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 WRITS OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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December 16th, 2022

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 ruling of the United States District Court for the Middle District of North Carolina was issued October 18th, 2021. Petitioners filed a writ of certiorari that this Court granted on January 24th, 2022. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1 to the U.S. Constitution provides:

> 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) provides:

> 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.

STATEMENT OF THE CASE

On November 17, 2014, Students for Fair Admissions (SFFA) filed a lawsuit against the University of North Carolina (UNC) for its use of race-conscious admissions. SFFA believes these policies to be in violation of Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

A. UNC Admissions And Racial Considerations

UNC, the nation's oldest public university, has used race as a factor in its admissions process for over thirty years. UNC.Pet.App.3. These racial preferences are afforded to minorities that UNC considers underrepresented in comparison to the demographic composition of the state, namely African American, Hispanic, and Native American applicants. UNC.Pet.App.15 & n.7, 37; see also UNC.JA690. Asian Americans and white applicants are excluded from these preferences. UNC.Pet.App.15, n.7, 37; see UNC.Pet.App.21. A person from an underrepresented minority applying to UNC may receive a 'plus' in the evaluation process on account of their race or ethnicity, which this Court's precedents allow. UNC.JA632.; *Grutter v. Bollinger*, 539 U.S. 306 (2003). This 'plus' may improve an applicant's

chances of being granted admission into UNC. UNC.JA472. SFFA believes the racial 'plus' system to be inconsistent with the Equal Protection Clause as it brings a disadvantage to non-underrepresented minority applicants. Although UNC continues to defend its admissions processes as nondiscriminatory by insisting that race is never a "negativ[e]," a student's race is often "determinative" of their acceptance to fill one of UNC's highly selective spots. UNC.Pet.App.112; UNC.JA638.

Evidence presented at trial provides further insight into UNC's use of race. From recruitment to application reading, race is considered "'at every stage'" of the admissions process. UNC.Pet.App.51; UNC.JA407. Students are recruited differently based on race. UNC recruiters are instructed to only invite students with certain SAT scores that meet a certain threshold for their race. UNC. Pet.App.47. For out-of-state underrepresented minorities, those with SAT scores of 1250 or higher are invited to apply. *Id.* For Asian-American and white applicants, 1450 is the mark. *Id.* Regardless of knowledge of a student's individual academic accomplishments, race factors into their opportunity to be encouraged to apply.

When reviewing applications, race is considered to qualify or contextualize a student's individual accomplishments. Broad statements like "Asian Americans … test higher" are taken "into account when … reading applications." UNC.JA399; see also UNC.JA1252. Non-underrepresented minorities such as Asian-American or white applicants tend to score lower on "personal qualities"

than their counterparts despite race having no such effect on an individual's character. UNC.JA410-15. Students with seemingly identical intellectual and "academic index" accomplishments received vastly varying admissions rates depending on their race. UNC.Pet.App.75-77; UNC.JA440. Revealed at trial, these unequal standards emphasize the extent to which UNC uses race to enhance or dilute academic prowess. UNC.JA1083; UNC.JA454-57. When simulated, a white applicant with a typical 10% acceptance rate chance had a 98% acceptance rate chance when his race was changed to African-American. UNC.JA1102. UNC's use of race is prevalent throughout its admissions practices. UNC.JA407.

B. UNC Rejects Feasible Race-Neutral Alternatives

SFFA has suggested a number of race-neutral means to maintain diversity in the admitted class without the use of racial classifications, all of which UNC rejected in the District Court trial. UNC.JA883. UNC rejected one proposal to set aside 750 spots for socioeconomically disadvantaged students, the Modified Hoxby Simulation, because it caused a slight decrease in average SAT scores (92nd percentile to 90th percentile) and led to a 0.5% decline in underrepresented minority students. UNC.JA574-76; UNC.Pet.App.134 n.43. Although these potential changes occurred, a corresponding increase in socioeconomic diversity spiked and Hispanic enrollment increased. UNC.JA1157. Furthermore, UNC dismissed all "top percent plans,"

which admit some specified percent of top students from each North Carolina high school. UNC.JA556-74, 1145-55. These plans have been shown to increase underrepresented minority numbers. *Id.* Reasoning that academic indicators such as GPA and average SAT score would decline slightly, UNC denied these "top percent" race-neutral alternatives. *Id.* Despite achieving considerably accurate numbers to current diversity and academic distributions, UNC insists that these alternatives would neither achieve the results they seek in a diversified class nor sufficiently academically prepare students. UNC.JA883.

C. District Ruling And Posture

Seven years after receiving the case's filing, the district court ruled in favor of the University of North Carolina. The court noted that UNC's use of affirmative action was permissible because race considerations "play a determinative role for a small number of URM students." UNC.Pet.App.112-13. In its findings, the district court also reasoned that UNC's practices were narrowly tailored to *Grutter's* 'plus'-only analysis. UNC.Pet.App.165. Furthermore, all race-neutral alternatives were rejected as insufficient in achieving the "educational benefits of diversity about as well" as UNC's current practices. UNC.Pet.App.176-83.

