No. 21-1046

IN THE

Supreme Court of the United States

FACULTY, ALUMNI, AND STUDENTS OPPOSED TO RACIAL PREFERENCES,

Petitioner,

—v.—

NEW YORK UNIVERSITY,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The court below dismissed *without prejudice* the complaint filed by Petitioner Faculty, Alumni, and Students Opposed to Racial Preferences ("FASORP") for failing to meet the most basic standing requirements established by this Court's cases.

The Petition alleges no split of authority stemming from the Second Circuit panel's straightforward application of binding law, identifies no important federal question warranting this Court's review, nor does it even cite to Rule 10 or give any "compelling reason[]" for this Court to take up this case. FASORP's only ask—summary reversal of a correct application of well-settled law—should be rejected. Indeed, the Petition does not cite a *single* associational standing case supporting its bid for summary reversal on the unique allegations of this case. There is no basis for FASORP's unprecedented request for this Court to exercise this exceedingly narrow review for a decision that dutifully applies decades of this Court's well-settled standing and pleading cases.

The question presented is: Should this Court summarily reverse the Second Circuit's split-less, fact-bound application of this Court's well-settled pleading and standing doctrines, where the panel unanimously concluded that FASORP failed to plausibly allege standing to sue—including by failing to sufficiently identify a single member who suffered harm, and by alleging only vague, "some day" intentions to interact with Respondent—while dismissing the case without prejudice?

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent New York University certifies that it has no parent corporation, and that no publicly-held corporation owns 10% or more of its stock.

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INTRODUCTION

The Second Circuit's decision applying this Court's well-settled precedent to FASORP's deficient standing allegations does not warrant review, let alone summary reversal. FASORP does not allege any split of authority. It does not claim that there is an important question resolved in the opinion below that warrants a full review by this Court. FASORP ignores the fact that the Second Circuit's dismissal was without prejudice and does not explain why FASORP repeatedly refused chances it was given to amplify its standing allegations. Instead, FASORP unabashedly asks this Court for case-specific error correction, relief typically reserved for the most egregious and obvious errors that implicate personal liberty interests.

There are no such obvious errors here because the Second Circuit properly applied the governing legal standards. The Petition does not cite to a *single* standing case that would support its unprecedented bid to expand standing for associations. The Petition also ignores the well-settled pleading standard established by *Twombly* and *Iqbal*, giving lip service to those decisions by repeatedly citing in isolation language that the law "does not require 'detailed factual allegations,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)), ignoring everything else that those cases say—including the rest of the very sentence FASORP quotes. *See Iqbal*, 556 U.S. at 678 (noting that the pleading standard "does not require detailed factual allegations, *but it demands more than an unadorned, the-defendant-unlawfully-harmed-me*

accusation" (quotation marks omitted) (emphasis added).

Under decades of this Court's cases, plaintiffs claiming organizational standing and seeking injunctive relief must "identify members who have suffered the requisite harm"—that is, who are "under threat of suffering injury in fact that is concrete and particularized," and "actual and imminent, not conjectural or hypothetical[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *see City of L.A. v. Lyons*, 461 U.S. 95, 105 (1983) (past harm was insufficient to establish standing to seek injunctive relief in the absence of "a real and immediate threat" of future harm). "'Some day' intentions" to act in the future—"without any description of concrete plans, or indeed even any specifications of *when* the some day will be—do not support a finding of the 'actual or imminent' injury" this Court's precedents require. *Summers*, 555 U.S. at 496 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992)). At the pleading stage, a plaintiff must assert "well-pleaded, nonconclusory factual allegation[s]" giving rise to a plausible inference that the plaintiff can meet its burden of proof on standing. *Iqbal*, 556 U.S. at 680.

The Second Circuit applied these clear and longstanding rules to the allegations of FASORP's complaint, which did not identify—in any capacity—a single member of its organization, let alone explain the concrete plans any members had that would give rise to a plausible claim to standing. *See, e.g.*, App. 13a-14a[1] (acknowledging that standing pleadings must be

[1] All Appendix citations are to Petitioner's Appendix.

