Fundamental National Public Policy” as Understood Both by Congress and by this Court	23
CONCLUSION	27
APPENDIX	
A. Court of Appeals Opinion on Rehearing En Banc (Dec. 5, 2006)	1a
B. Court of Appeals Panel Opinion (Aug. 2, 2005)	109a
C. District Court Opinion (Dec. 8, 2003)	153a
D. Complaint (June 25, 2003)	211a

TABLE OF AUTHORITIES

	Page
Cases	
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995)	15
<i>Bob Jones University v. United States</i> , 461 U.S. 574 (1983)	14, 24
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	24
<i>Burgert v. Lokelani Bernice Pauahi Bishop Trust</i> , 200 F.3d 661 (9th Cir. 1999)	2
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	22
<i>Connecticut National Bank v. Germain</i> , 503 U.S. 249 (1992)	26
<i>Edmonson v. United States Steel Corp.</i> , 659 F.2d 582 (Former 5th Cir. 1981)	17
<i>General Building Contractors Association, Inc. v. Pennsylvania</i> , 458 U.S. 375 (1982)	15-16
<i>Gratz v. Bollinger</i> , 539 U.S. 244 (2003)	8, 14-18, 24
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	14-19, 21-22
<i>Johnson v. Transportation Agency</i> , 480 U.S. 616 (1987)	9, 11, 14, 19-22
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244 (1994)	9
<i>McDonald v. Santa Fe Trail Transportation Co.</i> , 427 U.S. 273 (1976)	12-13, 23
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	10

TABLE OF AUTHORITIES—Continued

	Page
<i>Patterson v. McLean Credit Union</i> , 491 U.S. 164 (1989)	9, 23-24
<i>Pryor v. NCAA</i> , 288 F.3d 548 (3d Cir. 2002)	17
<i>Regents of University of California v. Bakke</i> , 438 U.S. 265 (1978)	18, 21
<i>Rice v. Cayetano</i> , 528 U.S. 495 (2000)	3-4, 10-12, 27
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	passim
<i>Saint Francis College v. Al-Khazraji</i> , 481 U.S. 604 (1987)	11
<i>Setser v. Novack Investment Co.</i> , 657 F.2d 962 (8th Cir.), <i>cert. denied</i> , 454 U.S. 1064 (1981)	17
<i>United Steelworkers of America v. Weber</i> , 443 U.S. 193 (1979)	9, 11, 14, 19-20

TABLE OF AUTHORITIES—Continued

	Page
Statutes, Legislative Materials, and Court Rules	
28 U.S.C. § 1254	1
§ 1291	7
§ 1331	6
§ 1343	6
42 U.S.C. § 1981	passim
§§ 2000d, et seq. (Title VI)	passim
§§ 2000e, et seq. (Title VII)	passim
Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130	25
Civil Rights Act of 1866, 14 Stat. 27	9, 16, 23
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071	9-10, 12, 24
Enforcement Act of 1870, 16 Stat. 140	16
Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518	25
Native Hawaiian Education Act, 20 U.S.C. §§ 7511-7517	25-26
H.R. Rep. No. 102-40(II) (1991)	24
H.R. Rep. No. 107-63(I) (2001)	26
Sup. Ct. R. 10	14
12.6	ii

PETITION FOR WRIT OF CERTIORARI

John Doe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App. 1a-108a) is reported at 470 F.3d 827; that court's now-vacated panel opinion (App. 109a-152a) is reported at 416 F.3d 1025. The opinion of the District Court for the District of Hawaii (App. 153a-210a) is reported at 295 F. Supp. 2d 1141.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, as amended and codified at 42 U.S.C. § 1981, provides:

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

1. Respondents are Kamehameha Schools/Bernice Pauahi Bishop Estate (“KSBE”) and its five trustees. KSBE is a “charitable testamentary trust established [in 1884] by the last direct descendent of King Kamehameha I, Princess Bernice Pauahi Bishop, who left her property in trust for a school dedicated to the education and upbringing of Native Hawaiians.” App. 6a (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000)). In its own words, KSBE is “the largest private landowner in the state of Hawaii.” <http://www.ksbe.edu/about/facts.php> (last visited Feb. 22, 2007). By its own report, “the market value of [KSBE’s] endowment grew by more than \$600 million to \$6.8 billion” in the fiscal year ending June 30, 2005. Kamehameha Schools, *A Report to the Community: July 1, 2004-June 30, 2005*, at 16 (2006), available at http://www.ksbe.edu/pdf/annualreport05/KS_Annual-Report_2005.pdf.

Princess Pauahi Bishop’s will directed the trustees of her estate to “erect and maintain in the Hawaiian Islands two schools . . . to be known as, and called the Kamehameha Schools.” App. 214a (¶ 10); *see also* App. 7a. In accord with that direction, the first trustees established the first Kamehameha School in 1887. Under the guidance of the current trustees (respondents here), KSBE today operates a private school system consisting of three K-12 campuses—one each on the islands of Oahu, Maui, and Hawaii—having a total enrollment of nearly 5,000 students. *See* App. 7a, 177a.

These schools can only be described as prestigious. As the district court found, KSBE “has achieved measurable success”; thus, “[s]eniors attending Kamehameha Schools outperform both national norms and state averages on the SAT I verbal and math tests.” App. 201a. As KSBE itself boasts, out of the 437 graduates from Kamehameha High

School on Oahu in 2004, “100% were accepted to two- and four-year colleges nationwide.” <http://www.ksbe.edu/about/facts.php>. These and other alumni of Kamehameha Schools—including U.S. Senators, state appellate judges, Olympic athletes, three-star admirals, and university professors—“have distinguished themselves as contributors and leaders to . . . the State of Hawaii.” App. 201a. Therefore, it is fair to say that KSBE “has an illustrious network of alumni and a record of success that exceeds that of any other school in Hawaii.” App. 73a (Bybee, J., dissenting).

