`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/RESPONDENTS

WILLIAM BROWN
Counsel of Record
Dublin Christian Academy
106 Page Road
Dublin, NH 03444

ABIGAIL MOODY
Dublin Christian Academy
106 Page Road
Dublin, NH 03444

22 December 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

The University of North Carolina's use of race in admissions is consistent with the Equal Protection Clause in the Fourteenth Amendment. The 39th Congress' actions after enacting the Fourteenth Amendment show their comfortability with the idea of race-conscious legislation. Their use of race is narrowly tailored and holds up under strict scrutiny. They conduct a highly individualized review of each applicant that does not determine whether or not a student is eligible solely on the basis of race. Another factor to consider is that UNC's use of race in admissions is in order to promote educational diversity which flows from a diverse student body (*Bakke and Grutter*). Also, the Equal Protection Clause in the Fourteenth Amendment is intended to protect individuals, not groups. This coordinates with UNC conducting highly individualized reviews, and not just judging someone based on their race. UNC's use of race in its process of admissions is rooted in and consistent with the Equal Protection Clause of the Fourteenth Amendment. UNC's use of race-conscious admissions policies does not violate the holdings of *Brown,* but instead seeks to unify diverse peoples with the goal of creating a diverse student body, the true intentions of *Brown.*

ARGUMENTS

I. The Equal Protection Clause Does Not Prohibit Race-Conscious Affirmative Action.

According to the Petitioners, the Fourteenth Amendment and the Equal Protection Clause were written with the intent of prohibiting activities such as the use of race-conscious affirmative action in college admission policies. The Amendment was written in response to the Black Codes, legislation that militated against the equality that was guaranteed by the Thirteenth Amendment. The Black Codes intended to "confin[e] [Black people] to the bottom rung of the social ladder." Daniel C. Thompson, The Role of the Federal Courts in the Changing Status of Negroes Since World War II, 30 J. Negro Educ. 94, 95 (1961). After the Civil War, these laws intended to discriminate against Black people based on their skin color, not their previous state of enslavement.

The Petitioners fall short in realizing that not only would the Framers of the Fourteenth Amendment support UNC's use of race in college admissions, but they were the originators of affirmative action. The actions of the Framers of the Fourteenth Amendment reflect the true intentions of the Fourteenth Amendment. Legislation enacted by the Thirty-Ninth Congress in the 1860s and 70s was the first situation in which race-conscious affirmative action was used. Not only was it used, but it was passed by the same Congress that had originally

passed the Fourteenth Amendment. "The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection." Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 754 (1985). Legislation such as the 1866 Freedmen's Bureau Act and the Civil Rights Acts of 1866 and 1870 all aid in understanding the intentions of the Framers of the Fourteenth Amendment. Those who supported these Acts and the Fourteenth Amendment saw them as "consistent and complementary" to the Fourteenth Amendment. Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 785 (1985). (collecting legislator statements). Petitioners attempt to push off these Acts as not race specific but based on a previous state of enslavement. However, these Acts "were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites." Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 754 (1985).

The Freedmen's Bureau was one example of the Reconstruction Congress' actions to assist blacks. The implementation of the Bureau shows the 39th Congress' comfortability of race-conscious legislation. The Freedmen's Bureau "provided its charges with clothing, food, fuel, and medicine; it built, staffed, and operated their schools and hospitals; and it wrote their leases and labor contracts, rented them land,

and interceded in legal proceedings to protect their rights." Stephen Siegel, The Federal Government's Power to Enact Color-Conscious Laws, 92 Nw. U. L. Rev. 477, 559 (1998). This aid was directed toward previously enslaved blacks and white refugees. However, the aid was not distributed evenly among blacks and whites. The Bureau later found that "in practice most of the Bureau's programs applied only to freedmen." Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 761 (1985). The Bureau was charged with giving special assistance and protection to blacks. The Bureau was given the ability to help blacks in almost every aspect related to their newly won freedom, while the Bureau only assisted white refugees with enough aid to make them self-supporting. Another aspect of the Bureau was its educational benefits. While the Bureau originally offered educational support to children both "refugees and freedmen", the act later transitioned to helping freedmen alone. This Act also was the beginning of race-conscious affirmative action angeled towards educational diversity. This was one way educational opportunity for blacks was created during the Reconstruction period. The 39th Congress and passers of the Fourteenth Amendment saw it fit to pass legislation that gave disproportionate aid to different castes.