supported "with the manner and degree of evidence required at the successive stages of the litigation," quoting *Lujan*, 504 U.S. at 561, and holding that FASORP's unadorned descriptions of its membership "are plainly insufficient to show that FASORP's members have suffered the requisite harm" because they do no more than suggest a "statistical probability that some of [its] members are threatened with concrete injury," quoting *Summers*, 555 U.S. at 497); App. 14a-15a (holding that FASORP failed to plausibly allege that its members "have experienced an invasion of a legally protected interest that is certainly impending or that there is a substantial risk that the harm will occur" because in the absence of "any description of concrete plans to apply for employment, submit an article, or of having submitted an article, that will be or has been accepted for publication, FASORP's allegations exhibit the kind of some day intentions that cannot support a finding of actual or imminent injury" under *Summers*) (cleaned up). And while FASORP oddly claims that the Second Circuit should have given FASORP the benefit of the doubt because of Rule 8's notice pleading standard, the court below properly applied this Court's decisions in *Twombly* and *Iqbal*, noting that "'at the pleading stage, the plaintiff must clearly allege facts demonstrating each of the elements that make up the irreducible constitutional minimum of standing." App. 10a (cleaned up) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016)).

FASORP's request to summarily reverse the Second Circuit's correct application of decades of well-established precedent should be denied.

STATEMENT OF THE CASE

This case involves claims by FASORP against Respondent New York University ("NYU") alleging unlawful discrimination against white men by the NYU Law Review (the "Law Review") and NYU School of Law (the "Law School"). FASORP filed its complaint on October 7, 2018, and amended its complaint on February 28, 2019.

The First Amended Complaint ("FAC") alleges that FASORP is a membership association whose members include "faculty members or legal scholars," App. 51a, ¶ 42 who "Oppose[] Racial Preferences," App. 43a, ¶ 3. FASORP alleges that the Law School violates Titles VI and IX "by using race and sex preferences when selecting [Law Review] members, editors, and articles[,]" and by "conferring preferences upon homosexuals and transgender[] people when selecting [Law Review] members, editors, and articles." App. 54a, ¶¶ 50, 51. The FAC also alleges that the Law School violates Titles VI and IX by "discriminating in favor of female or minority faculty candidates and against white men." App. 57a, ¶ 60. FASORP seeks declaratory and injunctive relief. App. 59a, ¶ 70.

FASORP alleges that it has standing to challenge (1) the Law Review's editor selection process; (2) the Law Review's article selection process; and (3) the Law School's faculty hiring process based on the existence of two groups of FASORP members.

First, FASORP claims that its membership includes "faculty members or legal scholars who have submitted articles to the NYU Law Review in the past,

and who intend to continue submitting their scholarship to the NYU Law Review in the future." App. 51a-52a, ¶¶ 42, 43. The FAC does not allege *any* additional facts about these purported FASORP members, their scholarship, or their plans for the future.

FASORP contends that these unidentified members will be injured by the Law Review's editor selection process (and thus have standing to challenge it) because their future articles—if eventually written and submitted—will be evaluated by "less capable students" on the Law Review, App. 49a ¶ 34, App. 52a ¶ 43, and—if eventually written, submitted, *and* accepted for publication—will be edited by students of "dilute[d] quality," App. 49a ¶ 35. FASORP claims that these unidentified members are also harmed by the Law Review's article selection policy, which FASORP claims "gives preference to articles written by women and racial minorities at the expense of articles written by FASORP members who are white or male," App. 49a ¶ 33, and thus that FASORP has standing to challenge that process too.

Second, FASORP alleges that its members include "individuals who have sought and applied for entry-level or lateral teaching positions at New York University School of Law and intend to do so again in the future, or *remain potential candidates* for visiting professorships and lateral faculty appointments *without any need to formally apply*[.]" App. 52a ¶ 45 (emphasis added). The FAC does not allege *any* additional facts about these FASORP members, the positions to which they applied in the past, the positions they might in the future apply to or be

eligible for "without any need to formally apply," or the qualifications that would subject them to any consideration whatsoever at the Law School. According to FASORP, these members are harmed because "New York University School of Law, along with nearly every law school in the United States, discriminates on account of race and sex when hiring its faculty, by discriminating in favor of female or minority faculty candidates and against white men." App. 47a ¶ 27. The FAC contains no other allegations relating to faculty hiring at the Law School.

Despite challenging the Law Review's editor selection process, the FAC does not allege *even a single member* of FASORP who is a current or former student at the Law School.[2] Rather, FASORP relies exclusively on its purported "faculty or scholar" members to allege standing to challenge the Law Review's editor selection process. *See* App. 13a at n.35 (quoting FASORP's Reply to the Second Circuit).

[2] FASORP claims in the Petition that "its members include faculty, *alumni, and students* of law schools who oppose the use of race and sex preferences in faculty hiring, student admissions, law-review membership, and law-review article selection." Pet. at 8 (emphasis added). However, the FAC does not allege that FASORP has "alumni" or "student" members, whether at the Law School or elsewhere.

