No. 21-707

In the
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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[December 16, 2022]

QUESTIONS PRESENTED

Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

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INTRODUCTION

The 14th Amendment's Equal Protection Clause echoes the words of the Nation's founding documents in saying that "no State shall … deny to any person … the equal protection of the laws." U.S. Const. amend. XIV, § 1. In the wake of the abolition of slavery, the Amendment attempted to integrate recently freed slaves into wider society by forbidding states from passing laws that treated them as second-class citizens.

This Court has never understood the Equal Protection Clause to forbid states from making any distinctions between persons. Rather, it has always understood that States may make reasonable and tailored distinctions in order to pursue valid interests.

However, recognizing the original intent of the Clause– to protect a minority group from the abuses of a hostile majority– this Court has always looked with special suspicion upon laws that specially disadvantage "discrete and insular minorities" who have no recourse to the political process. To these laws, this Court

has applied the most demanding standard in its Constitutional jurisprudence.

Indeed, in all but one instance, that the Court has applied strict scrutiny on account of the presence of a "suspect classification," the law in question had targeted a discrete and insular minority group.

Respondents ask that the Court overrule the exception to the rule. *Bakke*'s use of strict scrutiny to protect the majority is unprecedented and unjustified. Furthermore, *Bakke*'s exploitation of the Equal Protection Clause is antithetical to the history and purpose of the 14th Amendment.

SUMMARY OF ARGUMENT

Bakke's arguments justifying the application of strict scrutiny to the context of race-conscious college admissions are unconvincing. Overruling *Bakke* would also not upset any legitimate reliance interests, as admissions policies that formerly survived *Bakke*'s strict scrutiny regime would *a fortiorari* survive Respondent's proposed alternatives. Nor would any other areas of the law be negatively

affected, as *Bakke* and its progeny are unique in finding a suspect classification that disadvantages a majority group.

Respondent proposes that this Court instead apply intermediate scrutiny to most race-conscious admissions policies. The limited use of race in admissions to further the interest of diversity in higher education fulfills intermediate scrutiny's requirement of furthering an important government interest by means substantially related to that interest.

Alternatively, this Court may opt to abandon means-ends scrutiny altogether, as it did recently in *Bruen* and use history-and-tradition instead. This standard also supports a ruling in favor of Respondent. An examination of Reconstruction-era history shows that the same government that passed the 14th amendment gave several special benefits on the basis of race to benefit *minorities*, such as in the establishment of freedman's bureaus, which provided economic and legal support to recently freed slaves.

Lastly, even if the Court is not inclined to

overrule *Bakke*, it should affirm. The limited use of race in college admissions is a narrowly tailored means to the achievement of the compelling government interest of diversity in higher admissions, which studies show is crucial to producing better, most notably, in the military, making the issue one of national security.

ARGUMENT

I. *Bakke*'s Decision to Apply Strict Scrutiny to Race-Conscious Admissions is Erroneous and Should be Overruled.

Bakke's application of strict scrutiny was grievously erroneous. This Court's stare decisis factors also weigh in favor of overruling.

Parallels to this Court's decision in *Craig v. Boren* support Respondent's view that intermediate scrutiny is the most appropriate level of scrutiny in this case. Alternatively, this Court should move away from means-ends scrutiny and adopt a standard similar to that in *New York Rifle and Pistol Association v. Bruen*.

A. This Court Should Apply Intermediate Scrutiny or a Standard Based in History and Tradition.

1. Intermediate Scrutiny Would Be Consistent with This Court's Other Precedents.

This Court's precedents regarding the application of strict scrutiny to laws that classify based on race support Respondent's view.

This Court applies strict scrutiny to laws for two reasons: if a law threatens a "fundamental human right" (*United States v. Carolene Products Company*, 304 U.S. 144 (1938), *Vacco v. Quill*, 521 U.S. 793 (1997)), or if it involves a "suspect classification" (*Hirabayashi v. United States*, 320 U.S. 81 (1943), *Graham v. Richardson*, 403 U.S. 365 (1971)) Apart from *Bakke*, in every single instance in which this Court applied strict scrutiny on the basis of a suspect classification, the group that was disadvantaged was a "discrete and insular minority." 304 U.S.