Another example of race-conscious legislation passed shortly after the ratification of the Thirteenth Amendment is the Civil Rights Acts of 1866 and 1870. These Acts, like the Fourteenth Amendment, were passed in response to the Black Codes. These

Acts limited the power of the states after many states had passed discriminatory laws against blacks. These Acts also instructed any non-white persons to be treated equally to a white person. Section 1 of the Civil Rights Act of 1866 provides that all persons "of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, to be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Ch. 31, 14 Stat. 27, 27 (1866) (emphasis added), codified as amended at 42 U.S.C. §§ 1981 and 1982. Section 2 of the Civil Right Act of 1866 provided that if any non-white was subjected to "different punishment . . . by reason of . . . color or race, than is prescribed for the punishment of white persons", they would be punished accordingly. Siegel, The Federal Government's Power to Enact ColorConscious Laws: An Originalist Inquiry, 92 Nw. U. L. Rev. 477, 563 (1998). Section 16 of The Civil Right Act of 1870 supports Section 1 of the 1866 Act providing that "all persons within the jurisdiction of the United States shall have the same right[s] . . . as [are] enjoyed by white citizens." This shows that the 39th Congress was yet again willing to acknowledge in legislative form that blacks specifically were disadvantaged, and that they were willing to pass legislation that was intended to benefit a specific disadvantaged group of persons. The 39th Congress saw race-conscious measures as

necessary to right the wrongs of the past.

II. Arguments Still Work in Modern Society

A. Although we live in a different society, the argument that race-conscious legislation is constitutional still holds true, although the argument may be formed slightly differently. "The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality postulate that [t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,î ante, at 40ñ41, is not sufficient to decide these cases. Fifty years of experience since Brown v. Board of Education, 347 U. S. 483 (1954), should teach us that the problem before us defies so easy a solution." Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007). This issue is much too complicated to just say that it needs to be gotten rid of and get rid of it. It is an issue that requires much more than that. We have seen that since Brown v. Board of Education, there has been much change, however many of the basic principles that were considered when the issue concerning race-conscious legislation occurred still ring true today. We have seen this the way to go about handling this issue has changed, but the answer is definitely not to just "get rid of discrimination on the basis of race" entirely. It is a complicated issue that requires a complicated solution, and parts of

that solution will stay the same over time, whereas others will change. "If the court overturns decades of settles precedent, it would force hundreds of institutions across the country to overhaul admissions policies developed in reliance on that precedent." Students for Fair Admissions v. University of North Carolina No. 21-707 U.S. 3 (2022). The precedents which are already in place do not violate the Fourteenth Amendment, and they also satisfy the decisions made in Brown v. Board of Education. There is not a good enough reason for the court to overturn these decades of precedent when institutions are following guidelines and their admissions processes hold up under strict scrutiny. Overturning precedent like this would lead to an upset of universities all over the country. Also, the things that these universities put in place of the use of narrowly tailored race may just make the situation worse. Universities, UNC especially, have sought out different ways to go about admissions without the use of race, and while these institutions are actively seeking solutions, a better solution has yet to be found. So although our society has changed, these decades of precedents cannot have a simple, black-and-white solution, and these precedents cannot just be overturned, causing chaos within universities and the country.

III. Framers of the Fourteenth Amendment Would Provide Aid to Anyone in Need

A. The Framers of the Fourteenth Amendment would look at each individual and their situation rather than just analyze large groups; therefore, they would have argued that those discriminated against should receive the necessary aid. "In writing the guarantee of the equal protection of the laws into the Constitution, the Framers of the Fourteenth Amendment established an all-encompassing guarantee of equality under the law in order to protect, among others, Black persons newly freed from enslavement, white Union sympathizers residing in the South, and Chinese immigrants in the West from state-sponsored discrimination. Report of the Joint Committee on Reconstruction at the First Session Thirty-Ninth Congress xiii (1866) ("[i]t was impossible to abandon [the newly freed slaves] without securing them their rights as free men and citizens"); Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) ("[t]he adoption of this amendment is essential to the protection of Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been at arms against them"); id. at 1263 ("white men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country"); id. at 1090 (arguing that "all persons, whether citizens or strangers within this land" should "have equal protection in every State in this Union in the rights of life and liberty and property"); Cong. Globe, 41st Cong., 2d Sess.