I. Proceedings in the District Court

On March 31, 2020, the District Court issued its opinion and order dismissing the FAC. *See* App. 21a. The District Court concluded that FASORP failed to allege standing because it (1) failed to identify with specific allegations a member with standing and (2) failed to adequately allege "an invasion of a legally protected interest that is concrete and particularized," App. 34a (quotation marks omitted), with "a real and immediate threat of repetition," thus failing to support an injury-in-fact, App. 35a. The District Court also concluded that FASORP failed to state a claim under Rule 12(b)(6).[3]

The District Court gave FASORP the chance to amend the FAC a second time following dismissal. *See* App. 39a. FASORP declined that opportunity, requested final judgment, and appealed to the Second Circuit. *See* Pet. at 12.

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[3] About six months before the dismissal by the District Court, a district court in Massachusetts dismissed FASORP's simultaneously-filed complaint alleging nearly identical harm arising out of practices at Harvard Law School and its Law Review. *See Faculty, Alumni, and Students Opposed to Racial Preferences v. Harvard Law Review Ass'n*, 2019 WL 3754023, at *5 (D. Mass. Aug. 8, 2019). Like the District Court here, that court concluded that dismissal was warranted because FASORP failed to "'identify'—in any sense of that word—a member of [FASORP], let alone one who has suffered or will suffer the requisite injury," *id.* at *5, and had "not alleged facts showing the sort of concrete and particularized, actual or imminent, and redressable injuries in fact necessary to confer Article III standing," *id.* at *7 (quotation marks omitted). It also found FASORP failed to state a claim under Rule 12(b)(6). FASORP did not appeal.

II. The Second Circuit's Opinion

The Second Circuit panel—consisting of Judge Cabranes, Judge Leval, and Judge Menashi—unanimously affirmed the judgment of the District Court. Judge Cabranes wrote the majority opinion, which Judge Leval joined; Judge Menashi concurred in a separate opinion. All three agreed that dismissal was proper because FASORP failed to "identify members who have suffered the requisite harm" in *any* manner, let alone one which would affirmatively and plausibly suggest standing to sue. *See* App. 12a-14a (majority opinion); 18a (concurring opinion) (both quoting *Summers*, 555 U.S. at 499).

Citing to *Summers*, Judge Cabranes noted that in order to establish an injury-in-fact to one of its members, this Court has "required plaintiffs claiming an organizational standing to *identify members* who have suffered the requisite harm." App. 12a (quoting *Summers*, 555 U.S. at 499 (emphasis added)). This is because, as this Court has acknowledged, "standing is not an ingenious academic exercise in the conceivable," but rather "requires a factual showing of perceptible harm." *Summers*, 555 U.S. at 499; *see* App. 12a (quoting *Summers*).

Turning to the allegations in the FAC, Judge Cabranes noted that its only allegations concerning FASORP's membership are that FASORP includes "faculty members or legal scholars who have submitted articles to the Law Review in the past, and who intend to continue submitting their scholarship to the Law Review in the future" and "individuals who have sought and applied for entry-level or lateral

teaching positions at the Law School and intend to do so again in the future, or remain potential candidates . . . . " App. 13a (quoting FAC ¶¶ 42, 45).

In the absence of any specifics—for example, when FASORP's purported members submitted articles to the Law Review or applied for jobs at the Law School; whether members have drafted articles they intend to submit; and if so, when they plan to submit them—Judge Cabranes concluded that FASORP "effectively asks us to accept 'a self-description of the activities of its members' and to conclude that 'there is *a statistical probability that some of those members are threatened* with concrete injury.'" App. 14a (quoting *Summers*, 555 U.S. at 497) (emphasis added). The majority concluded that "[s]uch allegations are plainly insufficient to show that FASORP's members have suffered the requisite harm here." App. 14a; *see Summers*, 555 U.S. at 498 (noting that accepting such allegations would "make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm").

FASORP argued below—as it does here—that the Court's standing doctrine, including the requirement to "identify members who have suffered the requisite harm," *Summers*, 555 U.S. at 499, is somehow irrelevant because this case was decided on a motion to dismiss. But as Judge Cabranes acknowledged, this Court has made perfectly clear how its standing jurisprudence applies at the pleading stage. Specifically, "'at the pleading stage, the plaintiff must clearly allege facts demonstrating each of the

elements that make up the irreducible constitutional minimum of standing.'" App. 10a (cleaned up) (quoting *Spokeo*, 578 U.S. at 338). Thus, Judge Cabranes explained that even if there is no requirement to "name names" at the pleading stage, FASORP was still required to "allege facts that affirmatively and plausibly suggest that it has standing to sue," which it failed to do. App. 13a; *see id.* 13a-14a (majority opinion); 18a (concurring opinion).

