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 PETITIONER

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QUESTION 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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JURISDICTION

The Middle District of North Carolina's final judgment was entered on November 4, 2021. SFFA timely petitioned for certiorari before judgment on November 11, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1) and §2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 601 of Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

SUMMARY OF ARGUMENT

As this Court wrote in *Parents Involved in Community Schools v. Seattle School District No. 1,* "The only way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Affirmative action is discrimination based on race, and the University of North Carolina's policy is unconstitutional under the Fourteenth Amendment. Affirmative action is supported neither by history nor case law.

There is no historical justification for affirmative action. Although UNC has cited historical laws that appear to be race-based benefits to minorities, they are not. Almost all historical laws which were truly based on race were harmful to minorities and unconstitutional. Thus, a historical justification of affirmative action fails.

Justification based on case law also fails. This Court's ruling in *Brown v. Board of Education* rejected "any authority…to use race as a factor in affording educational opportunities." This conflicts with the Court's holding in *Grutter v. Bollinger,* which allows schools to use affirmative action to admit students of certain races at higher rates in order to enroll a "critical mass" of these students. This Court should overrule *Grutter,* because it fails the criteria in *Dobbs v. Jackson Women's Health Organization* that help determine whether this Court should follow *stare decisis.*

Finally, UNC's affirmative-action policies fail strict scrutiny as such policies may only be constitutional when no other policy will achieve the

same benefit of diversity. Evidence from states that ban affirmative action demonstrates that diversity can be achieved without basing admissions decisions on race.

ARGUMENT

I. The history of the 14th Amendment does not support race-based benefits.

Two types of laws inform the analysis of affirmative-action policies: historical laws that appear to provide a race-based benefit to minorities, and laws that harmed minorities. Both categories of law show that affirmative action is unconstitutional.

UNC cites Reconstruction-era laws that appear to benefit African Americans as historical support for modern-day affirmative-action policies. In context, however, these laws were designed to remedy past discrimination in a race-neutral way. Even where the laws provided specific benefits to African Americans, those benefits were already available to white Americans. Concurrent laws that harmed minorities by enforcing segregation were later ruled unconstitutional. Laws that benefited African Americans were not race-based, and laws that harmed African Americans were unconstitutional; thus, these laws do not justify race-based affirmative action.

A. The Freedmen's Bureau Acts were not race-based.

Although the Freedmen's Bureau Acts are

often cited as historical support for affirmative action, these acts explicitly provided benefits to "freedmen"—not to African Americans more broadly, making them race-neutral. Two Freedmen's Bureau Acts were passed: one in 1865 and the second in 1866. The first Act supplied "provisions, clothing, and fuel . . . needful for the immediate and temporary shelter and supply of destitute and suffering refugees" to freedmen, their wives and children, and war refugees. Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507, 507. The second Act expanded the previous one's aid to war refugees and freedmen, prohibited racial discrimination, and promoted non-discriminatory state education. One section confirms land purchases to African-American families. Even with this explicit reference to race, and the fact that all freedmen were black, the Freedmen's Bureau Acts were not race-based. While all freedmen were black, not all black people were freedmen. These laws dealt with former slaves, working to aid them in their new lives. They also provided for war refugees who were not necessarily black. The acts were not designed to provide benefits to all members of one race.

The Freedmen's Bureau Acts provided benefits based on an individual's prior condition of servitude. Both Acts were "undo[ing] the effects of past discrimination in [a way] that do[es] not involve classification by race," despite their "racially disproportionate impact." *City of Richmond v. J. A. Croson Co.* 488 U.S. 469 (1989) at 526 (Scalia, J., concurring). These Acts gave "identified victim[s] of state discrimination that which [they] were wrongfully denied." *Id*. Rather than raising one race

above another, these Acts worked analogously to "giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment." *Id*. This "is worlds apart from [a] system . . . in which those to be disadvantaged are identified solely by race." *Id*. In contrast, affirmative-action policies provide benefits based on whether applicants check a box identifying them as part of a certain race. Instead of aiding specific non-racial groups—such as the former slaves and war refugees aided by the Freedmen's Bureau Acts—affirmative-action policies aid college applicants purely because of their race.