SFFA appealed the decision and petitioned the Supreme Court to hear the case without first presenting the case to the U.S. Court of Appeals for the Fourth Circuit. In January of 2022, the Supreme Court granted an order of certiorari. Due to its

similar nature to *SFFA v. Harvard*, the Harvard and UNC suits were consolidated for ease of management by the Supreme Court, but later separated into two individual cases once again.

SUMMARY OF ARGUMENT

UNC's use of race-conscious admissions is a flagrant violation of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.

In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court rejected the right to "use race as a factor in affording educational opportunities" to students. With that, this Court concluded that public education "must [be] considered in the light of its full development and its present place in American life throughout the nation." *Id*. at 492. By this logic, *Grutter v. Bollinger*'s, 539 U.S. 306 (2003), permittance of consideration of race solely as a 'plus', is inconsistent with the reality of how public education has developed in America. As it stands, *Grutter*'s standards are unfeasible because of the inherent negatives certain races receive in the admissions process. UNC.JA529. *Brown*'s analysis of the practical reality of racial classification in public education makes it clear that *Grutter*'s core assumptions are unconstitutional. Indeed through similar analysis, this Court will find that historical ties to the Amendment's Framers fail because of the lack of congruence in intention and purpose *in practice*. Just because Reconstruction era policies were also race-conscious does not give a broad brush justification to all modern day race-conscious policies under the Equal Protection Clause. Thereby, "we cannot turn the clock back to 1868." *Brown,* 347 U.S. at 492.

Furthermore, the principles this Court has laid out for overruling precedent all point towards overturning *Grutter*. Namely, the decision has been

unequivocally and "grievously wrong," and it has spawned immense "negative consequences" in "the real-world." *Ramos v. Louisiana,* 140 S.Ct. 1414-15 (2020) (Kavanaugh, J., concurring in part). A ruling otherwise also does not "unduly upset reliance interests" because none such interests exist or were meant to exist. *Id.* at 1414-15. And, even by this Court's current understanding of precedent, UNC's practices fail strict scrutiny.

This Court must reject the use of racial classifications in higher-education institutions and overturn precedents that perpetuate discrimination and "deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Sweatt v. Painter,* 339 U.S. 629 (1950).

ARGUMENT

I. *Grutter* Is Inconsistent With The Fourteenth Amendment And Should Be Overturned

Embodied in the fundamental nature of this nation are the principles that "the Constitution of the United States … forbids … discrimination by the General Government or by the states against any citizen because of his race," and that, succinctly, "all citizens are equal before the law." *Gibson v. Mississippi*, 162 U.S. 565-566 (1896). Although imperfect and often infamous in practice, this Court has, at its core, understood the importance of the Equal Protection Clause of the Fourteenth Amendment in securing these principles for all Americans. Despite the plain fact that

"discrimination of race … is forbidden by the amendment," countless higher-education institutions engage in just that: admissions policies that actively consider and discriminate on the basis of race. *Strauder v. West Virginia*, 100 U.S. 303 (1880). The University of North Carolina (UNC) is no exception.

The Constitutional guarantee of equal protection must protect the "educational opportunities" for all races that this Court deemed "perhaps the most important function" of direct government. *Brown,* 347 U.S. at 493. However, UNC openly engages in admissions practices that violate that educational promise. Additionally, UNC's use of race-conscious admissions practices exists despite UNC being a public university that receives upwards of 941 million dollars in federal research funding and 543 million dollars from the State Government of North Carolina in a fiscal year. Calloway, *Carolina's Money: Where We Get It; How We Spend It*, The Well (March 11th, 2021), shorturl.at/bjyFT. Like thousands of other universities, UNC's federal funding binds the university to Section 601 of Title VI of the Civil Rights Act of 1964, a statute they continue to violate. 42 U.S.C. §2000d. As it stands, federal funding from the "General government" can only be allowed to continue if UNC ceases its unconstitutional use of affirmative action in admissions. *Gibson*, 162 U.S. 565.

UNC and universities like it continue to use affirmative action and innately discriminatory admissions practices because of this Court's erroneous decision in *Grutter v. Bollinger*. 539 U.S.

306 (2003). It has *enabled* them to discriminate. Ultimately, *Grutter* contradicts the Equal Protection Clause of the Fourteenth Amendment, is an affront to this Court's landmark decision *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954), and lives in violation of Title VI of the Civil Rights Act of 1964. All the while, respondents attempt to fallaciously tie the intentions of the Amendment's Framers to the policies of UNC – situations with markedly different uses of race-conscious practices. Overall, *Grutter* is brazenly unconstitutional and must be overturned.

