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

REPLY BRIEF FOR THE PETITIONER

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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.

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REPLY BRIEF FOR THE PETITIONER

Petitioner John Doe respectfully files this reply brief in support of his petition for a writ of certiorari.

ARGUMENT

Federal Rule of Appellate Procedure 35(a) warns that rehearing en banc is disfavored and unlikely to be ordered unless reconsideration is necessary to secure intra-Circuit uniformity or unless "the proceeding involves a question of exceptional importance." In the latter case, the warning is reinforced by requiring a rehearing petition to begin with a statement that "the proceeding involves one or more questions of exceptional importance." Rule 35(b)(1)(B).

Heeding this requirement, KSBE implored in the very first sentence of its petition for rehearing en banc that this case involves a "question of exceptional importance." KSBE went on to tell the court of appeals that the case concerns an "issue of great importance." Petition for Rehearing En Banc 1 (Aug. 23, 2007); *accord id.* at 7 (arguing again that "this is a case of exceptional importance"). Though petitioner opposed KSBE's rehearing petition, he readily "agree[d] that the case is important." Appellant's Response to Appellees' Petition for Rehearing En Banc 1 (Sept. 15, 2005).

Doubtless, the court of appeals took the same view: it granted KSBE's petition, heard reargument en banc before 15 judges, and issued no fewer than six opinions consuming more than 100 pages. Despite all this, KSBE now asserts that the en banc decision of the Ninth Circuit "presents [no] important question that warrants this Court's attention." Respondents' Brief in Opposition ("Opp.") 2. But as demonstrated in the petition and reiterated below, that assertion is wrong. So, too, is KSBE's assertion that the decision below does not "conflict[] with any decision of this Court." *Id.*

To the contrary, the court of appeals decided important questions of federal law that should be settled by this Court, and it decided those questions in a way that conflicts with numerous relevant decisions of this Court.

I. The Decision Below Contradicts Numerous Decisions of this Court.

The petition catalogued at length how the en banc decision of the Ninth Circuit contradicts many of this Court's decisions. KSBE tries to explain away those contradictions, but its efforts in this regard are unavailing.

A. *Gratz* and *Grutter*

As set out in the petition (at 15-16), *Gratz v. Bollinger*, 539 U.S. 244, 275 n.23 (2003), concluded that "purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981." Consistent with this conclusion, *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), held that "the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause." In both cases, the Court relied on *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 389-90 (1982), which had reviewed the history of the statute and found a "close connection" between § 1981 and the Fourteenth Amendment, such that "it would be incongruous to construe [§ 1981] in a manner markedly different from that of the Amendment itself."[1]

KSBE proffers several reasons why the Court did not mean what it said in *Gratz* and *Grutter*. First, as did the Ninth Circuit, KSBE emphasizes that those two decisions "involved challenges to race-conscious admissions policies by a *public* university," while the present case, "in contrast, involves a wholly *private* school." Opp. 15. Like the court below, however, KSBE simply has no response to the point that the statute's text repudiates any possible distinction

[1] KSBE asserts that *Gratz* and *Grutter* referred to *General Building Contractors* for "a much narrower proposition—namely, that both § 1981 and the Equal Protection Clause require a showing of *purposeful* discrimination," as opposed to mere disparate impact. Opp. 15 n.2 (emphasis added). KSBE's reading of the two cases is obtuse: there was simply no question whatsoever that the use of race in the two challenged admissions policies was "purposeful."

between public and private entities. *See* § 1981(c). It has no response either to this Court's holding that "the prohibitions of § 1981 encompass private as well as governmental action." *General Building Contractors*, 458 U.S. at 387-88.

KSBE does acknowledge that certain federal statutory claims against *private* persons—namely, claims under Title *VI* of the Civil Rights Act of 1964, 42 U.S.C. § 2000d—are "subject to the constitutional standard of strict scrutiny." Opp. 16. KSBE purports to distinguish Title VI from § 1981 on the novel theory that "[s]trict scrutiny of Title VI claims against private actors . . . ensures that the *government* does not unwittingly participate in unlawful race discrimination through public funding." *Id.* This is an interesting theory, but KSBE's sole cited authority—Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265, 285-87 (1978)—had a far simpler explanation for why strict scrutiny applies to Title VI claims against private persons: Congress intended so.[2] As explained in *General Building Contractors*, and as applied in *Gratz* and *Grutter*, the same holds true for § 1981.