B. Historical laws that benefited minorities did so in a race-neutral way.

There are five commonly cited laws that appear to be race-based. But these laws, like the Freedmen's Bureau Acts, do not provide sufficient justification for modern-day affirmative-action policies.

In 1866, Congress passed a law donating federal land "for sole use of schools for colored children" in the District of Columbia. Act of July 28, 1866, ch. 308, 14 Stat. 343. This law was neither discriminatory nor beneficial to one race over another. Prior to 1862, "public schools in the District were limited to white children." Rappaport, *The Colorblind Constitution*, 72 Notre Dame L. Rev. 71 (2013). While *Brown* would later deem all segregated schools unconstitutional, 347 U.S. 483, this law

created schools for black students in areas where schools were already available to white students. Despite glaring differences in the quality of education between white and black schools, this law did not intend to offer preferential treatment to one racial group; rather, it helped ensure that all citizens could access ostensibly equal services.

Another 1866 act gave funds to the National Association for the Relief of Destitute Colored Women and Children. This was a private institution that housed 64 former slaves, mostly children. Although the name of the organization suggests a race-based benefit, the purpose of the organization was to benefit "former slaves" Rappaport, *supra*, at 103. Again, this provision of funds achieved a racially disproportionate result in a race-neutral way.

The third law comes from 1867 and provided money for destitute "colored" people in the District of Columbia. While it was argued that racial language should be removed from the law as there were destitute white people as well, the law targeted areas of the city that were filled almost exclusively with former slaves. Senator Morril described their situation: "They are existing here in a state of almost utter destitution, inconceivable suffering, and want." Senator Morril, CONG. GLOBE, 39th Cong., 1st Sess, 1507 (1866). He added, "The hardship of their condition is increased by the fact that the city does not feel under the slightest obligation whatever to provide for them. There are no poor white people in this city in that condition. The cases are not parallel." *Id.* at 1508. This law did not benefit one race at the

expense of another; instead, it worked to remedy poverty worsened by the lack of support offered to black citizens by the District of Columbia city government, where assistance was already available to white citizens. Rather than providing race-based benefits, this law had the race-neutral purpose of alleviating poverty by ensuring all citizens could access the same resources.

Also in 1866, Congress mandated that chaplains instruct black troops "in the common English branches of education." Act of July 28, 1866, ch. 299, 14 Stat. 337. Chaplains for white troops were not legally required to provide similar education, although it was common practice for them to do so. At this time, Congress required all military bases to provide schools; this law required chaplains to educate black soldiers when they were not on army bases. Because many chaplains were already educating white soldiers, this law required that they do the same for black soldiers.

Lawmakers were likely "concerned that the black soldiers would not receive education from the" existing schools on military bases. Rappaport, *supra*, at 109. "By requiring that the chaplains for the black soldiers provide education, Congress would have ensured that the black soldiers would have been taught by the chaplains for their regiments." *Id.* Rather than providing additional benefits, this law ensured that all soldiers received comparable education. Furthermore, the situation on military bases was unique: "there might have seemed to be little point to avoiding racial distinctions given the

existing racial segregation and exclusion in the armed services." *Id.* at 110. Despite its race-based language, this law did not create additional racial benefits.

The final law benefiting black people was an 1866 act setting price controls on the "amount that could be paid to agents who helped black servicemen secure bounties, pensions, and other payments that they were due." Act of July 28, 1866, ch. 299, 14 Stat. 367–68 (1866). While this law does appear to provide racial benefits, those benefits are afforded under "significantly narrower grounds than the critics suggest." Rappaport, *supra,* at 102. It did not offer white servicemen the same benefits, perhaps because Congress believed black soldiers were more likely to be taken advantage of. Rappaport examines the cost-benefit analysis of these laws for white and black soldiers and makes a reasonable argument that these laws, if applied to white soldiers, would not have provided the same benefit. The statute "may have been based on the greater exploitation of black servicemen." Rappaport, *supra,* at 110. Thus, the price controls, which might prevent soldiers from hiring agents for more complex cases that would require greater compensation, could be detrimental to soldiers who were not being exploited. Assuming that fewer white soldiers than black soldiers were being exploited, these price controls might have been harmful overall if applied to white soldiers. Rappaport, *supra,* at 111. While the law itself was race-based, there is a reasonable argument that did not provide an undue benefit to black soldiers, and that it would not have helped white soldiers.