Having determined that the pleadings in the FAC failed to sufficiently "identify members," Judge Cabranes went on to observe that—even if FASORP had alleged an adequate identification—FASORP still failed to allege that those members were under threat of suffering "an 'invasion of a legally protected interest' that is 'certainly impending' or that 'there is a substantial risk that the harm will occur.'" App. 14a (quoting *Lujan*, 504 U.S. at 560; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quotation marks omitted)).

The majority considered the specific allegations of injury alleged in the FAC, namely, that FASORP members will be harmed—*i.e.*, discriminated against—"because they '*intend*' to continue submitting their scholarship' and '*intend*' to apply for jobs at the Law School, or remain candidates for recruitment to the faculty at the Law School." App. 14a-15a (quoting FAC ¶¶ 42, 45).[4] But absent additional detail, the

[4] The emphases in this quotation are original from the majority opinion but do not appear in the version of the opinion submitted in Petitioner's Appendix. *See Faculty, Alumni, and Students Opposed to Racial Preferences v. N.Y. Univ.*, 11 F.4th 68, 77 (2d Cir. 2021).

majority concluded that the FAC "only alleges a 'highly attenuated chain of possibilities'" supporting its allegations of injury-in-fact. App. 14a (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)).

"The primary defect in all these theories," Judge Cabranes explained, "is that there is an uncertain future action that would need to occur before the plaintiffs could arguably suffer the harm alleged." App. 15a. Just as in *Summers*—in which this Court found the plaintiff environmental organization lacked standing where its members asserted an "intention to visit the national forests" at issue, 555 U.S. 496—the majority concluded that FASORP's allegations that members "intend" to one day submit scholarship to the Law Review and "intend" to be considered for future jobs at the Law School (that they may never even apply for) were not sufficient to plausibly allege standing. *See* App. 14a-15a. Put simply, "without any 'description of concrete plans' to apply for employment, submit an article, or of having submitted an article, that will or has been accepted for publication, FASORP's allegations exhibit the kind of 'some day intentions' that cannot 'support a finding of actual or imminent injury.'" App. 15a (quoting *Summers*, 555 U.S. at 496 (cleaned up)).

In short, the majority applied this Court's decades-settled precedent to the complaint in this case, in which FASORP was unwilling or unable to offer all but the most threadbare allegations of standing. The panel therefore affirmed, noting in closing that because the complaint was dismissed for lack of Article III standing, dismissal was required to

be *without prejudice*. *See* App. 17a. FASORP therefore had (and still has) an opportunity to re-file to cure the defects in the FAC.

Judge Menashi concurred, also relying on *Summers*. App. 18a. Specifically, Judge Menashi agreed with the majority that FASORP "failed to establish associational standing" because it "has not identified a member who has, or will, submit articles to the Law Review or seek teaching positions at the law school. Accordingly, FASORP has failed to establish that it has standing as an association to bring suit on behalf of its unidentified members." *Id.* (citing majority opinion at 12a-14a). Because "[t]hat conclusion is enough to resolve this appeal," Judge Menashi would not have addressed the sufficiency of FASORP's allegations of injury-in-fact. App. 18a.

REASONS FOR DENYING THE PETITION

The Petition admits that it is a request for pure error correction. FASORP does not identify any question—related to pleading standards or to standing doctrine, or anything else—on which this Court's guidance is required. Indeed, FASORP does not even seek briefing on the merits. FASORP does not, and cannot, identify a single case supporting the exercise of the Court's supervisory power under similar circumstances. And for good reason—this Court does not exist to revisit each party's mundane disagreements with each lower court's application of well-settled law to unique facts. *See Tolan v. Cotton*, 572 U.S. 650, 661 (Alito, J., concurring in the judgment) ("Error correction is outside the mainstream of the Court's functions and not among

the 'compelling reasons' that govern the grant of certiorari") (cleaned up); *Salazar-Limon v. City of Houston, Tex.*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari) ("[W]e rarely grant review where the thrust of the claim is that the lower court simply erred in applying a settled rule of law to the facts of a particular case."). Because the Petition fails to identify any "compelling reasons" for review, it should be denied. Sup. Ct. R. 10.