This Court's Equal Protection jurisprudence regarding sex discrimination is instruct-

ive. Although Court's initial ruling in *Frontiero v. Richardson* "that classifications based upon sex… are inherently suspect, and must therefore be subjected to strict judicial scrutiny," *Frontiero v. Richardson*, 411 U.S. 677 (1973) appears to be a counterexample to the claim that strict scrutiny applies *only* to laws disadvantaging discrete and insular minorities, this Court in *Craig v. Boren* clarified that "previous cases," including *Frontiero*, merely "establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190 (1976)

Further, even if *Frontiero* did constitute an exception to the rule that only classifications which discriminate against minorities can be considered suspect, it does not help Petitioner. After all, *Frontiero* cited the long history of legal discrimination against women as the reason for the application of strict scrutiny. This is not the case in the context of most race-conscious admissions programs, where unlike

Frontiero, the disadvantaged group does not have a history of being discriminated against.

Craig v. Boren, which established *intermediate scrutiny* as the appropriate level of scruti-ny, is the closest parallel to the case before this Court today. In *Craig*, as in the case of most race-conscious admissions policies, the group that was disadvantaged (men between the ages of 18 and 21 in *Craig*) were neither a politically powerless minority nor a group historically discriminated against.

Petitioner may argue that this Court should treat race discrimination more harshly than other forms of discrimination, *ceteris paribus*, because the 14th amendment was written with racial discrimination in mind specifically. But this is an arbitrary level of resolution at which to interpret the 14th amendment. On one hand, we could read the amendment broadly, as this Court did in *Reed v. Reed*, and read the 14th amendment as "deny to States the power to legislate that different treatment be accorded to persons placed by a statute … on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71 (1971)

On another hand, we could read the amendment as a specific response to a specific historical event, as this Court in *the Slaughterhouse Cases*, when it wrote that the amendment's "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from." *Slaughterhouse Cases*, 83 U.S. 36 (1872) To ignore historical context and universalize only halfway, in order to see the meaning of the 14th amendment as abstractly against racial discrimination, without reference to the specific racial injustice it was attempting to address is an unfair interpretation of the amendment.

Petitioner may alternatively argue that the real biological differences between the sexes make sex discrimination different from race discrimination. But these differences are only relevant from an equal protection perspective insofar as they make it more likely that a state would have a rational basis upon which to make distinctions between the sexes. That is, the difference between the sexes may be a

reason why sex-based discrimination claims will more often pass intermediate scrutiny than race-based discrimination claims, but it does not mean that sex-based discrimination claims should be examined with a lower bar.

If this Court were to adopt a standard of intermediate scrutiny, there would be no good argument to disallow all forms of race-conscious admissions, as Petitioner asks. There are many important government interests that are furthered by these policies - most notably diversity in the student body. This Court in *Grutter* ruled, correctly, as Respondent will later defend, that "diversity ... furthers a compelling state interest". *Grutter v. Bollinger*, 539 U.S. 306 (2003) *A fortiorari* it is an *important* government interest, as required by intermediate scrutiny.

Further, the use of race is clearly substantially related to the important government interest of promoting diversity. All aspects of an applicant, including race, are important pieces of information to college admissions offices seeking to form a student body that is diverse in many different respects.

2. Alternatively, This Court Should Abandon Tiered Scrutiny Altogether as it Did in *Bruen*.

The severe divergence between this Court's jurisprudence and the intentions of the framers of the 14th amendment may justify doing away with tiered scrutiny altogether as it did recently in *Bruen*, when it "did not engage in means-end scrutiny when resolving the constitutional question, [but instead]... focused on the historically unprecedented nature of the decision in question." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ___ (2022)

Likewise, the historically unprecedented nature of *Bakke*'s application of strict scrutiny to the race-conscious admissions context may impel this Court to replace means-ends scrutiny with a standard wherein this Court, as it did in *Bruen*, "assesses the lawfulness of" race-conscious admissions policies "by scrutinizing whether it comported with history and tradition." 597 U.S.