Furthermore, this law, though it benefitted black soldiers, did not harm soldiers of other races. Unlike in college admissions, where admitting a student because of their race denies a seat to a more-qualified applicant, limiting the price that agents could charge when assisting black soldiers does not deny assistance to white soldiers. Regardless of whether this law was truly race-based, this law alone is not sufficient evidence to show that race-based affirmative action is constitutional.

The Freedmen's Bureau Acts and these five laws are not a sufficient historical justification for race-based affirmative action. Laws that are racially neutral, but result in a disproportionate impact, may be permissible—but laws giving one race an advantage are not.

C. Race-based laws harming minorities were unconstitutional.

The majority of race-based laws harmed minorities by enforcing segregation and were unconstitutional. There are three main types of Congressional segregation laws.

The first type is federal school segregation, which occurred in the District of Columbia. Prior to 1862, D.C. had public schools that only served white students. Black students were forced to rely on charitable private schools. In 1862, Congress required the district to create a school system for black students. Act of May 21, 1862, ch. 83, 12 Stat. 407. Congress did not mandate a segregated school system but also did not ban it. When the law was revised

twice in later years, Congress failed to add a section banning the segregation of these schools, implying they viewed segregation as permissible by local governments. *Id.*

The second type of law is military segregation. In 1866, Congress passed military legislation relying on the assumption that, unless specifically allowed, black people were not permitted in the armed forces. Act of Jul. 28, 1866, ch. 299, 14 Stat. 332. Therefore, Congress specifically established four separate units of infantry and two separate units of cavalry for black soldiers. Black soldiers were excluded from military roles including those in the artillery, corps of engineers, ordinance corps, and signal corps. *Id.*

The final category of relevant law is naturalization laws. Prior to 1870, only white immigrants could become naturalized citizens. After 1870, black immigrants, but not Chinese immigrants, could become naturalized citizens. Act of July 14, 1870. Sec. 3.

In 1954, this Court ruled that "such segregation is a denial of the equal protection of the laws," in *Brown v. Board of Education,* 347 U.S. 483, 486 (1954). *Bolling v. Sharpe* expanded this decision to the federal government, finding, "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U.S. 497, 500 (1954).

There are no constitutional race-based laws in the historical record. Thus, affirmative action cannot be justified on historical footing.

II. Based on the factors analyzed in *Dobbs v. Jackson Women's Health Organization,* this Court should overrule *Grutter v. Bollinger.*

Despite a lack of historical justification for affirmative-action policies, this Court permitted affirmative action in *Grutter v. Bollinger.* 539 U.S. 394. (2003). *Grutter* was wrongly decided, and this Court should overrule it. *Grutter* sanctioned a "narrowly tailored" use of race in the admissions process "to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." 539 U.S. 394. (2003). Yet the Court's opinion in *Grutter* is unclearly reasoned and unworkable, and UNC fails to follow its holding.

Though the principle of *stare decisis* rightly makes this Court hesitant to overrule prior precedent, *stare decisis* is not "an inexorable command." *Franchise Tax Bd. of Cal. v. Hyatt,* 139 S.Cit 1485, 1499 (2019) (cleaned up). Additionally, *stare decisis* is "at its weakest when [this Court] interpret[s] the Constitution," as it does in *Grutter. Knick v. Twp. of Scott,* 139 S.Ct. 2162, 2177 (2019). In *Dobbs v. Jackson Women's Health Organization*, this Court laid out five criteria by which to analyze prior precedent: "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance." An analysis of all five factors supports

overruling *Grutter*.

