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

Elijah Johnson
Counsel of Record
Dublin Christian Academy
106 Page Road
Dublin, New Hampshire 03444

Aidan Gillissen
Dublin Christian Academy
106 Page Road
Dublin, New Hampshire 03444

[11/16/22]

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

CASES

Constitutional Provisions

Other Authorities

SUMMARY OF ARGUMENT

The Court must not overrule the case of Grutter v. Bollinger, and hold that institutions of higher education can indeed use race in the process of admission as long as it is not the primary factor of selection. Race must be considered as a factor. However, it cannot be the sole factor on which a decision is made. Those of African American descent need help, not to get an upper leg on everyone else, but rather to even out the playing field. Those of African American descent have gone through so much in the past that they should be given the equality of opportunity. This equality has been something and should be something sought for in American life. The equality of all people is highly valued and stapled in even the Declaration of Independence.

ARGUMENT

I. The Equal Protection Clause of the Fourteenth Amendment does not prohibit race-conscious affirmative action.

No. The Fourteenth Amendment was made to promote equality between races, and for this reason, it does not prohibit race conscious affirmative action. It was said in the brief of Harvard UNC that "Nothing in the original meaning of the 14th amendment-not the equal protection clause, not the citizenship clause, not the due process clause, not the privileges or immunities clause - clearly prohibits race conscious admissions policies." This is well exemplified in history through the Freedmen Bureau Act where it gave aid to Black persons freed from bondage to help them become self-sufficient;" - Amicus Brief of Constitutional Accountability Center.

The Fourteenth Amendment does prohibit race quotas, but does not prohibit race being taken in account in the admission process. "As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." Fisher v. University of Texas at Austin II, 136 S.Ct. 2198 (2016).

There are four primary terms included in Section 1 of the Fourteenth Amendment two of which include rights of a citizen and equal protection, this was to combat the black codes. Amicus Brief of Professors of History and Law

"Following the ratification of the Thirteenth Amendment in 1865, many States in the South enacted discriminatory 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). . . . It was in this context that the Fourteenth Amendment was drafted and, in 1868, enacted. See, e.g., Joseph H. Taylor, The Fourteenth Amendment, the Negro, and the Spirit of the Times, 45 J. Negro Hist. 1, 27 (1960)."

Equal protection means true equality to liberty and freedom is given to all. In order to get on an equal playing field for an African American, one must be given certain tools of help to combat racism as well as the discrimination of current and past societies. Amicus Brief of Professors of History and Law

"As detailed below, although the Reconstruction Congress often invoked the principle of antidiscrimination, this did not mean race neutrality. Rather, for leading Republicans, the aim was to follow the abolition of slavery with efforts to outlaw certain anti-Black policies and practices that resulted from centuries of race-based slavery and associated racial prejudice, so as to provide Black people with a framework of fairness and opportunity in the

postemancipation United States. Thus, when Republicans spoke of banishing racial discrimination, they were referring to the aim of eliminating the impact of racism and levelling the existing playing field; they were not endeavoring to eliminate any consideration of race regardless of context or purpose. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton) (explaining that raceconscious measures adopted during Reconstruction were intended to "break down discrimination between whites and blacks" and "ameliorat[e] . . . the condition of the colored people")."

The Reconstruction-Era for remediating the effects of slavery was designed to help the freedmen in the 1800s to get back on their feet without having to contend with so much. Instead they were given privileges to help further and support their careers and life. This is clearly seen in the Act to incorporate the (Howard institute and home) of the District of Columbia. The goal was to educate freedmen and it was supported by the federal government, not just a tax break Act of June 21, 1866, ch. 130, § 2, 1866 Stat. 69, 14 Stat. 66. This is exactly what the University of North Carolina's policies are attempting to do as well. This evidence only furthers the position of helping those minorities who are not afforded the same opportunities and privileges as others.

II. The Framers of the Fourteenth Amendment's beliefs on the race legislative acts.

While there have been positive changes there is still a certain level of racism and segregation. Changes need to

occur. UNC still has a smaller amount of African American students then the state of North Carolina where it is located. The University of North Carolina is made up of only approximately 7.7%-10.25%. This is not nearly as close as North Carolina's more diverse demographic of 21.35% being African American in the state. African American students are still not represented enough in these schools such as UNC. There is still a glaring discrepancy in the amount of African Americans in North Carolina itself, and the amount of African American students in the UNC.

Student body diversity is important in all areas of education. Its importance is easily seen in anthropological and philosophical studies. Those of African descent often have a strong connection to familial tradition and faith. However, racial diversity in education is still evolving and there needs to be help in growing this diversity. This help may only need to last for a couple decades and then maybe racial diversification education will get to a point where that help can be diminished. But the help being applied now is necessary to help African American students overcome the unfair advantage given to those in a better financial and educational position. It is not just important to maintain this help, but vital if having a diverse student body is what is truly desired.

Grutter v. Bollinger, 539 U.S. 31 (2003)

"It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high

grades and test scores has, indeed, increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Anyone who has been in a group who has been discriminated against needs to be helped and nourished to an extent. Many races experience discrimination on many different levels. However, throughout history, more extreme or harsher levels of segregation and racism has been shown to certain races. Slavery was an absolutely disgusting act. Not to mention the horrific way African Americans and many others were treated discriminatorily long after the Civil War. This would include things like the discrimination in the 1950s and 60s when African Americans were not allowed to even use the same bathrooms as white people let alone attend a similar school. This was a heinous form of discrimination and the African American community has continued to struggle for many years both economically and educationally because of this. Those of African descent have gone through more than many can ever imagine. By allowing the race quota in schools and the conscious race consideration in a student's application, this allows the possibility to help fix a problem that has plagued this nation for far too long. Therefore, they are in more dire need of support and help in today's society.