An analysis of the history clearly shows that neither *Bakke*'s application of strict scrutiny nor Petitioner's view that race-conscious admissions are *always* unconstitutional are far from the views of the framers of the constitution.

Legislation enacted by Congress in the 1860s and 1870s reaffirms our answer that race-conscious laws are constitutional. These laws demonstrate historical precedent for explicitly race-conscious laws not only being permitted by the 14th amendment but being promoted by the very same people who wrote the amendment.

The Civil Rights Act of 1870, which the 14th amendment was directly derived from, is instructive. It reads that "all persons within the jurisdiction of the United States shall have the same right[s] . . . as [are] enjoyed by white citizens." Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140 (1870)

The specific pointedness of the act had the effect of allowing race-conscious policies that benefitted the historically marginalized minority group. Indeed, Senator Trumbull, who was

instrumental to the crafting of the Reconstruction era amendments, said that "[the law is]… for the relief of the persons who need the relief, not for the relief of those who have the right already." Cong. Globe, 39th Cong., 1st Sess. 1758 (1866)

For example, the Freedmen's Bureau act directly gave benefits to black individuals in social and educational contexts. Congress, for example, created schools specifically for black people, called freedman's schools, monitored labor deals between black people and other races and distributed resources to black people in a targeted manner.

Indeed, many of the arguments which the opponents of the Freedmen's Bureau made are echoed by the Petitioner today. President Johnson, for instance, who vetoed the bill, accused it of being "founded for one class or color of our people more than another." 6 A Compilation of the Messages and Papers of the Presidents, 1789-1902 408 (James Richardson ed., 1907) But the Framers of the Freedmen's Bureau, who would go on to frame the 14th amendment itself, were strongly opposed to

this line of reasoning. They responded that "the very object of the bill is to break down discrimination between whites and blacks" and to make possible "the amelioration of the condition of the colored people." Cong. Globe, 39th Cong., 1st Sess. 632 (1866)

It is very clear what the intentions of the framers of the 14th amendment were– they specifically meant to address racist laws disadvantaging historically marginalized black individuals in an attempt to reintegrate them into society. They would be appalled to see their amendment misunderstood to ban race-conscious admissions policies, meant to help the same historically marginalized individuals and prevent systemic racism from continuing into the future.

Petitioner may dispute, as *amicus* does, that the framers universally agreed on an interpretation of the 14th amendment which supported race-conscious measures to help disadvantaged and powerless minority groups. *Amicus* cites Charles Sumner's private comments that "equality is where all are alike" and that "[A]ny rule excluding a man on account of his

color is an indignity, an insult, and a wrong." Cong. Globe, 42d Cong., 2d Sess. 242 (1872)

Even if we accepted that this comment was representative of the founding era's beliefs on the 14th amendment, it does not prove Petitioner's point. Never is there any mention or suggestion that Sumner was speaking of anyone but the African-Americans whose rights and reintegration into society he fought so hard for, and certainly no suggestion that Sumner was saying these things to oppose policies that were meant to create diversity and opportunities for marginalized minorities.

Further, it was Sumner himself who chaired the committee which started the Freedman's Bureau. Most glaringly, when Senator James Grimes commented that "if [African-Americans] are free men, …, let them stand as free men," arguing against racially-targeted government assistance, Sumner responded that "the curse of slavery is still upon them" and that therefore the government had a responsibility to enact these policies. (US Senate, *Freedmen's Bureau Acts of 1865 and 1866*)

It is clear that Sumner agreed with his colleagues on the purpose of the 14th amendment- to integrate African-Americans, a historically marginalized and powerless group, into broader society.

Of course, the intention of the framers is not dispositive, but is an important factor we must consider when interpreting the 14th amendment. This court has failed to consider this intention in *Bakke*, and therefore, we ask that *Bakke* itself be overruled.

And furthermore, although no particular policy is before this Court today, it is clear that this Court will find that most, if not all race-conscious admissions policies have a great deal of historical precedent in the framing era. At the very least, Petitioner's claim that *no* race-conscious admissions policies are allowed under the constitution will prove clearly erroneous.