A. *Grutter* Is Inconsistent With *Brown*

The sanctity of public education is vital. Indeed, this Court has long demonstrated a "recognition of the importance of education to our democratic society." *Brown,* 347 U.S. at 493. Yet, the flagrant discrimination conducted by our nation's first public university exists in direct contradiction to the notion that "such an opportunity is a right which must be made available to all on equal terms" regardless of their race. *Id.* at 493.

Undeniably, the Fourteenth Amendment and the Constitution as a whole are absolute in nature and are the "supreme law of the land." *McCulloch v. Maryland,* 17 U.S. 316 (1819). Yet, *Grutter* plainly contradicts the Equal Protection Clause by maneuvering around the text's plain demands. Indeed, given the Amendment's "inconclusive" historical ties to "public education," race-conscious admissions cannot be "determined … on the basis of conditions existing when the Fourteenth Amendment was adopted." *Brown,* 347 U.S. at 483. Rather, the

practices *Grutter* errantly defends must be evaluated under the "light of the full development of public education" and its "place in American life." *Id.* at 492. By evaluating the practice in this sense, it is clear that the pure language of the Equal Protection Clause coupled with *Brown's* astute analysis of evaluating unconstitutional race-conscious classifications in a developmental light invalidate *Grutter*. In fact, the entire backbone of *Grutter*, the premise of "narrowly tailored" race-conscious admissions, is unfeasible in the American development of public education. 539 U.S. at 306; it is inconsistent with *Brown* and subsequently inconsistent with *Brown's* analysis of the Equal Protection Clause.

Endorsing Justice Powell's judgment in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court in *Grutter* gingerly asserted that universities "may consider race" or ethnicity only as "a plus in a particular applicant's file." *Id.* at 317. However, the nature of UNC's admissions as it has developed in America, and indeed higher-education admissions as a whole, makes giving applicants a 'plus' merely for their race an inherent *minus* for other races. UNC.JA453. By giving this 'plus' to select underrepresented minorities in their applications, other races, notably Asian Americans, receive the burden of explicit negatives in non-race aligned application components such as positive personal characteristics and the value of standardized test scores. UNC.JA410-15. In a process where a highly selective, set number of admittances can be awarded, such distinctions deny

countless applicants their fair opportunity on "equal terms." *Brown,* 347 U.S. at 493. By their very nature, public higher-education institutions have developed such that they do not accept *all* qualified applications, but rather use metrics such as race to evaluate and guide who they choose out of an incredibly talented applicant pool. UNC.JA338. Indeed, this competition stems from the very nature of UNC's selectivity; namely, there are only a predetermined number of spots at UNC. This forms the practical development of evaluating, for example, someone's SAT score based on race an advantage to one student but a disadvantage to another with the same test score but different racial background. UNC.JA1083; UNC.JA454-57. In other words, underrepresented minorities receive their 'plus' in categories such as standardized testing, where Asian American and White applicants do not in effect. Yet, Title VI forbids "methods having the *effect* of subjugating individuals to discrimination" based on factors such as race, precisely something UNC's admissions practices foster in the real world setting. *Alexander v. Sandoval,* 532 U.S. 275 (2001) (emphasis added); 42 U.S.C. §2000d. Those without this race-based advantage are intrinsically disadvantaged with a very perceived *minus* in the cutthroat admissions process. UNC's admissions use race far too often to tip the scale and put disadvantages on others. UNC.Pet.App.112. If college admissions in America worked such that *all* qualified applicants could gain admission, application of Justice Powell's judgment that race could be used "merely" as a "'plus'" factor" would make sense. *Bakke,* 438 U.S. at 317. However, this is not the case

anywhere in the country and no applicants are fooled by a 'plus'-only narrative.

Thus, developed in this incredibly closed and rigid reality, characteristics such as race that are necessarily favorable to one are unfavorable to another. This Court has recognized the unconstitutionality of considering race in similar closed systems, such as juries in which they should be "composed" with the "right to be without discrimination against … race." *Strauder v. West Virginia,* 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880); *Neal v. Delaware,* 103 U.S. 370 (1880); *Bush v. Kentucky,* 107 U.S 110 (1883); *Fort Bend County v. Davis*, 139 S.Ct. 1843 (2019). Systems where the conscious benefit of one race is the detriment of another are unequivocally unconstitutional. Again, *Brown* enshrines the American principles of equality in education and a fair and equal chance. The right to *apply* under "equal terms" is an "opportunity" and a precedent of this Court that must be reaffirmed as a "right." *Brown,* 347 at 493.