3658 (1870) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . . ; let them be protected by all the laws and the same laws that other men are."). As the text of the Equal Protection Clause makes." Respondent Brief on the Constitution Accountability Center, Page 5. The Equal Protection Clause was written during a time when the needs of newly freed slaves were in mind; however, the intent was so that anyone in that type of position could receive the help they need, especially in the area of education. 'The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, ß2. Because the Fourteenth Amendment ìprotect[s] persons, not groups,î all ìgovernmental action based on raceóa group classification long recognized as in most circumstances irrelevant and therefore prohibitedóshould be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.î Adarand Constructors, Inc. v. PeÒa, 515 U. S. 200, 227 (1995) (emphasis in original; internal quotation marks and citation omitted)." The Fourteenth Amendment does not protect groups of people, but rather individuals. The Fourteenth Amendment provides opportunity for individuals' situations to be looked at separately rather than just lumping certain races of people all into one big group. The Framers of the Fourteenth Amendment intended to protect individuals of

every race and did not intend to protect groups of only certain races.

IV. Affirmative Action is Not Needed in the Case of Sexual Orientation and Gender Identity

A. Affirmative action is a drastic response and gender identity and sexual orientation issues don't require this response. Justice O'Connor, in reference to *Bakke,* stated that "We acknowledge that ìthere are serious problems of justice connected with the idea of preference itself.î Bakke, 438 U. S., at 298 (opinion of Powell, J.)." The use of preference is a danger in itself. The use of preference should be reserved for drastic problems, such as the issue of race. You can't use a drastic response such as affirmative action to every problem. Affirmative action used in this context does not hold up under strict scrutiny. You can't use affirmative action to right problems that are already being quickly resolved. The issue of gender and sexual and gender orientation is not an issue to which a solution has already been found. The Respect for Marriage Act is an example of this. The Respect for Marriage Act was passed to recognize the validity of same-sex and interracial marriage. Another example of this is that universities are already extremely welcoming to individuals within the realm of issues dealing with gender identity and sexual orientation. There are also classes within universities dealing with these topics. The issues of sexual orientation and gender identity are already being solved. Those

arguing for gender identity and sexual orientation issues have already won. The debate is already over. There is no need to put measures in place for an issue that is already solved.

V. Affirmative Action is Consistent with the Ruling made in *Brown v. Bd. of Educ.*

A. The Petitioners fail to show the context and the reality presented in *Brown v. Bd. of Educ*. The harsh realities of forced racial segregation which demoralized and dehumanized Black persons are compared to the admission policies brought up in this case. The realities of racial segregation and dehumanization in question in *Brown* clearly made a mockery o the Fourteenth Amendment and to compare it to present-day admission policies is insulting to those who were victims throughout pre-*Brown* America. The question presented in *Brown v. Bd. of Educ*. was whether it was acceptable for someone to be rejected from a public institution solely on the basis of race. Furthermore, they questioned whether students could be separated solely on their race. Instead of rejecting or separating, and through race-conscious admission policies, UNC seeks to unify diverse students and bring them together, the true intention of *Brown*. One of this country's greatest attributes is its diversity. "Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . Such an

opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Board of Education of Topeka, 347 U.S. 494 (1954). Diversity is critical at a higher level because it prepares students for success in a diverse modern society. The Court correctly established diversity as a compelling interest in *Bakke* and *Grutter* because of its educational benefits. Bakke established, and Grutter reaffirmed that education diversity is a compelling interest of the Court. "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, Race-conscious admission policies, with the goal…." Grutter, 539 U.S. at 319. The value of educational diversity applied under strict scrutiny has been, and should continue to be, permissible by the Court. UNC continues to work toward this goal of educational diversity with these race-conscious measures.

B. Furthermore, *Brown* established that students could not be segregated in public education based solely on their race. The Respondents could not agree more with the Petitioners on this matter. To be categorized and rejected purely on one's race clearly rejects the fundamental truths of the Fourteenth Amendment. However, Petitioners act as though this is what the admissions policies at UNC are like. *Bakke* was the first instance in which race-conscious policies were addressed at the university level. The Court ruled that

universities could use race as a factor among many in college admission processes. However, colleges cannot have a quota system. "The nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples," Bakke, 438 U.S. at 313. In *Bakke,* the Court agreed that education diversity was a compelling interest of the Court. UNC works towards education diversity the same way as *Grutter* decided that if a college conducts a highly individualized review of an applicant, an applicant won't be rejected on the basis of race alone. Justice O'Connor wrote," in the context of its individualized inquiry into the possible diversity contributions of each applicant, the Law School's race-conscious admission program does not unduly harm non-minority applicants." *Bakke* continued this verdict by providing that race is acceptable in admission processes as long as the individual is viewed in a holistic way. UNC considers a single factor among many. In Fisher v. University of Texas at Austin II, 136 S.Ct. 2198 (2016), the Court yet again affirmed that "a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity." *Fisher II* 579 U.S. at 381.