A. The error in *Grutter* is egregiously wrong.

Because *Grutter* has no historical justification and because it is in direct conflict with *Brown v. Board of Education,* the error in *Grutter* is egregious. In *Brown,* this Court denied schools "any authority…to use race as a factor in affording educational opportunities." *Parents Involved,* 551 U.S. at 747 (plurality). This denial directly conflicts with the license *Grutter* gives schools to engage in race-based admissions that harm some students and benefit others based on their race alone. As Justice Roberts wrote in *Parents Involved,* "the only way to stop discriminating based on race is to stop discriminating based on race." *Id.* Regardless of the motives of those discriminating, making admissions decisions based on race is unconstitutional.

B. *Grutter's* reasoning is weak and inconsistent.

Grutter is internally contradictory. It relies on two conflicting assumptions: that policies can be designed to provide an admissions benefit to certain racial or ethnic groups, but that those policies will not harm other racial and ethnic groups. Any policy, however, that provides a race-based benefit to a certain group necessarily harms other groups. UNC acknowledges that an applicant's race is "often determinative" and that there are a "limited number of seats" available at the school. UNC.Pet.App.112; UNC.JA402. Giving a student of a certain race an admissions benefit conferred purely due to their race

means that a seat is denied to a better-qualified candidate—whatever that candidate's race. College admissions is a zero-sum game, and race-based admissions unconstitutionally determine the winners and losers.

SFFA's expert testified at trial that UNC applicants with the same "academic index" (a combination of test scores and GPA) but different races had widely different admissions rates. For out-of-state students, white students in the top decile have a 42% chance of admission; Asian American students a 53% chance. In contrast, black students in the top decile have a 73% chance of admission and Hispanic students have a 61% chance. The difference is even more dramatic in lower deciles: a black student in the fourth-highest decile has a higher chance of admission (58%) than a white or Asian student in the *highest* decile (42% and 53% respectively). UNC.JA1083.

Additionally, far from reducing stereotyping of students of different racial groups, during the admissions process, race-based admissions increases such stereotyping. Statements made by admissions officers at UNC demonstrate this. In online chat rooms, these officers made comments including:

- "If it is brown and above a 1300 [SAT], put them in for [the] merit/Excel [scholarship],"
- "[W]ith these URM…kids, I'm trying to at least give them the chance to compete even if their [extracurriculars] and essays are just average," and

- "perfect 2400 SAT All 5 on AP one B in 11th"
  "Brown?!"
  "Heck no. Asian"
  "Of course. Still impressive."

UNC.JA1244-51. Dividing students based on race leads to racial stereotyping in the admissions office, and the benefits that race-based admissions policies are designed to provide are nebulous at best. In *Grutter,* the court found that the "educational benefits" of racial diversity—including that such diversity allegedly "break[s] down racial stereotypes" and "prepa[es] students for an increasingly diverse workforce and society"—meet strict scrutiny. The two lines of reasoning that *Grutter* relies on cannot both be true: racial preferences cannot both improve diversity by using race as a proxy for outlook and opinions *and* break down stereotypes by showing that race is *not* a proxy for outlook and opinions. Furthermore, the Court provided no justification for why the nebulous educational benefits of diversity are a justification that meets strict scrutiny while protecting a child's best interests, *Parlmore v. Sidoti,* 466 U.S. 429 (1984), and remedying societal discrimination, *Shaw v. Hunt,* 517 U.S. 899, 909-10 (1996), are not.

C. *Grutter* is unworkable in practice.

Grutter requires schools to design policies to enroll a "critical mass" of minority students without defining what a "critical mass" means and without allowing schools to determine a "critical mass" on a numerical basis. This is incompatible with how admissions officers create an incoming class.