In these circumstances, it is no surprise that competition for admission to Kamehameha Schools is fierce. For instance, the district court found that, for “the 450 spaces available at Kamehameha Schools’ Kapalama [Oahu] campus for the 2002-2003 academic year, there were 4,518 applicants.” App. 177a. On the other hand, competition for admission to Kamehameha Schools is restricted. The central fact in this case is that KSBE’s publicly stated “policy on admissions is to give preference to children of Hawaiian ancestry.” *Id.* (quoting KSBE’s own declarant); *accord* App. 3a (majority opinion) (“We took this case en banc to reconsider whether a Hawaiian private, non-profit K-12 school [that is, KSBE] . . . violates [42 U.S.C.] § 1981 by preferring Native Hawaiians in its admissions policy.”).

2. How to characterize the nature, operation, and duration of KSBE’s admissions “preference” was the subject of heated debate in the multiple opinions below, but certain facts are undisputed.

a. The first is that, by the term *Hawaiian ancestry*, KSBE means basically “Native Hawaiian blood,” App. 29a, “defined to include any person descended from the aboriginal people who exercised sovereignty in the Hawaiian Islands prior to 1778,” App. 8a. In this regard, KSBE’s admissions policy employs essentially the same classification that was at issue in *Rice v. Cayetano*, 528 U.S. 495, 509 (2000), which classification restricted voting in certain elections to “Hawaiians,” defined to include “any descendant of the aboriginal

peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778.”

In *Rice*, of course, the Court concluded that such a use of Hawaiian ancestry was “a proxy for race,” that is, the restriction was “a racial classification.” *Id.* at 515 (emphasis added). Most, if not all, of the judges below adhered to *Rice* and “accept[ed] that ‘Native Hawaiian’—like ‘Negro’—is a racial classification.” App. 16a n.9 (majority opinion); *see also* App. 53a (Bybee, J., dissenting) (referring to KSBE’s “racially exclusive admissions policy”); App. 104a (Rymer, J., dissenting) (calling it an “exclusionary admissions policy based on racial preference”); App. 106a (Kleinfeld, J., dissenting) (opining that *Rice* held that “Hawaiian ancestry is a ‘racial classification’”). *But cf.* App. 39-40a (W. Fletcher, J., concurring) (“A narrower ground for sustaining [KSBE’s] admissions policy is that ‘Native Hawaiian’ is not merely a racial classification. It is also a political classification.”).

b. Another undisputed fact is that KSBE’s “preference” for Native Hawaiians is not merely a “goal” or a “plus factor” or even a percentage-type “quota.” Rather, KSBE’s admissions policy “operates to admit students without any Hawaiian ancestry only after all qualified applicants with such ancestry have been admitted.” App. 8a. In practice, “there are many more qualified students of Hawaiian ancestry than there are available places at the Schools,” such that “it is very rare that a student with no Hawaiian ancestry is admitted to the campus programs.” *Id.* “Very rare,” moreover, is a euphemism: “from 1962 until 2002, Kamehameha admitted exactly one student who was not of Native Hawaiian descent.” App. 74a (Bybee, J., dissenting) (citing App. 30a n.10 (majority opinion)). Even that one admission was an aberration: KSBE’s trustees “repeatedly apologized to the Native Hawaiian community” for doing it, and they made sufficient changes to the admissions process “to prevent such a ‘situation’ from happening again.” *Id.*; *see also* App. 74a-76a (Bybee, J., dissenting) (describing at length “the circumstances surrounding the admission of that lone

non-Native Hawaiian student”). In other words, in the past four decades, KSBE admitted a single student lacking Hawaiian ancestry out of the literally thousands who matriculated in that period—and promised never to do it again.

c. Also undisputed is that KSBE’s “Hawaiians only” admissions policy is no innovation. As stated in 1888 (just a year after the Schools’ founding) by Charles Reed Bishop (Princess Pauahi’s husband of some thirty years and one of the first trustees), the Princess “created the Kamehameha Schools, ‘in which Hawaiians have the preference,’ so that ‘her own people’ could once again thrive.” App. 7a. In 1910, Mr. Bishop wrote to his successors: “Mrs. Bishop intended that, in the advantages of her beneficence, those of her race should have preference.” *Id.* Therefore, he “concluded that the principal of the Schools was justified in refusing to admit a student who had no native Hawaiian ancestry.” *Id.* As the majority below put it, Bishop “went on to convey that only if Native Hawaiians failed to apply to the Schools, or if conditions changed fundamentally, should admissions be opened to other ethnicities: ‘It was wise to prepare for and to admit natives only and I do not think the time has come to depart from that rule.’” *Id.*

d. Charles Bishop’s century-old belief that “the time has [not yet] come” to depart from a “Hawaiians only” admissions policy remains the guiding philosophy of KSBE’s current trustees. As they publicly stated after this case was commenced: the policy “must remain [in place] until Hawaiians are leading in scholastic achievement, until they are underrepresented in prisons and homeless shelters, until their well-being is restored.” App. 78a (Bybee, J., dissenting). More quantitatively, despite KSBE’s wealth and the Schools’ long existence, KSBE’s “campus programs can only reach 7% of the Native Hawaiian school-age children in the State of Hawaii.” App. 202a. Yet the trustees have determined that KSBE’s current admissions policy will continue until KSBE has the ability to offer its “K-12 campus-based educational experience . . . to all [i.e., 100%] eligible Native

Hawaiian children.” App. 203a. Thus, it makes sense that KSBE’s publicly stated “mission is to fulfill Pauahi’s desire to create educational opportunities *in perpetuity* to improve the capability and well-being of people of Hawaiian ancestry.” App. 78a (Bybee, J., dissenting) (emphasis added).