Grutter's very nature is thus founded on the lie that racial classifications in higher education can be achieved without favoring and negating the opportunities of other races. *Grutter* relies on the idea that "use of race" in these practices can be "narrowly tailored because race was merely a 'potential 'plus' factor.'" 539 U.S. at 307. However, looking not only at UNC, but hundreds of American higher-education institutions, it is clear that in practice this solely 'plus'-oriented version of a narrowly tailored use of

race consideration is impossible to achieve without discriminating. Race-conscious admissions as they have "developed in public education" in "American life" must be evaluated in a sense that is earnest to how they *actually* evaluate race. *Brown,* 347 U.S. at 492-493. In reality, race-conscious admissions *do* "unduly harm" nonminority races. *Grutter,* 539 U.S. at 309, 341. *Brown* reaffirms that public education in the United States simply does not allow for race to be considered strictly enough to satisfy the nebulous compelling interest of student body diversity. There is no such thing as race being "merely a 'potential 'plus' factor.'" *Id. 307*. Thereby there is no such thing as narrowly tailored consideration of race in admissions. Because the backbone of *Grutter*'s "narrowly tailored" permission is quixotic, unachieved in American society, and enabling of discrimination, *Grutter* is inconsistent with the Equal Protection Clause. *Id.*

Chiefly through analyzing *Grutter* in this practical sense can this Court "determine" if race-conscious admissions practices "deprive" students "of the equal protection of the laws." *Brown,* 347 U.S. at 493. *Grutter* cannot be allowed to stand anymore, because everything it has stood for has wrought iniquities in this nation's higher-education system.

B. UNC Cannot Align Its Policies With The Intentions of The Fourteenth Amendment Framers

Throughout their arguments, Respondents insist that historical context and the intentions of the

Framers of the Fourteenth Amendment justify upholding race-conscious admissions. Br.28-33. Although our nation's government has pursued and continues to pursue race-conscious policies in some form, when doing so, it has been under wildly different terms that are completely inapplicable to UNC's policies. Just because Reconstruction era policies were also race-conscious does not give a broad brush justification to all modern day race-conscious policies under the Equal Protection Clause.

Following the Civil War and the passage of the Reconstruction Amendments, Congress passed governmental policies intended to remediate, assist, and acclimate freed slaves into American society. *Freedmen's Bureau Acts of 1865 and 1866*, U.S. Senate, shorturl.at/uLQX3. Indeed, many of the Framers of the Fourteenth Amendment were themselves the largest proponents of such remedial policies intended for the benefit of freed African Americans. *Id*. These intentions were, however, vastly different from the compelling interest that UNC seeks to fulfill.

It is no secret that under this Court's precedent, "remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 551 U.S. 701 (2007); *Freeman v. Pitts,* 503 U.S. 467 (1992). Throughout this nation's history, policies that consider race have sought primarily to rectify the discriminatory past of many of their preceding racist policies, including those resulting from this Court's own decisions. For

one, in 1988 Congress issued a race-specific and race-conscious reparations authorization of $20,000 each to survivors of Japanese internment during World War II, a policy notoriously upheld by this Court. 50a U.S.C. § 1989b; *Korematsu v. United States*, 323 U.S. 214 (1944). Similarly, policies such as the formation of the Freedmen's Bureau, were hallmarks of the Reconstruction Era and furthermore reliant on the entire premise that they were *remedial* in their interest and intent. Yes, these congressional policies demonstrated an understanding that the Equal Protection Clause's scope could allow for specific race-conscious measures. *Marsh v. Chambers,* 463 U.S. 783 (1983). But, under this Court's precedent and understanding, such policies would be for righting the historical wrongs in the law without again discriminating, *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200 (1995) (Scalia, J., concurring); indeed, laws that Respondents allude to emphasized that their Commissioners were "agents of the United States" under congressional authority in achieving this very interest of restitution when "the freemen … became part of the people." *Titus v. United States*, 87 U.S. 475 (1874); *Texas v. White,* 74 U.S. 700 (1868).

The Framers of the Fourteenth Amendment, the very members of Congress who would later support legislation such as the Freedmen's Bureau, found their actions consistent with the Equal Protection Clause. Cong. Globe, 39th Cong., 1st. Sess. app.69 (1866). However, they would *not* find UNC's policies to hold the same. UNC holds that its policies are defended by this Court's decision in *Grutter* through its pursuit of "a compelling interest in