Finally, KSBE argues that strict scrutiny should not govern § 1981 claims because it "would make little sense to open the door to flexible race-conscious measures in private employment under Title *VII*, only to close it under § 1981." Opp. 17. KSBE has it exactly backward: with its origin in the Civil Rights Act of 1866, § 1981 was enacted almost a century before Title VII, and Congress in 1972 "specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866 . . . insofar as it affords private-sector employees a right of action based on racial

[2] *See, e.g., id.* at 284 ("Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution."); *id.* at 285 ("[S]upporters of Title VI repeatedly declared that the bill enacted constitutional principles."); *id.* at 286 ("Other sponsors shared [this] view that Title VI embodied constitutional principles.").

discrimination in employment." *Runyon v. McCrary*, 427 U.S. 160, 174 (1976). Moreover, compliance with Title VII has never been thought to insulate a defendant from liability under § 1981: an individual who is aggrieved by racial discrimination "clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief"; rather, Title VII and § 1981 "augment each other and are not mutually exclusive." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975).

In sum, by applying Title VII-type scrutiny instead of the strict scrutiny applicable to Title VI and the Fourteenth Amendment, the court below construed § 1981 in a manner "markedly different" from the latter provisions, thereby contradicting *Gratz*, *Grutter*, and *General Building Contractors*.

B. *Runyon* and *Bob Jones*

Runyon held that "§ 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because" of their race. 427 U.S. at 168. *Bob Jones University v. United States* reaffirmed that, in the view of both the Court and Congress, "racial discrimination in education"—including at private nonprofit schools like KSBE—"violates a most fundamental national public policy." 461 U.S. 574, 593 (1983). KSBE denies the obvious relevance of these decisions on the ground that "[b]oth cases involved race discrimination against African-Americans," and "[n]either case involved the use of race-conscious measures adopted for the legitimate purpose of remedying harm to a minority group." Opp. 17.[3] In other words, KSBE advances an interpretation of § 1981 under which the statute would "mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.).

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[3] In one case, this is simply wrong: unlike KSBE, Bob Jones University "allow[ed] all races to enroll"; its discrimination consisted of its "prohibitions of association between men and women of different races, and of interracial marriage." 461 U.S. at 605.

If it took the Court some time to reject that inconsistency in the constitutional context, *see, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218-24 (1995), it took the Court no time at all to reject an inconsistent interpretation of § 1981. As detailed in the petition (at 23), on the same day as it decided *Runyon*, the Court determined that § 1981 "was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts *against, or in favor of, any race*." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 295 (1976) (emphasis added).

KSBE further asserts that because its racially exclusionary admissions policy was "adopted for an indisputably legitimate remedial purpose," the decision below "presents no inconsistency" with *Runyon* or *Bob Jones*. Opp. 18. But this Court has instructed that the legitimacy vel non of a given racial classification is what emerges at the end of judicial scrutiny, not a premise to be assumed at the start:

> "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . . ."

Adarand, 515 U.S. at 226 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

In purporting to legitimize KSBE's system of racially segregated schools, the Ninth Circuit deviated sharply from the letter and spirit of both *Runyon* and *Bob Jones*.[4]

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[4] In this context, KSBE cites an Internal Revenue Service document purporting to find that KSBE's racially exclusionary admissions policy is consistent with *Bob Jones*. *See* Opp. 20 n.4. That document is hardly probative or persuasive, as it relies heavily on the Ninth Circuit's 1998 decision in *Rice v. Cayetano*, which was subsequently reversed by this Court. *See* 528 U.S. 428 (2000).