3. Petitioner is a native (and lifelong resident) of the State of Hawaii, but he is not “Native Hawaiian” in a racial sense. *See* App. 213a (¶ 4); App. 3a, 12a. Petitioner applied for admission to Kamehameha High School for each of four successive academic years, from 2002-2003 (his ninth grade year) through 2005-2006 (his twelfth grade year). In each instance, KSBE “deemed him a ‘competitive applicant’ and put him on the waiting list”; nevertheless, “he was repeatedly denied admission.” App. 12a. In light of the foregoing, the reason for the repeated denials is unambiguous: KSBE forthrightly “concede[s] that [petitioner] likely would have been admitted had he possessed Hawaiian ancestry.” *Id.*

In June of 2003, Petitioner privately gave KSBE the opportunity to remedy its racial discrimination against him by admitting him to the tenth grade for the upcoming academic year. When KSBE refused, petitioner (then a minor suing by his mother as next friend) instituted this action against KSBE and its five trustees in the District Court for the District of Hawaii. Invoking that court’s subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4), petitioner attacked the legality of KSBE’s admissions policy as described above, alleging that it constituted “invidious discrimination on the basis of race in violation of 42 U.S.C. § 1981.” App. 212a (¶ 1). Petitioner’s complaint sought

a declaratory judgment that the [policy is] illegal and unenforceable; a permanent injunction against any further implementation of the challenged [policy] or any other admissions policy or practice at KSBE that grants a preference on the basis of ‘Hawaiian ancestry’; a permanent injunction admitting Plaintiff to a KSBE campus; damages; and a reasonable attorney’s fee.

App. 212a-213a (¶ 1). Without objection from KSBE or the district court, petitioner and his mother “brought this action anonymously on the basis of their reasonable fears of retaliation by KSBE students, their parents, and members of the public for challenging KSBE’s preference for applicants of ‘Hawaiian ancestry.’” App. 213a (¶ 4).

After respondents answered the complaint, both sides moved for summary judgment. Petitioner moved for partial summary judgment, seeking a ruling on the facial legality of KSBE’s admissions policy. In its response to petitioner’s motion, respondents also sought a ruling on the legality of their Hawaiians-only admissions policy; they moved for a summary judgment dismissing the complaint on the ground that the policy is consistent with § 1981. *See generally* App. 155a-156a. Respondents did not contest petitioner’s standing or that the admissions policy is racially discriminatory; rather, they confined their arguments to the issue whether KSBE has a “legitimate justification” for its admittedly discriminatory policy. *See* App. 184a-186a & n.18.

In a lengthy opinion, the district court ruled in favor of respondents, concluding that KSBE’s admissions policy was consistent with § 1981. *See generally* App. 153a-210a. In accord with its ruling, the court entered a final judgment dismissing petitioner’s entire complaint with prejudice on December 19, 2003. At the time, petitioner was attending the tenth grade at his local public high school.

4. Petitioner timely appealed to the Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291. A three-judge panel of that court heard oral argument in November of 2004 while petitioner was attending the eleventh grade at his local public high school. The panel issued its decision on August 2, 2005, ruling in favor of petitioner. *See generally* App. 109a-152a. The majority opinion, written by Judge Bybee and joined by Senior Judge Beezer, held that KSBE’s “admissions policy, which operates in practice as an absolute bar to admission for those of the non-preferred race, constitutes unlawful race discrimination

in violation of § 1981.” App. 111a. Judge Graber dissented. The panel denied petitioner’s motion for injunction pending appeal, which had sought an order that KSBE admit him to the twelfth (and final) grade at Kamehameha High School while the matter remained in the appellate courts.

5. The court of appeals granted respondents’ petition for rehearing en banc. The case was reargued before a 15-judge court in June of 2006, just as petitioner was graduating from his local high school. The en banc court issued its decision on December 5, 2006, dividing 8 to 7 in favor of respondents. *See generally* App. 1a-108a.

a. Judge Graber wrote for the majority; her opinion was joined by Chief Judge Schroeder and Judges Pregerson, Reinhardt, W. Fletcher, Paez, Berzon, and Rawlinson. The majority correctly noted that petitioner no longer seeks injunctive relief (having graduated from high school); but the “case is not moot . . . because if [KSBE’s] admissions policy were unlawful, [petitioner] has a possible claim for money damages.” App. 12a n.5; *accord* App. 218a-219a (allegations of, and prayer for, damages in complaint). As it described the procedural history of the case, the majority was moved to observe that the “panel’s decision generated strong public opposition”; “[e]leven amicus briefs were filed by diverse political and social interests in Hawaii supporting rehearing en banc”; and “the current governor of Hawaii and a prominent former governor both submitted declarations to the district court on the importance of maintaining the Kamehameha Schools’ admissions policy.” App. 13a n.6.

On the merits, the majority opinion had three parts.

First, the majority confronted the “standard we should use to analyze the validity of [KSBE’s] admissions policy.” App. 14a. The majority rejected petitioner’s argument that strict scrutiny governs statutory claims brought under 42 U.S.C. § 1981 just as it governs such claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 275 n.23 (2003) (reiterat-

ing that “discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI”). Instead, the majority selected “the more deferential Title VII test for evaluating affirmative action plans, with variations appropriate to the educational context.” App. 14a (emphasis added).

Second, in applying that test, the majority consciously deigned to hew to a “a traditional Title VII analysis,” App. 33a, and chose instead to apply a “modified Title VII standard,” App. 21a (section heading). Drawing three pertinent factors from this Court’s decisions in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the majority explicitly “adjust[ed]” or “modified” each of these factors to “take[] into account the inherently broad and societal focus of the educational endeavor.” App. 26a. It was perhaps to be expected, then, that the majority found that KSBE’s admissions policy satisfied each of the majority’s “adjust[ed]” or modified factors. *See* App. 27a-34a.

Third, the majority held—“alternatively, and in addition”—that “Congress specifically intended to allow” KSBE to operate racially segregated schools when Congress “re-enacted § 1981” as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. App. 34a (section heading).¹ But as evidence of Congress’s “specific intent,” the majority pointed to nothing in the language of § 1981 (before or after

¹ Strictly speaking, it is a misnomer to say that § 1981 was “re-enacted” in 1991. As this Court has recounted, the 1991 Act was “in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964,” that is, § 1981 and Title VII. *Landgraf v. USI Film Products*, 511 U.S. 244, 250 (1994). Thus, as one of many revisions to the federal civil rights statutes, section 101 of the 1991 Act “*amended* [§ 1981’s] prohibition of racial discrimination in the ‘making and enforcement [of] contracts,’ in response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).” *Landgraf*, 511 U.S. at 251 (emphasis added).