The Framers would view race and sexual orientation on separate levels. The sexual orientation that deviated from tradition was not in the sector of focus to the Framers. In the day when the Framers wrote the constitution, the

notion of someone identifying as a gender that deviated from his physical form was existent but not prevalent. This ideology was not well known in that day because while it has existed for all of human history, it was very much smothered by society that it was not as well known or as easily encountered. In Grutter 539 U. S. 15, O'Connor wrote that context matters when considering affirmative action. This is due to the much worse tragedies that have occurred to those of African American descent. The problems of those who are a part of the issues of sexual orientation and gender identity have not experienced the horrible tragedies of slavery and mistreatment in the past. In fact, the American government, and America as a whole, supports those of the LGBTQ+ community. Same sex marriage has been legalized.The Framers were more focused on creating a level playing ground based for all. This entails the idea of giving extra help to those who have not been given that equality and have been demeaned or belittled in the past.

III. Brown v The Board of Education does not prohibit race- conscious affirmative action.

Brown prohibited separate but equal. Plessy vs Ferguson said that as long as you have equal schools you can have segregated schools. Affirmative action is seeking to fix the educational harm that some students face due to their race. This harm has been caused through segregation as well as non-equal educational opportunities.

Grutter 539 U. S. 19

"We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ìsustaining our political and cultural heritageî with a fundamental role in maintaining the fabric of society. Plyler v. Doe, 457 U. S. 202, 221 (1982). This Court has long recognized that *education . . . is the very foundation of good citizenship*. Brown v. Board of Education, 347 U. S. 4 83, 493 (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."

IV. Grutter Vs. Bollinger should not be overruled.

It is hard to overturn already established law. *Roe v Wade* was overturned due to the fact that there is little discussed about this issue in the Constitution. As Supreme Court Justice Alito explains, a right must be "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted). The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy." Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022)

Race is heavily discussed in the Constitution. This is made evident in Amendments 13, 14, and 15. Amendment 13 states, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States.” Amendment 14 discusses the prevention of racism/segregation. Amendment 15 explains how race should not be a factor when it comes to the ability to vote. These Amendments are in place to protect race as well as create a state of equality and fairness for all American citizens.

Justice Kagan wrote in her dissent in Dobbs v. Jackson Women's Health Organization, “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 change. It is a doctrine of judicial modesty and humility.” By having the current Supreme Court stay consistent with the decisions of previous Supreme Courts will maintain wisdom and consistency in judgment of the law. Constantly changing the law of the land will confuse residents to a point where the nation will inevitably reach a point of bedlam.

The plaintiffs cannot prevail if the court decides not to overrule Grutter. By remaining consistent with previous court decisions and not overruling Grutter, the argument for having a non-diverse school community is a concerning argument to make. The intention of making a wiser and more equitable school and society should be desired by all. By not overruling Grutter, the court promotes a more well-rounded and nondiscriminatory society. Because the

Fourteenth Amendment does not prohibit any kind of bolstering of any mistreated or degraded race, race conscious admission consideration is consistent with the Fourteenth Amendment. It merely attempts to raise all races to an equal plateau of opportunity. As it was previously stated in the first argument, there is nothing in any of the clauses of the Fourteenth Amendment that prohibits these types of policies from helping a race of people who have been treated unfairly and unequally.

If the court decides to overrule Grutter it can be presumed that the military will have difficulty recruiting those of different ethnicities. Education and influence will have a great effect over the younger generations of children. If the influence on them is one of a discriminatory nature, they will not want to go to the military. The military is a predominantly white organization according to Statista (Distribution of active-duty enlisted women and men in the U.S. Military in 2019, by race and ethnicity.) The military officer corps today remains significantly less racially and ethnically diverse than the enlisted corps. For example, in 2020,

Black servicemembers accounted for roughly 19% of the enlisted corps but only 9% of the total officer corps, including just 5.7% of the Marine Officer Corps and 6.3% of the Air Force Officer Corps. See 2020 Military Demographics, at 22–24. This discrepancy continues to be felt by minority servicemembers, many of whom feel "constantly challenged over their right to be in elite units, let alone lead them." Helene Cooper, African-Americans Are Highly Visible in the Military, but Almost Invisible at

the Top, N.Y. Times (May 25, 2020). It is also an organization that has a very clear hierarchy structure that is and should be based on intelligence, skill, and grit on an individual. However, if there is a clear bias against those of a different race, it will be astonishingly difficult, nyon impossible for African Americans and other races to progress or rise in the ranks. This is clearly seen from the experience of General Charles Brown Jr., the first Black service chief in U.S. military history and current Air Force Chief of Staff, who said that because of lack of diverse authority he had to work twice as hard (Brief of Amici Curiae Former Military Leaders). They will be denied opportunities at different areas of expertise or leadership opportunities not because of their competence but simply because of the color of their skin. This will radically change the population of the military and definitely decrease the diversity. It will decrease because those of a different race will not want to spend so much time and effort working hard when their efforts will not even be considered to be rewarded.

CONCLUSION

For the foregoing reasons, we pray that the court does not overrule the case of Grutter v. Bollinger and hold that institutions of higher education can indeed use race in the process of admission as long as it is not the primary factor of selection.

Respectfully submitted,

ELIJAH JOHNSON
COUNSEL OF RECORD
DUBLIN CHRISTIAN ACADEMY
106 PAGE ROAD
DUBLIN, NH 03047

AIDAIN GILLISSEN
Dublin Christian Academy
106 Page Road
Dublin, NH 03047

December 18, 2022