C. *Weber* and *Johnson*

The petition has shown (at 19-22) the several ways in which KSBE's racially exclusionary admissions policy fails a "traditional" Title VII analysis, i.e., the standard explicated in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). Of course, the majority below did not actually engage in that analysis: instead, it consciously undertook a "sweeping modification of the Title VII standard" fashioned by this Court in *Weber* and *Johnson*. Pet App. 53a (Bybee, J., dissenting); *see also* Pet. 9, 20-21, 22.

KSBE does not even try to defend the majority's conscious departures from *Weber* and *Johnson*. Instead, KSBE chooses to make its stand on a factual point: "the district court found as a matter of fact that Kamehameha Schools' admissions policy is not an 'absolute bar' to the admission of non-Native Hawaiians." Opp. 21. And so it did. *See* Pet. App. 201a. But for the reasons detailed in the petition (at 3-6, 17-19), that "finding" is *clearly erroneous*. Indeed, the court of appeals declined to rely on the district court's finding; rather, the majority below "modified" this Court's absolute bar requirement into an unprecedented "separate but adequate" standard. *See* Pet. 20.

Alternatively, KSBE argues that "[e]ven if [its] admissions policy could be characterized as an absolute bar," the policy nonetheless "would satisfy the *Weber* test" because it is "remedial." Opp. 21. This argument is contrary to the Court's understanding of the test. In *Johnson*, the defendant's plan "directed that sex or race be taken into account for the purpose of remedying underrepresentation"; thus, the plan "sought to remedy [sex-based] imbalances" within the defendant's workforce. 480 U.S. at 634. Yet despite the plan's "remedial" character, the Court considered whether it "unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement." *Id.* at 637-38. The Court found the requirement satisfied not because the plaintiff had (to paraphrase the majority below) "ample

and adequate alternative [employment] options" elsewhere in the industry, Pet. App. 30a, but because "*No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." 480 U.S. at 638. On its face, KSBE's racially exclusionary admissions policy fails this requirement.

In numerous respects, the majority below consciously "modified" the Title VII standards developed and applied in *Weber* and *Johnson*. As a result, the decision of the court of appeals is in conflict with those two decisions as well as the others described above. KSBE's attempts to explain away those conflicts are ineffectual. Review is warranted.

II. Respondents' Reasons for Denying Review Are Untenable.

As set forth above and in the petition, the importance of the questions presented is manifest. The proper level of judicial scrutiny under § 1981, the proper interpretation of Title VII as it applies to educational institutions, and the proper continuing application of § 1981 in light of scattered congressional enactments bearing on Native Hawaiians—all of these are questions on which this Court (and not the Ninth Circuit) should have the "last word." Pet. App. 108a (Kozinski, J., dissenting). Fantastic as it may seem, KSBE actually operates a system of racially segregated schools in twenty-first century America. If that racial segregation is to be given the imprimatur of the federal courts—which for more than fifty years have been the primary guardians of the fundamental national public policy against racial discrimination in education—it should be this Court and none other that explains why.

KSBE proffers several reasons why review should not be granted despite the conflict with this Court's precedents. We may easily dispose of a preliminary one—that petitioner is a single plaintiff who seeks only monetary damages. *See* Opp. 23. Several of the crucial precedents in this area arose from cases brought on behalf of just one or two individuals: *McDonald*, *Johnson*, *Croson*, and *Rice*. *Croson* in particular

involved *only* money damages, all other relief having been mooted (as here). *Compare* 488 U.S. at 478 n.1, *with* Pet. App. 12a n.5. Perhaps the most significant § 1981 case in the last two decades—which "consider[ed] important issues respecting the meaning and coverage of one of our oldest civil rights statutes"—was initiated by just one individual who apparently sought only money damages. *Patterson v. McLean Credit Union*, 491 U.S. 164, 168 (1989). As set out below, KSBE's other reasons are similarly makeweight.

A. Kamehameha's "Uniqueness"

In KSBE's own estimation, it is "so unique as to render the court of appeals' decision inapplicable in other contexts"; that is, the decision "sets no precedent for any other private school, or any other Native Hawaiian program." Opp. 24-25. For two reasons, this argument lacks merit.