attaining a diverse student body." 539 U.S. at 307. The intentions of UNC's race-conscious policies are completely disparate and incompatible with what the Framers of the Fourteenth Amendment sought to achieve and fight for. This is plainly due to the fact that the racially remedial nature of Acts such as the Freedmen's Bureau are completely different with the vague diversity interest of UNC's affirmative action practices. UNC makes no mention of any intentions to rectify racial wrongs in this country's history in their admissions policies. Br. 1-70. In fact, just by looking at the language of legislation such as the Freedmen's Bureau Acts of 1865 and 1866, the "relief" given to "destitute and suffering refugees of freedmen" such as "provisions, clothing, and fuel" would be for the amelioration of the wrongs of slavery. Act of July 16, 1866, ch.200, 14 Stat. 173-74. Because "the curse of slavery [was] still upon them," these policies were used as rightings of racial wrongs. Cong. Globe, 40th Cong., 1st. Sess. 79 (1867). Furthermore the very fact that it was to "continue … for [just] one year thereafter" is pure testament to the fact that the Act was merely a temporary remedial aid for freedmen. Act of July 16, 1866, ch.200, 14 Stat. 173-74. The total bulk of the Bureau's work extended for just over two years after renewal from Congress. *Id*. Meanwhile, affirmative action policies at UNC and across the nation's universities have hidden under the guise of a completely different compelling interest – a nebulous need to produce diversity and its ill-defined benefits – for well over *half a century*. Clearly, there can be no serious connections between UNC's use of race-conscious policies and the historical use of race-conscious

policies during the framing of the Amendment despite what Respondents attest to. They share neither the same intentions, effects, nor time frame. It would be completely unfair and nonsensical to allow an argument attempting to justify race-conscious admissions under an unjustifiable compelling interest simply by noting how the Amendment's Framers also used race-conscious policies. The designation of 'race-conscious' is not a ticket to guaranteed historical justification.

Even the most germane historical example of race-conscious measures, Berea College, does not successfully represent the same race-conscious interests as UNC. With support from the Freedmen's Bureau, Berea College sought to create interracial education and actively considered race in increasing African American enrollment. At first glance, Berea College is proof of the historical justification of affirmative action. This stands until analysis of Berea College's historical foundation is taken into account, such as from their very own statement of "Our Inclusive History: 1855 to Today." *Our Inclusive History: From 1855 to Today*, Berea College (Jan. 1st, 2022), https://www.berea.edu/about/1855-to-today/. The College's founder, John G. Fee actively sought to "bring … education and humanity … to freed slaves" and "resumed" his mission at the College. *Id*. Race-conscious considerations were not used merely for diversity sake. Nay, the creation of interracial education was for restoring fair and just education to freed slaves at the same level of their white counterparts.

The only historical tie Respondents can draw is the mere fact that both situations make use of the broad concept of a race-conscious policy. However, it is a dangerous and slippery slope to paint a broad brush on connecting historical analogs without comparing the intentions of each. *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). UNC cannot claim to be consistent with the Fourteenth Amendment without acknowledging the stark differences in compelling interests. Especially given that this Court has found the historical context of the Fourteenth Amendment's in relation to public education to be "inconclusive," Respondent's historical claims are strained and completely misleading. *Brown,* 347 U.S. at 489. Because "legislative history can never defeat unambiguous statutory text," this Court should not be swayed by the false historical corollary Respondents seek to push forth. *Bostock v. Clayton County,* 140 S.Ct. 1731 (2020). After all, Title VI, protected by the text of the Fourteenth Amendment, prohibits the very discrimination UNC practices in admissions.

Again, UNC makes no argument that rectifying past racial discrimination is their compelling interest when it comes to the use of race-conscious admissions practices. Br. 1-70. Indeed, even if UNC was to circumvent this by incorporating remedial components to their compelling interest, their policies would again fail strict scrutiny. *Parents Involved,* 551 U.S. 752; *City of Richmond v. J A Croson Company*, 488 U.S. at 469.

It must be noted that Petitioners do not assert that all race-conscious policies must be tied to remedial efforts. Rather, those race-conscious measures that satisfy this Court's holding that "all racial classifications … must be analyzed … under strict scrutiny" would absolutely be permissible. *Adarand Constructors,* 515 U.S. 202. In fact this Court has "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Grutter*, 539 U.S. at 328. Race-conscious policies continue to exist throughout the government, regardless of their connection to the Amendment's historical Framing and justification. Exec. Order No. 13985, (2021), *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*. What is disingenuous, however, is to justify discrimination by misinterpreting historical context.

II. *Grutter* Does Not Survive Application of *Ramos* And *Janus* Principles for Overturning Precedent.

In *Ramos v. Louisiana,* 140 S.Ct. 1390 (2020), and *Janus v. AFSCME*, 138 S.Ct. 2448 (2018), two consequential cases that have guided this Court's analysis of precedent, this Court laid out the general "factors to consider" when deciding when to overturn precedent. *Id.* Applying and combining the related principles in both *Ramos* and *Janus* leads to the inevitable conclusion that *Grutter* can and should be overturned.