B. *Bakke*'s Own Reasoning for Applying Strict Scrutiny is Not Compelling.

1. The History and Purpose of the 14th Amendment Do Not Support *Bakke*'s View.

Bakke's claims that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination" *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) and that "This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history."

But an actual examination of the historical evidence, as we have previously done, shows that *Bakke*'s view, which does not distinguish discrimination that helps powerless and marginalized from discrimination that hurts the powerless and marginalized, has no basis in the framing-era history of the 14th amendment.

2. Respondent's Proposal to Apply Different Levels of Scrutiny to Minorities and Majorities is Not a Violation of Equal Protection and is Consistent with This Court's Precedents.

Bakke argues that using different standards of scrutiny for different racial groups is a violation of the Equal Protection clause that tiered scrutiny is meant to apply, writing that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." 438 U.S. But this Court's jurisprudence has never treated all groups of individuals equally, without any distinctions, nor is it required to do so by the 14th amendment.

A hypothetical law that discriminates against both racial minority applicants and women is illustrative to this point. Although both racial minority men and non-minority women are both adversely affected by the law, this Court's jurisprudence allows for a different standard for the sex-based discrimination (intermediate scrutiny) and the race-based discrimination (strict scrutiny). This is not because one form of discrimination is less deleterious to justice, but because racial minorities, unlike women, are "discrete and insular

minorities" who have "no recourse to the political system."

3. The "Intrinsic Odiousness" of Racial Classifications Does Not Justify Applying Strict Scrutiny.

Bakke also argues that strict scrutiny should apply to the context of race-conscious admissions by deeming all policies that distinguish based on race "by their very nature, odious to a free people." 438 U.S.

This argument misunderstands the role of tiered scrutiny in this Court's jurisprudence. It is precisely through tiered scrutiny, after all, that this Court judges whether or not a racial classification is indeed "invidious and odious."

It is true that this country's laws have discriminated against and marginalized groups of people on the basis of race throughout history– and that this discrimina-tion was indeed "odious to a free people." This historical reality may justify giving heightened scrutiny to laws which discriminate *against racial minorities*, but it does not justify the

application of the highest level of scrutiny in the United States legal system to programs meant to *prevent* racial injustice from occurring in the future by exposing the future leaders of the nation to a broad variety of backgrounds, including a broad variety of racial backgrounds and experiences.

Furthermore, *Hirabayashi*, which this Court cited in *Bakke*, found that the racial classification in question (Japanese Internment) passed strict scrutiny and was constitutional. Of course, *Hirabayashi*'s conclusion was erroneous, but it clarifies this Court's jurisprudence. Not all racial classifications are *prima facie* unconstitutional, and we have tiered scrutiny to distinguish between constitutional and unconstitutional distinctions between persons. And although unjust racial discrimination is certainly odious and contrary to a free people, so is unjust discrimination based on sex and other similarly immutable characteristics, most of which do not receive strict scrutiny.

As Respondent has argued earlier, this Court's jurisprudence *does not* tie the *level of*

scrutiny used in an Equal protection analysis to the "intrinsic odiousness" of a distinction, but rather to the political power and minority status of the group a distinction negatively affects, as well as the nation's historical treatment of that group.

C. This Court's *Stare Decisis* Factors Favor Overruling *Bakke*.

This Court has always abided by the principle of *stare decisis*. By definition, *stare decisis* requires that parties asking this Court to overrule previous precedent must have a reason above and beyond mere error. This Court has historically considered a number of factors when determining whether or not to overrule precedent.

In *Dobbs v. Jackson Woman's Health*, this Court set out a list of considerations: "[t]he nature of the error," "[t]he quality of its reasoning," "[e]ffect on other areas of the law," and "[r]eliance interests." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022) Respondent has already proven that *Bakke* was not only erroneous,

and grievously so, but that its reasoning was unconvincing and unmoored from this Court's jurisprudence.

Respondent will further prove that the other *stare decisis* factors strongly favor overruling.