1991); nothing in the “Findings” or “Purposes” of the 1991 Act, *see* §§ 2-3, 105 Stat. at 1071; and nothing in the legislative history of the 1991 Act. Instead, the majority cited seemingly every provision in the Statutes at Large that referred to “Native Hawaiians,” *see* App. 35a-37a, with special emphasis on two items (one of them a House committee report) “mentioning [Kamehameha] Schools and the Bishop Trust approvingly by name,” App. 38a. Based on these generic references and approving mentions—none of which adverted either to § 1981 or to KSBE’s admissions policy—the majority held that Congress “signaled its clear support for the Kamehameha Schools and for the validity of the Schools’ admissions policy” under § 1981. *Id.*

b. Judge W. Fletcher, joined by Judges Pregerson, Reinhardt, Paez, and Rawlinson (together, a majority of the majority), wrote a concurring opinion. *See generally* App. 39a-51a. Though fully agreeing with the majority opinion, these judges identified “an easier and narrower ground for upholding Kamehameha Schools’ admissions policy”—that “‘Native Hawaiian’ is not merely a racial classification. It is also a political classification.” App. 39a-40a. Specifically, these judges concluded both that “Congress [can] constitutionally provide special benefits, including educational benefits, to descendants of Native Hawaiians, because ‘Native Hawaiian’ is a political classification”; and that “Congress [has] done so in § 1981.” App. 40a.

The first conclusion followed, according to the concurrence, from the “special relationship” doctrine recognized in *Morton v. Mancari*, 417 U.S. 535 (1974). *See* App. 40a-43a. The opinion relied on *Mancari* for treating “Native Hawaiian” as a *political* classification despite this Court’s express refusal in *Rice* to go down that path: “If Hawaii’s [ancestry-based] restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law.” 528 U.S. at 518. Thus, the concurrence simply rolled over what this Court called the “difficult terrain” posed by the question “whether Congress

may [constitutionally] treat the native Hawaiians as it does the Indian tribes,” a question “of considerable moment and difficulty.” *Id.* As for its interpretation of what Congress has done in § 1981, the concurrence did not confront *Rice*’s statement that in “the interpretation of the Reconstruction era civil rights laws”—i.e., § 1981—“racial discrimination” is that which singles out ‘identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.’” *Id.* at 515 (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987), a decision interpreting § 1981).

c. Judge Bybee wrote the principal dissent. Judges Kozinski, O’Scannlain, Tallman, and Callahan joined that opinion in full, and Judges Rymer and Kleinfeld joined in substantial part. *See generally* App. 52a-101a.

Part I of Judge Bybee’s dissent agreed that “Title VII and not strict scrutiny provides the standard of review in this case,” but it then excoriated the “majority’s sweeping modification of the Title VII standard.” App. 53a. First, by “completely eliminating any school-based analysis and jettisoning any historical inquiry” as required by *Weber*’s and *Johnson*’s focus on “manifest imbalance” *within* an institution, “the majority effectively green-lights discrimination so long as the identified group currently suffers from ‘significant imbalances in educational achievement,’ thus granting private schools like KSBE “a *broad* and *perpetual* license” to engage in racial discrimination. App. 62-63a.

Second, by shifting the judicial focus from “whether *an individual* has been denied an opportunity” to “whether the *individual’s racial group* ‘within the community as a whole’ has been denied an opportunity,” App. 63a, the majority has contradicted at the same time a bedrock principle of equal protection jurisprudence and the plain language of § 1981, which safeguards the rights of “all persons.” Finally, “the majority completely ignores *Johnson*’s suggestion that even a *partial preference* should be checked by an *explicit* sunset provision, by holding that Kamehameha’s *absolute preference* need not contain a sunset provision at all.” App. 69a.

Part II of Judge Bybee’s dissent confronted the majority’s holding that Congress has “implicitly exempted racial preferences for Native Hawaiians from § 1981’s coverage.” App. 79a. He found each of the three premises behind that holding to be “either demonstrably wrong or utterly irrelevant.” App. 80a. First, the claim that ‘Congress could not have had any conscious intention as to how [§ 1981] would apply in Hawaii’ is just plain wrong,” *id.*, for it contradicts the Hawaii Statehood Act, the equal footing doctrine, and the Supremacy Clause—not to mention the text of § 1981, which protects “[a]ll persons within the jurisdiction of the United States.” *See* App. 80a-81a.

Second, regarding the “re-enactment” of § 1981 in the Civil Rights Act of 1991, Judge Bybee showed that Congress *amended* § 1981 to “codify] the Court’s holding in *Runyon v. McCrary*, 427 U.S. 160 (1976)] that § 1981 applies to discrimination by private actors.” App. 81a (citing § 1981(c)). Third, as for the materials that mentioned KSBE by name (or otherwise “favored” Native Hawaiians), “Congress never even mentioned [KSBE’s] admissions policy in [any] piece of legislation, including the legislative history; in fact, there is nothing in the congressional materials to even suggest that Congress *knew* that [KSBE’s] admissions policy was racially exclusive, let alone that Congress *endorsed* it.” App. 87a.