Even if mere error correction of a fact-bound and split-less decision of a Court of Appeals were a sufficient reason for review, the Petition should be denied because the Second Circuit's decision was correct. This Court's long-standing precedent makes plain that a plaintiff claiming organizational standing must "identify members who have suffered the requisite harm," *i.e.*, harm that is "concrete and particularized" and "actual and imminent, not conjectural or hypothetical[.]" *Summers*, 555 U.S. at 493. At the pleading stage, a plaintiff must allege facts that affirmatively and plausibly suggest that it has standing to sue. *See Lujan*, 504 U.S. at 561 ("[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."); *Iqbal*, 556 U.S. at 680 (at pleading stage, plaintiff's "well-pleaded, nonconclusory factual allegations" must plausibly give rise to finding in plaintiff's favor).

FASORP's threadbare allegations do not meet these standards. Facts concerning FASORP's members are in the unique possession of FASORP itself. Nonetheless, the FAC alleges only that FASORP

members include "faculty members or legal scholars who have submitted articles" to the Law Review and "intend" to do so at some point "in the future," as well as "individuals who have sought and applied for" positions at the Law School and "intend to do so" again at some point in the future, or "remain potential candidates . . . without any need to formally apply[.]" App. 51a-52a, ¶¶ 42, 45. FASORP was given the opportunity to amend its complaint following dismissal, and declined to do so. *See Faculty, Alumni, and Students Opposed to Racial Preferences v. N.Y. Univ. L. Rev.*, 2020 WL 1529311, at *8 (S.D.N.Y. Mar. 31, 2020); Pet. at 12. Indeed, FASORP *still* has the opportunity to re-file because the Second Circuit's dismissal was without prejudice. *See* App. 17a.

FASORP's unvarnished allegations suggest only "'some day' intentions" which, "without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury" required under this Court's established precedent. *Summers*, 555 U.S. at 496 (quoting *Lujan*, 504 U.S. at 564). Summary reversal would undercut that precedent and throw open the courthouse doors to membership associations with generalized grievances of all types. The sound and unanimous conclusion of the Court of Appeals that the FAC was properly dismissed for failure to allege Article III standing does not warrant summary reversal.

I. The Second Circuit's Fact-Specific Application of This Court's Well-Settled Doctrine Does Not Warrant Summary Reversal

a. The Petition Presents a Case-Specific Question on an Issue of Settled Law on Which FASORP Agrees There Is No Split

"A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10. FASORP fails to identify any. The Petition challenges only the panel's application of well-settled law to particular allegations—a case-specific question on which FASORP agrees there is no conflict. Not only does the Petition admit there is no conflict, it fails to identify *any basis whatsoever* for this Court to grant review under Rule 10.

This Petition does not present a decision by a Court of Appeals that is "in conflict with the decision of another United States court of appeals on the same important matter[.]" Sup. Ct. R. 10(a). The Second Circuit has not "decided an important federal question in any way that conflicts with a decision by a state court of last resort[.]" *Id.* It has not "so far departed from the accepted and usual course of judicial proceedings" as to "call for an exercise of this Court's supervisory power[.]" *Id.* Nor has it "decided an important question of federal law that has not been, but should be, settled by this Court," or "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

The Second Circuit simply applied this Court's well-established law on pleading and Article III standing to the scantly alleged facts of this case. Notably, FASORP does not argue that the Second Circuit misapprehended or misstated the legal standards at issue. It argues only that the panel's *application* of those standards to the FAC—specifically, the unanimous conclusion that the threadbare and conclusory allegations in the FAC concerning FASORP's members failed to plausibly allege Article III standing, and the majority's conclusion that the allegations concerning those members' intended future actions were likewise insufficient—is "untenable" and therefore worthy of summary reversal. Pet. at 19. The Petition's failure to identify or articulate any "compelling reason[]" for review is alone sufficient basis for its denial. Sup. Ct. R. 10.

In any event, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," like FASORP alleges here. Sup. Ct. R. 10; *see Tolan*, 572 U.S. at 661 (Alito, J., concurring in the judgment) ("Error correction is outside the mainstream of the Court's functions and not among the 'compelling reasons' that govern the grant of certiorari") (cleaned up); *Salazar-Limon*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari) ("[W]e rarely grant review where the thrust of the claim is that the lower court simply erred in applying a settled rule of law to the facts of a particular case."). Indeed, FASORP fails to cite a *single summary reversal* of a Court of Appeals decision affirming dismissal for failure to adequately allege

Article III standing. This is unsurprising, since summary reversal is reserved for the most compelling cases, in which an error is so obvious that it warrants correction without briefing on the merits. *See, e.g.*, *Tolan*, 572 U.S. at 659 (intervention via summary reversal appropriate in qualified immunity case only because, unlike here, "the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents").