Justice O'Connor wrote in *Grutter* that the University of Michigan Law School has a "compelling interest in a diverse student body" because of the "educational benefits" of diversity, but that a system that assures "some specified percentage of a particular group merely because of its race or ethnic origin" would be "outright racial balancing" id and "patently unconstitutional." 539 U.S. 394. The Court in *Grutter* turned a blind eye to the Law School's hyper-focus on race—a focus that included "daily reports" showing the "racial and ethnic composition of the class"—and following *Grutter's* precedent would require this Court to do the same in sanctioning UNC's precise racial calibration. *Id.*

The race of applicants is a dominant factor throughout UNC's admissions process. At the time that SFFA sued UNC, the university used "core reports" and "core report comparisons" to closely analyze the racial makeup of the incoming class. These reports were sent to leadership daily and sent to staff biweekly, and they were discussed during staff meetings. They showed the incoming class's current racial composition and compared it to the prior year's statistics. UNC.JA1228-29.

Furthermore, UNC does not follow even the limited guidance that *Grutter* provides. Although the concept of a "critical mass" is reiterated throughout *Grutter,* UNC does not "discuss the concept of a 'critical mass' in its Admissions Office, has not determined if it has achieved a critical mass of underrepresented students, and has not defined the term." UNC.Pet.App.54-55. A UNC official testified that "I'm not even sure we would know what it [a

critical mass] is." UNC.JA401-2. Most egregiously, UNC ceased distributing "core reports" after SFFA sued, because "it wasn't confident in how others would interpret what [it was] doing." UNC. JA690-91. UNC admits students based on race to obtain a specific, consistent racial makeup of its incoming class—which directly violates *Grutter*.

In practice, admissions officers do not and cannot obtain a "critical mass" of students *without* attempting to admit "specified percentage[s]" of students from different racial and ethnic groups. The fact that UNC has not attempted to comply with *Grutter's* ruling demonstrates the ruling's unworkability.

D. *Grutter* is disruptive to other areas of law.

Grutter complicates the legal landscape of race-based laws. By allowing race-based practices in educational settings, *Grutter* opens the door to both racial preferences in other settings—such as the military—and educational preferences for other qualities—such as sexual orientation or gender identity. *Grutter* lowers the legal standard to which race-based laws must be held, which moves away from *Brown's* proscription against race-based educational decisions and decreases the resistance to race-based laws in other settings.

E. *Grutter* has generated no legitimate concrete reliance interests.

Under the Equal Protection Clause, no one has a legitimate interest in treating people differently based on their race. Therefore, *Grutter,* which allows

universities to do so, cannot have generated any legitimate reliance interests.

In *Nordlinger v. Hahn,* this Court found that "classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws." 505 U.S. 13 (1992). These reliance interests include residents' expectation of free busing in a "reorganized" school district, *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450 (1988), the expectation of "windfall" retirement benefits by individuals employed in the railroad industry, *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 178 (1980), and street vendors in long-term operation, *New Orleans v. Dukes,* 427 U.S. 297 (1976).

But schools that desire to continue making admissions decisions based on an applicant's race do not have a legitimate reliance interest in doing so—regardless of how complex it would be to change their admissions policies. Not only do a majority of Americans believe that colleges and universities should not consider race when making admissions decisions (74%, including 59% of African Americans and 68% of Hispanics, Gómez, *U.S. Public Continues to View Grades, Test Scores as Top Factors in College Admissions,* Pew Research Ctr. (Apr. 26, 2022), pewrsr.ch/3MB2vVa), but several states—including Michigan—have also expressly banned the use of race in admissions. Furthermore, *Grutter* itself contains a "termination point" that prevents universities from being able to rely on its provisions long-term: *Grutter* stated that "all race-conscious admissions" must have

a "termination point" because "their deviation from the norm of equal treatment" must serve "the goal of equality itself." 539 U.S. 394.

Yet UNC expressly ignores this part of the holding in *Grutter,* having never "set forth a proposed time period in which it believes it can end all race-conscious admissions practices." UNC.Pet.App.62. UNC instead believes that making admissions decisions based on race is essential to "treat[ing] students as whole people." UNC.JA.632. UNC's use of race in admissions is not a temporary policy; instead, it is a permanent—and unconstitutional—part of their admissions process.