Part III of Judge Bybee’s dissent was devoted to rebutting Judge Fletcher’s concurrence. *See* App. 91a-101a.

d. Judge Rymer wrote a dissenting opinion for herself and Judges Kozinski, O’Scannlain, Tallman, and Callahan. *See generally* App. 101a-104a. She began by observing that KSBE’s admissions policy operates “in such a way that, as a practical matter, non-Native Hawaiian students are precluded.” App. 101a. Because “§ 1981 applies to persons of any race,” App. 102a (citing *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)); “Native Hawaiian ancestry can be a proxy for race,” *id.* (citing *Rice*, 528 U.S. at 514); and “§ 1981 applies to private transactions,” including “contracts for educational services,” *id.* (citing *Runyon*),

she concluded that precedent does not allow KSBE “to justify its preferential admissions policy on the footing that the policy redresses past societal discrimination against Native Hawaiians.” App. 103a.

e. Judge Kleinfeld wrote a dissenting opinion that was joined by Judges Kozinski and O’Scannlain. *See generally* App. 105a-107a. These judges did not subscribe to the view that “Title VII provides the standard of review in this case,” because Title VII (as an employment discrimination statute) “has nothing to do with exclusion of students from schools because of race.” App. 105a. These judges thought the case “considerably simpler”:

The law we have to follow was laid down by the Supreme Court in *Runyon v. McCrary*. *Runyon* holds that [§ 1981] prohibits a private school from denying admission to prospective students because of their race. . . . In *McDonald v. Santa Fe Trail Transportation*, the Supreme Court decided that [§ 1981] protects whites as well as non-whites from discrimination. A fortiori it protects all the ethnic groups in Hawaii: blacks, Filipino-Americans, Japanese-Americans, American Samoans, Chinese-Americans, and all the others, regardless of their ancestry.

In my view, that is the end of the analysis. I might have preferred to avoid deciding this case, if some jurisdictional defect existed. But we do have jurisdiction. Employment law, Indian law, our admiration for Kamehameha Schools, and our sentiments about public policy are irrelevant.

App. 106a-107a (footnotes omitted).

f. Finally, Judge Kozinski filed a solo dissent. *See generally* App. 107a-108a. He believed that his dissenting colleagues had all “catalogued eloquently the many reasons why neither the majority nor the concurrence reflects what the law is, or should be.” App. 107a. He went on to explain

why he also believed that § 1981 would not apply to Kamehameha Schools if—contrary to fact—the Schools “were run entirely as a philanthropic enterprise and allowed students to attend for free.” *Id.* Judge Kozinski’s final paragraph observed that “[g]iven the scores of pages we have written on both sides of this issue, it should be clear that the question is close and ours may not be the last word.” App. 108a.

REASONS FOR GRANTING THE PETITION

Judge Kozinski is right: a closely but deeply divided Ninth Circuit should not have the “last word” on the legality of a private school admissions policy that absolutely—and with no end in sight—excludes children like petitioner solely because of their race. It has long been “this Court’s view that racial discrimination in education violates a most fundamental national public policy.” *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983). For just as long, Congress has “clearly expressed its agreement that racial discrimination in education violates a fundamental public policy.” *Id.* at 594. Given that public policy, this Court cannot give the final say to a lower court that has interpreted the Nation’s oldest civil rights law to sanction the system of racially segregated schools operated openly by respondents. If not overturned, that interpretation would sanction racially exclusive private schools for any group that could point to “significant imbalances in educational achievement.”

As explained below, the en banc decision of the court of appeals contradicts numerous decisions of this Court, beginning with *Runyon v. McCrary*, 427 U.S. 160 (1976), and including *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *Gratz v. Bollinger*, 539 U.S. 244 (2003); and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

In short, review is warranted because the court of appeals has decided important questions of federal law that should be settled by this Court; in addition, the lower court decided those questions in a way that conflicts with relevant decisions of this Court. *See* Rule 10(c).

I. In Applying Title VII Scrutiny Instead of the Stricter Title VI Scrutiny to Claims Asserted Under § 1981, the Court of Appeals Departed from this Court's Decisions Construing § 1981.

As illustrated by the oscillating series of decisions that culminated in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the proper standard for scrutinizing racial classifications is a crucial question of federal law that this Court has revisited many times. *Adarand*, of course, settled that the “strictest judicial scrutiny” is demanded for every racial classification challenged under the Constitution. *Id.* at 224. It is undisputed that this very same level of scrutiny is demanded for racial classifications challenged under at least one federal *statute*, namely, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *See Gratz v. Bollinger*, 539 U.S. 244, 275 n.23 (2003) (opining that “discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI”).

Gratz involved multiple challenges to a school's race-based admissions policy under the Equal Protection Clause, Title VI, and § 1981. *See id.* at 249-50. Having concluded that such “admissions policy violates the Equal Protection Clause of the Fourteenth Amendment,” *id.* at 275, the Court might have declined to address liability under the two statutes. But instead, the Court went on expressly to “find that the admissions policy also violates Title VI and 42 U.S.C. § 1981.” *Id.* at 275-76. In the same footnote that equated liability under the Constitution and Title VI, the Court declared that § 1981 shares the same substantive standard: “purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981.” *Id.* at 276 n.23 (citing *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 389-90 (1982)). *Gratz's* companion case similarly opined that “the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause.” *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (citing *General Building Contractors*).

General Building Contractors, from which both *Gratz* and *Grutter* drew for this point, had reviewed the history of § 1981. Finding that “the origins of the law can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870,” which “were legislative cousins of the Fourteenth Amendment,” the Court reasoned: “In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.” 458 U.S. at 389-90.

In holding that the strict scrutiny applied to Title VI claims does not apply to § 1981 claims (because Title VII-type scrutiny applies instead), the decision below conflicts with the cited decisions of this Court. Although the court of appeals purported to distinguish *Gratz* and *Grutter* on the basis that they “strictly scrutinized the admissions policies of a *public university*,” App. 20a, no public-private distinction exists in either the text or jurisprudence of § 1981. To the contrary, as amended in 1991 (*see supra* p. 9 n.1), the statute expressly repudiates such a distinction: “The rights protected by this section are protected against impairment by nongovernmental discrimination *and* impairment under color of State law.” 42 U.S.C. § 1981(c) (emphasis added). This Court’s decisions do the same. *See Runyon*, 427 U.S. at 172 (holding that “the racial exclusion practiced by [two *private* schools] amounts to a classic violation of § 1981”); *Gratz*, 539 U.S. at 275-76 (holding that a *public* university’s race-based “admissions policy also violates . . . § 1981”).²

² The majority asserted that “[s]everal courts expressly have applied Title VII’s substantive standards [i.e., standard of scrutiny] when examining § 1981 challenges to private affirmative action plans.” App. 18a. But in the supposed “leading case,” *id.*, where the Eighth Circuit “equat[ed] the affirmative action standards of title VII with those of section 1981,” the court punted on the precise question presented here: “Whether constitutional standards for affirmative action differ from title VII standards is a question
(continued...)”