FASORP cites just two cases in which this Court summarily reversed the dismissal of a complaint at the pleading stage—and neither involves standing. Nor does either involve a dismissal by the lower courts without prejudice, as is the case here. Those cases serve only to highlight that the Petition does not warrant consideration (let alone summary reversal) by this Court.

The first, *Johnson v. City of Shelby, Mississippi*, 574 U.S. 10 (2014), did not involve the sufficiency of a plaintiff's factual allegations at all. Rather, plaintiff police officers alleged that they were terminated in violation of due process "because they brought to light criminal activities of one of the aldermen." *Id*. at 10. The Fifth Circuit affirmed dismissal of the officers' claim, finding that plaintiffs were required to couch their claim as one for violation of § 1983 and had not done so in their complaint. *See id*. This Court summarily reversed because a plaintiff need not "invoke § 1983 expressly in order to state a claim." *Id*. at 11. In other words, summary reversal was warranted because the Fifth Circuit applied the wrong standard, imposing a requirement that plaintiff set out a specific *legal theory* to support its claim when no

such pleading requirement exists. *See id.* at 12 (citing *Wright & Miller* for the proposition that "it is unnecessary to set out a legal theory for the plaintiff's claim for relief"). This Court explicitly rejected the relevance of its decisions in *Twombly* and *Iqbal* because those cases "concern the *factual* allegations a complaint must contain to survive a motion to dismiss." *Johnson*, 574 U.S. at 12. It is precisely the inadequacy of FASORP's factual allegations in this case that led to the dismissal of the FAC—whereas the *Johnson* Court explicitly distinguished such cases from that one. Thus, *Johnson* has no relevance here.

Erickson v. Pardus, 551 U.S. 89 (2007), is similarly inapposite. That case came on the heels of *Twombly* and before *Iqbal*, at a time when the lower courts were still grappling with how and to what extent to apply *Twombly*'s "plausibility" standard in other contexts. In *Erickson*, plaintiff—an incarcerated individual proceeding pro se—alleged that he had a liver condition resulting from hepatitis C which required treatment that had been started but then wrongfully terminated by prison officials, threatening his life. *Id.* at 90. The district court dismissed the complaint on the basis that it failed to allege that the prison physician's actions "had caused petitioner 'substantial harm,'" and the Tenth Circuit affirmed, concluding that petitioner had failed to allege in the complaint that he had "suffered any harm, let alone substantial harm, other than what he already faced from the Hepatitis C itself" as a result of the interruption in treatment. *Id.* at 92-93 (cleaned up).

This Court summarily reversed, finding that petitioner's allegations were sufficient for pleading

purposes to establish that he had suffered "a cognizable independent harm as a result of his removal from the hepatitis C treatment program." *Id.* at 93 (quotation marks omitted). Specifically, this Court found that the Court of Appeals had failed to properly apply the pleading standards set forth under Rule 8, which are "less stringent" as applied to pro se plaintiffs than as to "formal pleadings drafted by lawyers." *Id.* at 94 (quotation marks omitted). The Court of Appeals also overlooked the fact that petitioner had "bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings." *Id.* Under those circumstances—in which a prisoner, proceeding pro se, made "inartful[]" but specific claims that a physician's termination of essential medical care had endangered his life—this Court concluded that the lower court's departure from applicable pleading standards warranted summary reversal.

By comparison, the Court of Appeals here considered the sufficiency of allegations made by FASORP—which is represented by counsel—about basic facts concerning *its own members* in light of decades of clear guidance from this Court concerning what is required to plead Article III standing. The Second Circuit correctly concluded that the allegations in FASORP's FAC failed to plausibly support standing because the FAC did not identify, in *any* capacity, members of FASORP who would allegedly suffer the harm complained of. *See* App. 14a (majority opinion) (FASORP merely alleges that "there is a statistical probability that some of [its] members are threatened with concrete injury") (quoting *Summers*, 555 U.S. at 497); App. 18a (concurring opinion) ("FASORP has not

identified a member who has, or will, submit articles to the Law Review or seek teaching positions at the law school. Accordingly, FASORP has failed to establish that it has standing as an association to bring suit on behalf of its unidentified members."). That determination came after FASORP had been given multiple opportunities to amend its complaint, including the chance to amend after dismissal by the District Court, and declined to do so. And even then, the Second Circuit's dismissal was made without prejudice. This case bears no resemblance whatsoever to *Erickson*, or to any other instance of summary reversal.