First, the court of appeals majority created a generally applicable "Modified Title VII Standard in the Educational Context Under § 1981." Pet. App. 21a. That standard included at least three rules that apply by their terms to *any* school subject to § 1981. *See* Pet. App. 26a. As the dissent rightly observed, "the majority's reasoning reaches far beyond [KSBE]" and "narrow[s] the scope of one of our oldest and most enduring civil rights statutes." Pet. App. 89a.

Second, in its alternative and additional holding that excused KSBE from the normal strictures of § 1981 as they apply to other institutions, *see generally* Pet. 25-27, the majority below relied principally on the "landscape of Native Hawaiian-oriented congressional enactments against which § 1981 must be read." Pet. App. 37a. Though some of this landscape concerned education in particular, the majority justified its departure from otherwise applicable law on the basis that Congress has "provide[d] specifically for [Native Hawaiians'] welfare in a number of different contexts." Pet. App. 36a. Nothing in the en banc court's reasoning would prevent a subsequent Ninth Circuit panel from relying on those "different contexts" to justify further departures from governing law in light of "the special relationship that the

United States has with Native Hawaiians." *Id.* Because a majority of the majority would read *Rice* as "confine[d]" to "voting rights under the Fifteenth Amendment," Pet. App. 44a (Fletcher, J., concurring), such departures are likely.

B. Native Hawaiian Programs

KSBE contends that "[t]he relevant statutory context includes numerous federal laws providing remedial grants and programs targeted expressly and often exclusively toward Native Hawaiians," but that "this statutory context is so specialized that interpretation of § 1981 in this case can have little bearing on other cases arising under § 1981." Opp. 26-27. To the contrary, as explained above, the court of appeals has bequeathed us the worst of both worlds: it has formulated a generally applicable "standard" that will govern *all* schools subject to § 1981, while at the same time planting the seeds for further Hawaiians-only exceptions to the statute *outside* of the educational context.

C. Current Debate in Congress

Finally, KSBE observes that "the political status of the Native Hawaiian people is currently under debate in Congress." Opp. 27 (section heading). In light of this "debate," argues KSBE, "it would be premature for the Court to decide a strictly statutory case related to these issues." Opp. 28. This argument is specious: nothing in the cited bills would authorize KSBE to operate a system of racially segregated schools or would otherwise even amend § 1981. As KSBE concedes, moreover, "nothing in the court of appeals' decision turns on the outcome of congressional debate." *Id.* Legally irrelevant "debate" is no reason to deny review.[5]

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[5] For the record, we note that Congress has been "debating" Hawaiian issues ever since the *Rice* decision in 2000. No fewer than thirteen "Hawaiian status" bills have been introduced since that time, and only one passed even a single house. *See* S. 2899, 106th Cong. (2000) (reported favorably by Committee on Indian Affairs); H.R. 4904, 106th Cong. (2000) (passed House and placed on Senate legislative calendar); S. 81, 107th Cong. (2001) (referred to

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Committee on Indian Affairs); S. 1783, 107th Cong. (2001) (same); S. 746, 107th Cong. (2001) (reported favorably by Committee on Indian Affairs); H.R. 617, 107th Cong. (2001) (reported favorably by Committee on Resources); Native Hawaiian Recognition Act of 2003, S. 344, 108th Cong. (reported favorably by the Committee on Indian Affairs); H.R. 665, 108th Cong. (2003) (referred to Committee on Resources); Native Hawaiian Government Reorganization Act of 2004, H.R. 4282, 108th Cong. (reported favorably by Committee on Resources); Native Hawaiian Government Reorganization Act of 2005, S. 147, 109th Cong. (reported favorably by Committee on Indian Affairs but cloture not invoked on Senate floor); Native Hawaiian Government Reorganization Act of 2005, H.R. 309, 109th Cong. (referred to Committee on Resources); Native Hawaiian Government Reorganization Act of 2006, S. 3064, 109th Cong. (placed on Senate legislative calendar); Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (referred to Committee on Indian Affairs); Native Hawaiian Government Reorganization Act of 2007, H.R. 505, 110th Cong. (referred to Committee on Natural Resources).