The Ninth Circuit is the first court of appeals to give sustained consideration to the proper standard of scrutiny under § 1981 in light of this Court's recent decisions. But the Ninth Circuit departed from those decisions in applying Title VII scrutiny—instead of the strict scrutiny of Title VI—to petitioner's § 1981 claim. Review is warranted.

II. In Upholding a Racially Exclusionary Admissions Policy that Operates as an *Absolute and Perpetual Bar* to Children of the Wrong Race, the Court of Appeals Deviated Sharply from this Court's Civil Rights Jurisprudence.

Regardless of the standard of scrutiny chosen, KSBE's racially exclusionary admissions policy fails muster. Thus, as explained below, the court of appeals deviated sharply from this Court's precedents when it upheld the policy.

1. It is easy to show that KSBE's racially exclusionary admissions policy fails the "narrow tailoring" prong of strict scrutiny.

a. *Gratz* and *Grutter* together teach that in the context of race-based school admissions policies, a hallmark of a narrowly tailored policy is "individualized consideration." Thus, *Gratz* invalidated an admissions policy that did "not

² (...continued)

we need not reach in this case." *Setser v. Novack Investment Co.*, 657 F.2d 962, 967 & n.4 (8th Cir.) (en banc), cert. denied, 454 U.S. 1064 (1981).

The two other appellate decisions cited by the majority below either do not discuss standard-of-scrutiny issues, see *Edmonson v. United States Steel Corp.*, 659 F.2d 582, 584 (Former 5th Cir. 1981) (per curiam); or are contradicted by later decisions from the same court, see *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002) (opining, with respect to claims asserted against a private institution under both Title VI and § 1981, that "[o]nce a plaintiff establishes a discriminatory purpose based on race, the decisionmaker must come forward and try to show that the policy or rule at issue survives strict scrutiny" (emphasis added)).

provide [the] individualized consideration” contemplated by Justice Powell’s opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). *Gratz*, 539 U.S. at 271. Likewise, *Grutter* upheld an admissions policy only because it “satisf[ie]d the requirement of individualized consideration.” 539 U.S. at 336. Indeed, *Grutter* emphasized that the “importance of this individualized consideration in the context of a race-conscious admissions program is paramount,” and it approvingly quoted Justice Powell’s observation that the “‘denial . . . of the right to individualized consideration’ [was] the ‘principal evil’ of the medical school’s admissions program.” *Id.* at 337 (quoting *Bakke*, 438 U.S. at 318 n.52).

Individualized consideration means, at very least, that the school “cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.” *Id.* at 334. In addition, a narrowly tailored admissions policy must “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.” *Id.* at 338; accord *Gratz*, 539 U.S. at 272 (condemning the challenged policy because it “has the effect of making ‘the factor of race . . . decisive’” for any given applicant (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.))). In the end, a court must be able to say that “a rejected applicant ‘will not have been foreclosed from all consideration for [a] seat simply because he was not the right color or had the wrong surname.’” *Grutter*, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 318 (opinion of Powell, J.))).

Given the undisputed facts (*supra* pp. 3-6), it is manifest that KSBE’s racially exclusionary admissions policy falls short of these requirements in all respects. It is, in its essence, a two-track system: KSBE “consider[s] the ethnic background of the students and admit[s] qualified children with Native Hawaiian ancestry before [actually, *instead of*] admitting children with no such ancestry.” App. 29a. For applicants like petitioner who have no Hawaiian ancestry, race is both “defining” and “decisive”—only one such child

having been admitted by KSBE since 1962. It is apparent that non-Hawaiian children are indeed foreclosed from all consideration for admission just because they are not of the right ancestry and have the wrong bloodline.

b. In addition to failing the requirement of individualized consideration, KSBE's admissions policy fails "[t]he requirement that all race-conscious admissions programs have a termination point." *Grutter*, 539 U.S. at 342. The court of appeals struggled mightily to deny the obvious, but the perpetual nature of the "Hawaiians only" policy is evident from respondents' own words. *See supra* pp. 5-6. The majority's own observation that for "118 years, [KSBE's] admissions policy . . . has remained constant," App. 31a, only confirms the unlikely prospect of any change in the foreseeable future. *Grutter* took "the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." 539 U.S. at 343. The Court should likewise take respondents at their word when they publicly promise "to fulfill Pauahi's desire to create educational opportunities *in perpetuity* to improve the capability and well-being of people of Hawaiian ancestry." App. 78a (Bybee, J., dissenting) (emphasis added).

KSBE's racially exclusionary admissions policy neither affords individualized consideration nor has a termination point. In nevertheless upholding that policy, the court of appeals deviated sharply from this Court's decisions that scrutinize race-based school admissions policies.

2. That deviation holds true even if KSBE's policy is scrutinized under the marginally less demanding standards that govern Title VII claims. As explained in *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), and as confirmed in *Johnson v. Transportation Agency*, 480 U.S. 616, 637-38 (1987), a racial preference violates Title VII if it "unnecessarily trammels the rights of [the non-preferred] employees or creates an absolute bar to their advancement." While not foreclosing every kind of quota (as strict scrutiny

would do), this standard nonetheless demands a modicum of individualized consideration: “No persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants.” *Id.* at 638; *see also id.* (finding that the challenged plan did not create an absolute bar where it “sets aside no positions” but instead “merely authorizes that consideration be given to affirmative action concerns”). For the reasons set forth above (pp. 17-19), the challenged admissions policy fails the “absolute bar” test as explicated by this Court.