1. *Bakke*'s reliance interests would not be affected by a ruling in favor of Respondent.

Bakke has many legitimate and important reliance interests. Most notably, *Bakke*'s progeny, *Grutter*, specifically protects race-conscious admissions programs. Hundreds of public universities have relied on *Grutter*'s precedent for decades in order to carefully craft policies that follow this Court's guidelines while furthering the important goals of diversity and academic excellence.

But overturning *Bakke* in favor of either of Respondent's alternatives would only strengthen these reliance interests. After all, no school will be forced to change its standards under either of Respondent's proposed alternatives, as the current strict scrutiny standard

is far more demanding. Rather, schools will have the option to continue with their current policies, or slightly modify them to greater promote diversity within the Constitution's limits as laid down by this Court.

2. Overruling *Bakke* would not affect other areas of the law.

As Respondent has argued, *Bakke* is in direct contradiction to the rest of Court's tiered-scrutiny jurisprudence. Therefore, overruling it would have no negative effects on other aspects of the law. On the contrary, overruling *Bakke* will make this Court's tiered scrutiny jurisprudence *more* consistent and logical.

II. Even If it Does Not Overrule *Bakke*, This Court Should Still Affirm.

If this Court upholds *Bakke*, it should uphold *Grutter* also, as *Grutter* correctly applies *Bakke*'s standard and engenders significant reliance interests.

1. *Grutter* Correctly Identified Diversity as a Compelling State Interest.

As mentioned by various *amici*, and by this Court in *Grutter*, diversity in higher admissions is a compelling state interest. This is clearest in the context of the armed forces, whose lack of diversity among the officer classes could lead to a major national security crisis.

If the Court overrules *Grutter*, the military will have a particularly difficult time recruiting a diverse group of military leaders to lead an already greatly diverse group of enlisted soldiers, which would fracture camaraderie and be a threat to national security.

Indeed, the Department of Defense in a recent memo emphasized that having a fighting force that is diverse in all respects, including race, is "integral to overall readiness and mission accomplishment" and that diversity is a "strategic imperative" that is "essential to achieving a mission-ready fighting force in the 21st Century." Department of Defense (DoD), Department of Defense Board

on Diversity and Inclusion Report: Recommendations To Improve Racial and Eth-nic Diversity and Inclusion in the U.S. Military 3 (2020) (D&I Report);

The nation's history shows that the disparity in racial diversity between officers and enlisted soldiers can be deadly. In the Vietnam War, for instance, racial tensions seriously jeopardized the war effort because the officer class was almost exclusively white, while the enlisted soldiers were highly diverse. The military's own report showed that "lack of diversity in military leadership" led to "perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders" and delegitimized the military. Several fights broke out between black and white soldiers during the war, injuring dozens, killing several, and severely diminishing morale.

Because commissioned officers generally must have a Bachelor's degree from a University, diversity in higher education is crucial to diversity in the group of individuals who can and will become the military leaders of the future. Over 80% of these leaders come from

civilian schools, like the University of North Carolina.

Studies show that the proportion of black students at elite institutions could plummet by up to one-half in the absence of race-conscious admissions policies. (Shafer, The Case for Affirmative Action, Usable Knowledge) This means that in the absence of race-conscious admissions policies, the government would have a vastly smaller pool from which to draw a diverse group of future military leaders.

2. Overruling *Grutter* would upset many substantial and legitimate reliance interests.

As we mentioned above, hundreds of public universities rely on *Grutter*'s precedent for decades in order to carefully craft policies that follow this Court's guidelines while furthering the important goals of diversity and academic excellence.

But unlike Respondent, Petitioner's proposal is to overrule *Grutter* without a replacement that would similarly protect the reliance

interests of these institutions. On the contrary, schools would be forced to abandon academic excellence or campus diversity and rapidly shift to a suboptimal admissions policy.

CONCLUSION

Bakke should be overruled and replaced with intermediate scrutiny or a history-and-tradition standard, else, the opinion below should be affirmed.

Respectfully submitted,

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[December 16, 2022]