Although "the doctrine of *stare decisis* reflects a judgment 'that "in most matters it is important that the applicable rule of law be settled than that it be settled right,"'" this Court has noted countless times that the nature of *stare decisis* is not an "inexorable command." *Knick v. Township of Scott,* 139 S.Ct. 2162 (2019); *Franchise Tax Bd. of Cal. v. Hyatt,* 139 S.Ct. 1485 (2019); *Pearson v. Callahan,* 555 U.S. 223 (2009); *State Oil Co. v. Khan,* 522 U.S. 3 (1997). When cases are found to be "grievously or egregiously wrong," this Court finds the grounds of the case to be a "special justification" for its overruling. *Ramos*, 140 S.Ct. at 1414-15 (Kavanaugh, J., concurring in part); *Arizona v. Rumsey,* 467 U.S. 203 (1984). Although "adherence to precedent is the norm," *Grutter* is far, far from the norm. *Dobbs v. Jackson Women's Health Organization,* 142 S.Ct. 2228 (2022). It is grievously wrong and warrants grounds to be overturned.

In *Janus*, this Court found that "several important factors … should be taken into account in deciding whether to overrule a past decision." 138 S.Ct. at 2483. Chief among them are "the quality of [the case's] reasoning, … its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id. at* 2485. These factors were later condensed into "three broad considerations" for the overruling of precedent. *Ramos,* 140 S.Ct. at 1414-15. First, a decision must be "not just wrong" but "grievously or egregiously wrong." *Id*. Second, that decision must have caused "significant negative jurisprudential or real-world consequences." *Id*. Finally, overturning

that decision must not "unduly upset reliance interests." *Id*.

Overall, consideration of the quality of reasoning and consistency of *Grutter* will demonstrate how the decision was egregiously wrong. Developments in higher education in America will corroborate the real-world consequences of *Grutter*. And a lack of true reliance on the decision will prove how a ruling in favor of Petitioners would not "unduly upset reliance interests." *Id*. "All of these factors counsel in favor of overruling" *Grutter*. *Knick*, 139 S.Ct. 2162.

A. *Grutter* Is Egregiously Wrong

Apart from being inconsistent with the Fourteenth Amendment and *Brown*, *Grutter* satisfies grounds for overturning precedent: it is egregiously wrong. The reasoning and consistency of the decision are incredibly poor.

The woes of *Grutter* begin with its assertion "that student body diversity is a compelling state interest in the context of university admissions." *Grutter*, 539 U.S. at 308, 325. The benefits of student body diversity are still ill-defined, amorphous, intangible, and not nearly the interest of "paramount importance" this Court finds it to be. *Bakke*, 438 U.S. at 319 n.53 (op. of Powell, J.).

Compelling state interests are supposed to be of the utmost importance and "necessary … to the accomplishment" of government goals, especially when considering race. *McLaughlin v. Florida,* 379

U.S. 184 (1964). These interests must be so important that even consideration of race in the protection of a child by parental custody, for example, is not a compelling interest. *Palmore v. Sidoti*, 466 U.S. 429 (1984). Similarly, the consideration of race in trying to achieve a reduction of gang-violence in prisons is not a compelling interest. *Johnson v. California,* 543 U.S. 499 (2005). Even consideration of race in the remediation of societal discrimination is *not* a valid compelling interest. *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267 (1986). Yet at the same time, achieving the benefits of a "cross-racial understanding" and "classroom discussions" that are "more enlightening and interesting" are a greater compelling interest than all those aforementioned examples under this Court's precedent in *Grutter*. 539 U.S. at 330.

Even with student body diversity being an alleged compelling interest, it is yet to be proven that the "substantial benefits" were even realizable. *Id.* at 365. Instead, this Court gave deference to the expertise of the University of Michigan in *Grutter*. *Id.* at 308. When asserting that the "benefits [were] not theoretical but real," *Grutter* took the University's word that racial consideration was the only way to achieve goals such as "exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330. Racial diversity in itself does not automatically grant students these exposures. Assuming so would presume that individualized concepts such as viewpoints are products of race alone.

Furthermore, it is precisely this judicial deference to higher-education institutions that has

perpetuated discrimination. This Court has twice justified its permittance of affirmative action in admissions by deferring to Harvard University's submitted plan in *Bakke*. *Id.* at 307; *Bakke*, 438 U.S. at 316. However, it is clear the very plan that Harvard submitted is far from the truth of how admissions is conducted in this nation. As painted in their example to this Court in *Bakke*, Harvard noted that race was nothing more than considering "geographic location" or "life spent on a farm." *Id.* at 314. Yet, it is obvious for Harvard, UNC, and essentially every elite higher-education institution that race contributes a substantial and concerning consideration in admissions. Harv.Pet.App.135-36; UNC.Pet.App.51. The very premise Harvard submitted to this Court admits that race could be and has been unconstitutionally used to "tip the balance" towards admission for candidates. *Id*. The notion that this Court "defers to the … School's educational judgment that diversity is essential to its educational mission" has been ludicrously abused far enough to be a judicial euphemism for permitted discrimination. *Grutter,* 539 U.S. 308. No school, not even Harvard, accurately bases its admissions practice in practice to the "illuminating example" this Court based its decision on in *Grutter*. *Bakke,* 438 U.S. at 316. Yet, under fire, Harvard and UNC refer to *Grutter*, a decision based on their very own alleged admissions processes described some nearly 45 years ago. By circularly deferring to the precedent of the original Harvard submitted plan, who is left to truly analyze their processes? Though idealistic, facially "nondiscriminatory," and allegedly narrowly tailored, the Harvard submitted plan in *Bakke* is neither

accurately used nor race-neutral. *Id.* at 438. *Grutter* and subsequent decisions clutch to an illusion to continue to justify affirmative action.