The majority below, however, consciously “modified” this Court’s test. *See* App. 26a. Judge Bybee has cogently catalogued the majority’s numerous errors in this regard, *see* App. 57a-79a, but one error was particularly egregious. In asking whether a race-based policy creates an absolute bar to advancement, the majority considered not advancement within the defendant institution, but instead “within the [relevant] community as a whole.” App. 26a. This led the majority to ask not whether children lacking Hawaiian ancestry are absolutely barred from attending *Kamehameha Schools*, but whether they “have ample and adequate alternative educational options,” i.e., whether they can “attain educational achievement in Hawaii” at other schools. App. 30a. One can imagine the majority asking whether black children in Topeka, Kansas had “adequate alternative educational options” given the public school admission policies that excluded them because of their race. Indeed, one might say the majority is proposing a new standard for school admissions: “separate but adequate.”

3. Other aspects of the Ninth’s Circuit’s “sweeping modification of the Title VII standard,” App. 53a (Bybee, J., dissenting), also warrant review.

a. The majority below acknowledged that under a “traditional” Title VII analysis, App. 33a—a shorthand for *Weber* and *Johnson*—a valid affirmative action plan “must respond to a manifest imbalance in the work force.” App. 23a. The majority also acknowledged that this requirement

embodies the “goal of achieving diversity and proportional representation in the workplace,” which is a goal that “necessarily focuses *internally* and is limited to the ‘employer’s work force.’” App. 25a.

This traditional Title VII analysis is fatal to KSBE’s admissions policy. Obviously, that policy does not seek to achieve either racial diversity or proportional ethnic representation in the classroom: it seeks precisely the opposite. Moreover, the focus of the policy is decidedly *external*: as catalogued by the majority, KSBE’s efforts are directed at, among other things, “increasing the number of Native Hawaiians attending colleges and graduate schools, improving Native Hawaiian representation in professional, academic, and managerial positions, and developing community leaders who are committed to improving the lives of all Native Hawaiians.” App. 29a. Indeed, KSBE’s policy has no less ambitious goal than “to help perpetuate Native Hawaiian culture.” *Id.*

Faced with these stubborn facts, the majority used the device of “adjusting” the manifest imbalance requirement to account for “the external focus of [KSBE’s] educational mission. App. 26a. This adjustment “render[ed] unnecessary the requirement of proof of a ‘manifest imbalance’ within a particular school; the relevant population is the community as a whole.” *Id.* The majority then found that “the relevant community in this case is the state of Hawaii” and further that “a manifest imbalance exists in the K-12 educational arena in the state of Hawaii, with Native Hawaiians falling at the bottom of the spectrum in almost all areas of educational progress and success.” App. 28a. These findings took the majority straight to the conclusion foreordained when the majority “adjusted” this Court’s test: “it is precisely this manifest imbalance that [KSBE’s] admissions policy seeks to address.” *Id.* But this kind of imbalance—the effects of general societal discrimination against a particular group—is “precisely” the sort of justification condemned by this Court from *Bakke* through *Grutter*.

b. Title VII scrutiny as formulated by this Court has a final requirement: racial preferences must be “intended to *attain* a balanced work force, not to maintain one.” *Johnson*, 480 U.S. at 639. The majority below “modified” this requirement, too: rather than seek to attain a balanced work force (or, in the case of a school, a balanced student body), “an admissions policy must do no more than is necessary to remedy the imbalance *in the community as a whole*.” App. 26a (emphasis added). Accordingly, KSBE may hold on to its racially exclusionary admissions policy “for so long as is necessary to remedy the current educational effects of past, private and government-sponsored discrimination and of social and economic deprivation.” App. 32a. In other words, the racially exclusionary policy may continue until all the socioeconomic ills of Native Hawaiians are cured. Surely, this is the kind of reasoning that “could be used to ‘justify’ race-based decisionmaking essentially limitless in scope and duration.” *City of Richmond. v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (plurality opinion).

The majority acknowledged that the final Title VII requirement mandates that racial preferences be “temporary.” App. 32a. Yet in the teeth of the undisputed evidence set forth above (at pp. 5-6), the majority found KSBE’s racially exclusionary admissions policy to be “limited in duration” for two reasons. App. 32a. One was the assertion discussed in the previous paragraph, i.e., the policy will disappear “as soon as” Native Hawaiians overcome the lingering effects of discrimination and deprivation. The other was this notion: “if qualified students with Native Hawaiian ancestry do not apply to the Schools in sufficient numbers to fill the spots available, as happened in one recent year, [KSBE’s] policy is to open admissions to any qualified candidate.” *Id.* To paraphrase: what happened once in the past four decades *might* someday happen again. Can this slender possibility really “assure[] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter”? *Grutter*, 539 U.S. at 342 (quoting *Croson*, 488 U.S. at 510 (plurality opinion)).

Admission to the Kamehameha Schools is governed by a policy that operates as an absolute and perpetual bar to children of the “wrong” ancestry. Regardless of the standard of scrutiny applied, the policy cannot pass muster. In reaching a contrary conclusion, the court of appeals issued a decision in conflict with numerous decisions of this Court.

III. In Concluding that Congress “Specifically Intended” to Authorize KSBE to Operate a System of Racially Segregated Schools, the Court of Appeals Repudiated “Fundamental National Public Policy” as Understood Both by Congress and by this Court.

The Ninth Circuit held “alternatively, and in addition,” that Congress “specifically intended to allow [KSBE] to operate” its system of racially segregated schools. App. 34a (section heading). In so holding, the court of appeals repudiated “fundamental national public policy,” as understood by Congress and this Court.

1. Born of the Civil Rights Act of 1866, 14 Stat. 27, § 1981 is “one of our oldest civil rights statutes,” if not the oldest. *Patterson v. McLean Credit Union*, 491 U.S. 164, 168 (1989). It has, moreover, a venerable history in this Court. In *Runyon v. McCrary*, 427 U.S. 160, 168 (1976), the Court held that “§ 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because” of their race. On the same day it decided *Runyon*, the Court also handed down *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Against the argument that the statutory phrase “as is enjoyed by white persons” operated to exclude whites from the statute’s protections, *McDonald* held that § 1981 “was not understood or intended to be reduced . . . to the protection solely of non-whites. Rather, [§ 1981] was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts *against, or in favor of, any race.*” *Id.* at 295 (emphasis added). Central to this holding was the truth that “the statute explicitly applies to ‘all persons.’” *Id.* at 287.