b. The Court of Appeals Correctly Applied This Court's Jurisprudence to the Unique Facts of This Case

Even if case-specific error correction were a valid ground supporting this Court's review, there is no error to correct—let alone an error significant enough to warrant summary reversal. *See Tolan*, 572 U.S. at 659 (intervention by summary reversal required solely because, unlike here, opinion below reflected a "clear misapprehension" of precedents); Richard Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691 (2020) ("The *Tolan* majority's explanation matches what has become the standard account, that summary reversals are reserved for 'clearly erroneous' decisions.") Before the District Court, FASORP was unwilling or unable to offer anything but the most nebulous allegations supporting standing, even though FASORP is in the sole possession of such facts, and even though it was given multiple opportunities to supplement its allegations.

It is no surprise—let alone error warranting summary reversal by this Court—that the panel unanimously agreed that FASORP failed to plausibly allege standing.

This Court's standing doctrine is clear and well-developed. In *Summers*, environmental organizations sought to enjoin the United States Forest Service from exempting certain agency decisions from the notice, comment, and appeals process. *See* 555 U.S. at 490. In an opinion by Justice Scalia, this Court held that the plaintiff organization lacked standing because it failed "to make *specific allegations establishing that at least one identified member* had suffered or would suffer harm." *Id.* at 498 (emphasis added); *see id.* at 499 ("[T]he Court has required plaintiffs claiming organizational standing to *identify members who have suffered the requisite harm*—surely not a difficult task here[.]") (emphasis added).

Here, the Court of Appeals correctly concluded that the FAC was properly dismissed because FASORP failed to plausibly allege that the organization includes *any* member who has suffered the requisite harm. The court below did not suggest that FASORP must establish the same level of proof required by *Summers* at the pleading stage. Rather, Judge Cabranes' majority opinion correctly acknowledged that "standing pleadings 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" App. 13a (quoting *Lujan*, 504 U.S. at 561). Thus, FASORP needed to plausibly suggest that it could identify "members who

have suffered the requisite harm." *Summers*, 555 U.S. at 499; *see Iqbal*, 556 U.S. at 680 (on motion to dismiss, the court considers the "well-pleaded, nonconclusory factual allegation[s]" and determines whether they "plausib[ly] suggest" plaintiff can meet its burden of proof). This *should not have been difficult*—after all, the relevant allegations concern FASORP's own purported members.

FASORP did not meet that standard, liberal as it is. FASORP's sole allegations describing its membership are that the organization includes "faculty members or legal scholars who have submitted articles" to the Law Review and "intend" to do so in the future, App. 51a, ¶ 42, and "individuals who sought and applied for . . . teaching positions at [the Law School] and intend to do so again in the future, or remain potential candidates . . . without any need to formally apply," App. 52a, ¶ 45. The Second Circuit rightfully and unanimously concluded that those allegations do not "affirmatively and plausibly suggest that [FASORP] has standing to sue." App. 13a; *see* App. 14a (majority opinion); App. 18a (concurring opinion).

The court below also correctly concluded that, even if FASORP *had* adequately identified members of the organization, the FAC was correctly dismissed because "FASORP fails to demonstrate that those members have experienced an 'invasion of a legally protected interest' that is 'certainly impending' or that 'there is a substantial risk that the harm will occur.'" App. 14a (quoting *Lujan*, 504 U.S. at 560; *Susan B. Anthony List*, 573 U.S. at 158 (quotation marks omitted)).

Again, the majority's conclusion follows directly from this Court's well-settled guidance. In *Summers*, members of the plaintiff organization submitted affidavits asserting that they had visited many national forests in the past and planned to do so again in the future. *Id.* at 495. This Court determined those allegations were insufficient for standing because they did not assert the members' "firm intention" to visit the relevant forest locations in the future. *Id.* at 496. A "vague desire" to act in the future "is insufficient to satisfy" standing because "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* (quoting *Lujan*, 504 U.S. at 564).

This Court reached a similar conclusion in *Lujan*, in which a wildlife conservation organization sued the Secretary of the Interior, seeking injunctive and declaratory relief to protect its members' rights to observe wildlife whose lives would be endangered by a new regulation. 504 U.S. at 558-59. To support standing, plaintiffs' members alleged that they had previously observed endangered wildlife in their "traditional habitat[s]," and "intend[] to do so again." *Id.* at 563-64. Again in an opinion by Justice Scalia, this Court rejected those assertions as insufficient because "profession of an intent" to take action at some unspecified time in the future "is simply not enough" for standing. *Id.* at 564 (quotation marks omitted).