VI. Justice O'Connnor's Time Expectancy is not Sufficient

A. Race is a contentious subject now and in all of American history. The history of slavery and racial segregation has created tension in America

since its very beginning. Just in the past years, there have been violent upheavals that were caused by issues linked with race. However, America is beginning to make progress toward a society in which race is not as contentious a subject. While race is still a contentious subject, we need the drastic effort of affirmative action to negate the drastic wrong of slavery and racial segregation. Affirmative action is a tool used to right egregious wrongs like slavery and to ensure the promise of the Fourteenth Amendment. However, when those wrongs have been righted, affirmative action is no longer necessary. In *Grutter*, O'Connor acknowledged that it might be an idea to have a sunset clause, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today…." Grutter, 539 U.S. at 319. O'Connor gave a hopeful suggestion as to how long she thought affirmative action would be needed, However, it is not as simple as that. To put a steadfast time frame would be disingenuous to the mission of educational diversity.

B. Another way to know when affirmative action is no longer needed is when affirmative action no longer needs to be used to promote educational diversity. UNC uses affirmative action under strict scrutiny to promote the Court's compelling interest in educational diversity (*Bakke* and *Grutter*). UNC plans on continuing to use affirmative action (with the Court's consent) as long as race-conscious affirmative action is needed to promote educational diversity.

VII. *Grutter v. Bollinger* Should not be Overruled

A. *Grutter v. Bollinger* should not be overruled. This would only cause more chaos and division. In her dissent in Dobbs v. Jackson Women's Health Organization, Justice Kagan wrote, "Stare decisis is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for the change. It is a doctrine of judicial modesty and humility." Stare decisis cannot be overturned because of just any probem. It must be a significant problem for which there is a very good reason for change. Stare decisis should only be overturned due to an eggregious wrong. If stare decisis could be overturned at the drop of a hat, there would be no precedent for keeping decided cases' decisions in place. This would cause complete chaos. Another thing to be considered is that the overturning of *Grutter v. Bollinger* would upset years of precedent in colleges around the country. "*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division." As addressed with the issue of allowing for affirmative action, exceptional circumstances call for exceptional measures. *Roe v. Wade* was an exceptional circumstance of abuse of judicial authority. The decision in *Roe v. Wade* only brought about more chaos and confusion rather than

peace and unity. On the other hand, the decision in *Grutter v. Bollinger* is a decision that brings about more unity and allows for the aid of disadvantaged individuals. In conclusion, the overturning of *Grutter v. Bollinger* would only cause more chaos and confusion.

VIII. The Plaintiffs cannot Win if Grutter is not Overruled

A. No. UNC adheres to the ruling made in Grutter. Justice O'Connor wrote, "in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants." The ruling in *Grutter v. Bollinger* determined that narrowly tailored use of race in admissions is acceptable. The Law school also conducts a highly individualized review of these applicants. UNC adheres to this ruling. Their narrowly tailored use of race is acceptable under the ruling made in *Grutter*. They also conduct a highly individualized review of each applicant. These things are done in order to promote educational diversity which flows from a diverse student body. In conclusion, if *Grutter* is not overturned, then UNC cannot lose the case because it shows that it adheres to the ruling made in *Grutter*.

IX. Affirmative Action is Necessary for the Military

A. Diversity is not just important in education but also in other institutions like the military. "A

"highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." Grutter v. Bollinger, 539 U.S. 18 (2003). However, this diverse officer corps and military does not come easily. One route that many officers go to become officers is through universities and ROTC.

CONCLUSION

Respectfully submitted,

WILLIAM BROWN
COUNSEL OF RECORD
DUBLIN CHRISTIAN ACADEMY
106 PAGE ROAD
DUBLIN, NH 03444

ABIGAIL MOODY
Dublin Christian Academy
106 Page Road
Dublin, NH 03444

22 December 2022