Subsequently, in 1989, the Court considered whether *Runyon* was correct in ruling that “§ 1981 prohibits *private* schools from excluding children who are qualified for admission, solely on the basis of race.” *Patterson*, 491 U.S. at 171 (emphasis added). After reargument on this point in particular, the Court unanimously “reaffirm[ed] that § 1981 prohibits racial discrimination in the making and enforcement of private contracts.” *Id.* at 172. As discussed above (p. 9), Congress itself reaffirmed that very same thing as part of the Civil Rights Act of 1991, expressly confirming that the statute protects against “nongovernmental discrimination.” 42 U.S.C. § 1981(c); *see also* H.R. Rep. No. 102-40(II), at 37 (1991) (explaining that new subsection (c) of § 1981 “is intended to codify *Runyon v. McCrary*”). Since the 1991 Act, Congress has not further amended § 1981 in any fashion. The Court, of course, has continued to apply the statute as before, ruling in 2003 that a university’s race-based admissions policy violated § 1981. *See Gratz*, 539 U.S. at 275-76.

This decisional and statutory history are classic illustrations of two points explicated in *Bob Jones University v. United States*, 461 U.S. 574 (1983). The first is “this Court’s view that racial discrimination in education violates a most fundamental national public policy.” *Id.* at 593. The second is that “Congress . . . [has] clearly expressed its agreement that racial discrimination in education violates a fundamental public policy.” *Id.* at 594. While the Court’s view, and Congress’s agreement with that view, were no doubt forged in significant part in controversies that involved *public* education, *see, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954), the “fundamental national public policy” identified in *Bob Jones* quintessentially targets racial discrimination by *private* schools as well—even *nonprofit* private schools. Thus, on the basis of that public policy, *Bob Jones* affirmed a denial of federal tax exemptions to two “nonprofit private schools that prescribe and enforce racially discriminatory admissions standards.” 461 U.S. at 577. More generally, but with particular relevance with respect to KSBE and its racially exclusionary admissions policy: “Whatever may be

the rationale for [the] private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy." *Id.* at 595.

2. In this light, no court could conceivably find that Congress had affirmatively *authorized* a private school to exclude children who are qualified for admission, solely on the basis of race, absent the clearest possible expression of intent to do so. Of course, the majority below purported to find such expression, concluding that Congress "specifically intended" to authorize KSBE's racially exclusionary admissions policy. App. 34a. That is, "the most plausible reading of § 1981, in light of the Hawkins-Stafford Amendments and the [Native Hawaiian Education Act], is that Congress intended that [KSBE's] preference for Native Hawaiians . . . be upheld." App. 38a. But the cited materials do not even come close to approaching the required expression of intent.

a. The "Hawkins-Stafford Amendments" are the majority's shorthand for several short-lived statutes relating to "Education for Native Hawaiians," enacted in 1988 and wholly repealed in 1994.³ The majority's reliance on these provisions, *see* App. 36a-37a, is untenable. That Congress instructed the Secretary of Education to provide grants to KSBE (1) to implement the "model curriculum developed by [KSBE] in appropriate public schools," and (2) for "a demonstration program to provide Higher Education fellowship assistance to Native Hawaiian students," former 20 U.S.C. §§ 4903(a), 4905(a), tells us literally nothing about KSBE's policy to absolutely bar children of the wrong race from its private elementary and secondary schools. Accordingly, to say that such instruction is "clear support . . . for the validity of [that] policy," App. 38a, is specious.

³ *See* Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, Title IV, 102 Stat. 130, 358-63 (codified for a time at 20 U.S.C. §§ 4901-4909), *repealed by* Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 362, 108 Stat. 3518, 3975.

b. The “Native Hawaiian Education Act,” now codified at 20 U.S.C. §§ 7511-7517, is similarly irrelevant. The most the majority could say regarding this statute is that it “recognized the special needs of Native Hawaiian students and the great disadvantages that they still face in Hawaii.” App. 37a (citing 20 U.S.C. § 7512). How this “recognition” constitutes affirmative congressional authorization for racially segregated private schools in Hawaii is a question the majority left unanswered. That leaves the majority’s reliance on a committee report:

The Bishop Trust [i.e., KSBE] is currently one of the largest charitable trusts in the world, valued in excess of \$ 10 billion, and holds approximately 8 percent of all land in the State of Hawaii as well as a 10 percent share of Goldman Sachs. The Committee urges the Trust to redouble its efforts to educate Native Hawaiian children.

H.R. Rep. No. 107-63(I), at 333 (2001), *quoted in* App. 38a. Judge Bybee charitably understated the point in observing that the quoted report “provides remarkably little support for [the majority’s] position.” App. 72a n.8.

In the end, there is simply no credible “evidence” that Congress affirmatively authorized KSBE to impose its racially exclusionary admissions policy on innocent children in the face of § 1981. The majority below should have heeded this Court’s teaching that “a court should always turn first to one, cardinal canon before all others,” i.e., “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In § 1981(a), Congress said that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts” on a nondiscriminatory basis; in § 1981(c), Congress said that such right is “protected against impairment by nongovernmental discrimination” like that practiced by respondents. For Congress literally to deny persons who lack Hawaiian

ancestry the equal protection of the federal civil rights laws like § 1981 “would raise questions of considerable moment and difficulty.” *Rice v. Cayetano*, 528 U.S. 495, 518 (2000). But whether Congress has in fact denied such protection by approving KSBE’s racially exclusionary admissions policy is not one of these difficult questions.

For these reasons, the Ninth Circuit’s interpretation of 42 U.S.C. § 1981 repudiates the fundamental national public policy against racial discrimination in private education, as formulated by this Court and Congress. In this respect, the majority below decided an important federal question in a way that conflicts with numerous decisions of this Court. Moreover, the Ninth Circuit should not have the last word as to whether respondents may operate a system of racially segregated schools notwithstanding the federal civil rights laws. Therefore, review is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

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