Even if *Grutter* had generated legitimate reliance interests, those interests would not be enough to prevent this Court from overruling *Grutter*. Where racial classification is at stake, this court has not shied away from overruling precedent even when the new ruling would be difficult to implement. *E.g., Smith v. Allwright,* 321 U.S. 649, 664-65 (1944) (overruling *Grovey v. Townsend); Batson v, Kentucky,* 476 U.S 79, 95-96 (1986) (overruling *Swain v. Alabama); Trump v. Hawaii,* 138 S.Ct. 2392, 2423 (2018) (overruling *Korematsu).* In *Brown* itself, this Court recognized the "wide applicability" of the new ruling and the "considerable complexity" of enforcement. 347 U.S. at 495. Nevertheless, this Court has consistently overruled precedents that sanctioned racial classification regardless of the reliance interests they produced, and should do so in this case.

III. UNC's affirmative-action policy fails strict

scrutiny.

A. Race-based policies must be held to strict scrutiny.

Because affirmative action affects a protected class under the Fourteenth Amendment, "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling v. Sharpe,* 347 U.S. 483, 506. Race-based affirmative action must be held to the highest standard of scrutiny. As this Court found in *Fisher I,* "Strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013).

To satisfy strict scrutiny, "'a race-conscious admissions program …must 'remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" *Fisher I*, 570 U.S. at 309 (quoting *Grutter*, 539 U.S. at 334, 337). UNC's current admissions process defines students by their race, as evidenced in admissions officers' chat rooms:

- "If it is brown and above a 1300 [SAT], put them in for [the] merit/Excel [scholarship]," UNC.JA1244-51;
- "Still yes, give these brown babies a shot at these merit $$."

- "Stellar academics for a Native Amer/African Amer kid."; UNC.JA1242
- "I'm going through this trouble because this is a bi-racial (black/white) male."

UNC.JA1243. Rather than using race as the deciding factor between two equally qualified students, admissions officers at UNC admit and offer scholarship money to students whose SAT scores were much lower than average purely because of those students' race.

B. The states that have ended affirmative action demonstrate that race-neutral policies result in equal diversity.

As held in *Fisher I*, "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013). Several states have banned race-based admissions. Their levels of racial diversity have not suffered, showing that race-neutral alternatives can produce the educational benefits of diversity.

In 2012, Oklahoma passed an amendment to their state constitution which requires that "The state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of race, color, sex, ethnicity or national origin in the operation of public employment, public education or public contracting." OKLA. CONST. art. II, § 36A. Since 2012, black student enrollment has risen from just below 7% to 8.1%, Asian American enrollment from around 7.4% to 10.9%, and American Indian and Native Alaskan enrollment from approximately 9.4%

to over 10%. The University of Oklahoma is achieving the benefits of diversity of background, culture, and viewpoint without categorizing students by skin color. Institutional Research and Reporting, Annual Reports: FirstTime Freshman Analysis, University of Oklahoma, https://www.ou.edu/irr/data-center/annual-reports.

In 2000, 14.5% of the University of Michigan Law School's entering class identified as a minority. 539 U.S. at 320. In 2014, voters amended the Michigan constitution to ban affirmative action. The University of Michigan Law School entering class of 2023 was 18% minority. Michigan Law, 2023 Class Profile, https://www.law.umich.edu/prospectivestudents/Pages/classstatistics.aspx. Just as in Oklahoma, banning race-based admissions did not cause racial diversity to decrease at the law school.

Not only Oklahoma and Michigan but also states such as Texas, California and others have banned race-based admissions without significant drops in diversity. Although the principle of federalism allows universities to adopt different systems for admitting students, federalism does not give states license to violate the Fourteenth Amendment in the name of diversity. "If 'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,' then the university may not consider race." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013). (external citations omitted). In Oklahoma, Michigan, and other states universities have proven that the

benefits of diversity can be achieved without defining students by their race, and UNC has provided no compelling reason why similar processes would be unworkable in North Carolina.

CONCLUSION

"'[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.'" *Fisher I*, 570 U.S. at 316 (Thomas, J., concurring). Students of all races are complex people with complex backgrounds. Schools can achieve the educational benefits of diversity without reducing these students to their race.

We pray that this Court will reverse the decision of the lower court and overrule *Grutter v. Bollinger*.

Respectfully submitted,

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