In fact, it is precisely this deference that led to this Court trusting the overly-idealistic and unattainable plans for affirmative action that no university truly adheres to. And as mentioned early, this Court's interpretation of permissible racial consideration such as 'plus'-only factors are impossible to attain in reality. The very systems that this Court upheld are first – based on regimes that are not even in use – and second – under the guise of reliance on unfeasible factors.

The entirety of the reasoning of *Grutter*, from its flawed assumptions on compelling interests to its utter impracticality, is grievously incorrect. Under analysis in this sense, *Grutter* should not survive.

B. A Ruling In Favor Of Petitioners Would Not Be Profoundly Disruptive

Overturning *Grutter* would not profoundly disrupt or "unduly upset" reliance interests. *Ramos,* 140 S.Ct. 1414. Rather, dismantling race-conscious admissions would be a step towards fixing the ever present negative consequences left in *Grutter*'s wake. *Grutter* is an exceptionally weak precedent that finds wide disapproval, lives from a false necessity, and has few, if any, real reliances.

In fact, prior to *Grutter*, California (1996), Washington (1998), and Florida (1999) banned use of affirmative action in public institutions of

higher-education. Since *Grutter*, six states have followed suit in their bans: Nebraska (2008), Arizona (2010), New Hampshire (2012), Oklahoma (2012), Idaho (2020), and even Michigan (2006) itself – home state of *Grutter*'s very case. Saul*, Which States Have Banned Affirmative Action?*, NYT (Oct. 31st, 2022), shorturl.at/fgqX8. Furthermore, across the board, regardless of race, political affiliation, or gender, sentiments that "race or ethnicity should *not* be factored into college acceptance decisions" maintain extremely strong majorities, including 59% of Black adults and 68% of Hispanic adults. 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. From all perspectives, American society as a whole has found race-conscious admissions to be an unnecessary and unfair tool in higher education. Majorities of all racial demographics and backgrounds are willing and ready to live in a post-*Grutter* world with race-neutral admission practices.

These sentiments are reflected in what higher-education could be. Simply put, there is no true necessity for race-conscious admissions. The broader American public holds it in disdain. And even universities, those who claim it to be a crucial keystone in maintaining their academic integrity, refuse to admit that workable alternatives to their consideration of race work. UNC.JA883. The fact of the matter is they do. The notion that race-conscious admissions is a necessary mechanism cannot stand. Admissions models proposed at trial such as the Modified Hoxby Simulation among others have been

soundly rejected by UNC despite fulfilling current diversity distributions to a highly accurate degree. *Id.* Notably, in the model, socioeconomic diversity increased, Hispanic enrollment increased, and low income high-school representation increased. UNC.JA1157. Overall, the slight decrease in underrepresented minority enrollment totaled to just 0.5% from 16.5% to 16.0%. *Id.* In regard to academics, SAT scores decreased from the 92nd percentile to the 90th. *Id.* These marginal changes in minority representation and academic excellence would not damage the rigors and benefits of a University of North Carolina education, certainly not to the necessity and extent that Respondents claim. Although UNC claims that race is the only way to achieve the "benefits of diversity," clearly those aims can be achieved via race-neutral means. *Grutter,* 539 U.S. at 309; UNC.JA883. There is no real reliance on *Grutter*'s principles when such means exist.

In fact, countless public universities have realized and easily adapted to the very fact that race need not be an admissions factor. This nation's top three best public colleges, renowned for their diversity in viewpoint, opportunity, academic excellence, and contributions to American society exist in states that have banned affirmative action: the University of California, Berkeley (#1), the University of California, Los Angeles (#2), and the University of Michigan, Ann Arbor (#3). *Top Public Schools*, U.S. News, (Jan. 1st, 2022), shorturl.at/hjlDP. Verily, *eight* in the top ten best public universities in the nation do not use race-conscious admissions. Evidently, universities

have been able to excel and adapt to race-neutral admissions policies. Surely, the University of North Carolina can as well.