And in *Clapper*, plaintiffs—individuals "whose work, they allege, requires them to engage in sensitive

international communications with individuals who they believe are likely targets of [United States government] surveillance"—sought injunctive and declaratory relief to invalidate Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a. 568 U.S. at 401. This Court rejected plaintiffs' claim because their "speculative fear"—which relied on a "highly attenuated chain of possibilities" that the Government would successfully invoke its authority over § 1881 and intercept plaintiffs' communications—was insufficient to establish standing. *Id*. at 410.

The court below correctly concluded that FASORP failed to adequately allege "certainly impending" injury, relying on this Court's hornbook decisions in *Summers*, *Lujan*, and *Clapper*. *See* App. 14a-15a. Just as in *Summers* and *Lujan*, FASORP alleged only "some day intentions," missing any "'description of concrete plans' to apply for employment, submit an article, or of having submitted an article, that will or has been accepted for publication[.]" App. 15a (quoting *Summers*, 555 U.S. at 496). And as in *Clapper*, FASORP's allegations of harm were based on a "highly attenuated chain of possibilities"—specifically, that its members "will be injured—*i.e.*, discriminated against—because they '*intend*' to continue submitting their scholarship' and '*intend*' to apply for jobs at the Law School[.]" App. 14a-15a (quoting *Clapper*; FAC ¶¶ 42, 45).[5]

[5] FASORP repeatedly and mistakenly asserts that the Second Circuit "*must* accept the truth of the allegation[s]" concerning its membership and its members' plans for the future regardless of how conclusory those allegations are. Pet. at 20. As an initial matter, FASORP overlooks the fact that only "well-pleaded,

The primary purpose of this Court's standing doctrine is to ensure the "proper—and properly limited—role of the courts in a democratic society" by requiring "federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Summers*, 555 U.S. at 492-93 (quotation marks omitted). Reversing the Second Circuit's decision would not only undermine that purpose and upend this Court's prior precedents, but would empower any association with a "generally available grievance" to obtain jurisdiction in federal court and subject a defendant to the costs and burdens of discovery regardless of whether the group has a single member who has suffered or will

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nonconclusory factual allegations" are accepted as true in determining whether a plaintiff has plausibly alleged entitlement to relief. *Iqbal*, 556 U.S. at 680. Thus, for example, FASORP's bald insistence that it is "certain" its members "*will face discrimination*," Pet. at 21, 23 (quoting App. 51a-52a), is not entitled to the presumption of truth, even at the pleading stage. *See Iqbal*, 556. U.S. at 679 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). More importantly, the relevant question is not whether the Second Circuit was required to accept as true that FASORP has members who "intend" to submit scholarship to the Law Review, App. 51a, ¶ 42, and "intend" to apply (or "remain potential candidates" without applying) to jobs at the Law School, App. 52a, ¶ 45, but rather whether those generic allegations of "'some day' intentions," *Summers*, 555 U.S. at 496—standing alone and without any additional detail—are sufficient to affirmatively and plausibly suggest that FASORP has standing under the Court's clear precedents. They are not.

suffer "actual or imminent" harm from the conduct complained of. *Lujan*, 504 U.S. at 560, 573.

While the Petition attempts to draw this Court's attention to the merits of the claims asserted in the FAC, those claims were not addressed by the Second Circuit and are irrelevant to the sole issue of standing.[6] The Second Circuit's decision, based exclusively on FASORP's failure to allege Article III standing, was the result of a correct and routine application of this Court's precedents to the unique facts of this case. If FASORP and its purported members truly have meritorious claims of discrimination, relief remains available through a complaint that cures the obvious deficiencies of the FAC. Instead, FASORP asks this Court to ignore decades of jurisprudence and summarily reverse. This Court should reject that invitation and deny the Petition.

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[6] In its Application to Extend Time to File a Petition for Writ of Certiorari, FASORP claimed that "[t]he issues in this case are similar to those in *Students for Fair Admission v. President and Fellows of Harvard College*, No. 20-1199," and suggested that if certiorari were granted in the *Harvard College* case, "this petition would present a plausible candidate for a hold request." But the only question presented by FASORP's Petition relates to standing. FASORP does not request a hold—indeed, it does not reference the *Harvard College* case at all—in the Petition. The Petition should not be held pending this Court's decision in the *Harvard College* case, because that case relates to this Court's substantive affirmative action jurisprudence, an issue that is irrelevant to this Petition. Nor should the Petition be granted and the case vacated and remanded to the Second Circuit for consideration of a decision in the *Harvard College* case, for the same reasons.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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