Still, looking at this Court's precedents and reasonings, it is clear there could never be a true reliance to begin with. This Court's precedents on affirmative action in college admissions are incredibly divisive and enervated. In *Bakke,* this Court's inconclusive 4-1-4 decision left the judicial system "struggling to discern whether … diversity rationale [was] binding precedent." *Id.* at 307. Taking up the issue in *Grutter*, this Court endorsed neither plurality, but instead turned the previous opinion of just one justice into binding precedent by an extremely slim 5-4 margin. Again and again, this Court skirted reaffirmation, offered fiery dissents, and gave self-destruct mechanisms to its own decisions, weakening the solidity of constitutional and public reliance. *Fisher II,* 579 U.S. 365 (2016); *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). Indeed, the Court's opinion in 2003 that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," "contains its own self-destruct mechanism." *Id.* Reliance interests were never meant to form on *Grutter* if they were expected to be abandoned just a quarter century later. This Court never expected reliance nor did it want there to be. UNC's arguments otherwise seek only to prolong their use of discrimination.

In a society where reasonable race-neutral alternatives exist, overwhelming majorities of the

public advocate for affirmative action's demise, and its very decision contains a "self-destruct mechanism," how can it be said that true reliance could have been built on *Grutter*? *Id.* A ruling in favor of Petitioners would not and could not "unduly upset reliance interests" because none such exist. *Ramos*, 140 S.Ct. at 1415.

On the contrary, a ruling for Petitioners would be the beginning of restoring equal footing for all applicants. Apart from the egregiously erroneous and weak precedential standing of *Grutter*, it has "caused significant negative … real-world consequences." *Id.* at 1414. For decades now, Asian-American applicants have felt the disadvantages of being themselves and speaking to their cultures. The stereotyping of Asian-Americans' academic, personal, social, and career inclinations has deeply damaged the community as a whole. Throughout the admissions process at UNC, Asian-Americans consistently face an uphill battle. For example, they must pass a higher threshold to be actively recruited by admissions officers. UNC.Pet.App.47. Despite each applicant being an individual with differing academic strengths, Asian-American applicants' test scores are qualified by stereotypically acknowledging their race is "take[n] into account" because "Asian Americans … test higher." UNC.JA399. Asian-Americans consistently score lower on the strength of their personal qualities such as "likeability" and "courage" despite race obviously having no such effect. UNC.JA410-15. Moreover, Asian-Americans face the lowest acceptance races proportionally to their academic prowess. UNC.JA1083; UNC.JA454-57. As

it stands, holistic admissions as applied by UNC and other universities like it unfairly harms Asian-American applicants to a significant extent.

As a consequence, young, bright, qualified Asian-American applicants have been forced to grapple with their very own identity and recognize that their race can be a burden to their success in admissions. Indeed, Asian-Americans as a whole have felt these extremely real negative consequences. Asian-American applicants often avoid mentioning race, writing about their heritage, and including passions that are "stereotypically" Asian. Qin, *Applying to College, and Trying to Appear 'Less Asian'*, NYT (Dec. 6th, 2022), shorturl.at/tyKMZ. With that, high and rising rates of depression and anxiety among Asian-American teens exist, partial products of the need to nebulously prove their worth to officers. *Id*.

Through all this, how can institutions of higher-education achieve "diversity of viewpoint" and the basis of *Grutter* if they continuously create a climate that stifles the very identity of the perspectives of Asian-Americans? 539 U.S. at 308. What benefits exist when students of Asian descent hide who they are just to gain admittance to a system that claims to want to hear their viewpoints? UNC's admissions policies and *Grutter* as a whole have perpetuated this discriminatory and considerably damaging system. Asian-Americans have felt the consequences.

On the other hand, for many underrepresented minority students admitted to selective colleges,

imposter syndrome takes hold – the belief that affirmative action was the only reason they received an acceptance. According to the American Psychological Association, imposter syndrome is "especially prominent among people with underrepresented identities. For example, BIPOC people … wrestle with imposter feelings at higher rates, contending with feelings … that they are products of affirmative action." Palmer, *How To Overcome Imposter Phenomenon*, APA (Jun. 1st, 2021), shorturl.at/ckotY. The lingering presence of race-conscious considerations in admissions has led clearly deserving students to doubt the integrity of their admission. Students of all backgrounds feel the negative effects of *Grutter*.

Overall, this continued racial lens forms a dichotomy that enhances or dilutes what race really means to an applicant. It pervades its effects into every corner of higher-education at UNC. In the end, it has created exceptionally negative consequences that extend beyond both the courtroom and the classroom.

III. Application of Strict Scrutiny Dooms UNC's Use of Race-Conscious Admissions

Despite their stalwart defense of this Court's current precedents on the use of affirmative action in admissions, UNC does not even act in accordance with the precedents in place. Instead, they refuse to move on from racial classifications and "find a race-neutral admissions formula," like countless universities before them. *Id.* at 309-10. UNC's policies as they stand fail strict scrutiny even under this

Court's current precedents, and their rejection of race-neutral alternatives is unconstitutional.

A. UNC's Admissions Process Is Not Narrowly Tailored

Should this Court even maintain and accept the premise of diversity as a compelling interest, it will still find that UNC fails to use narrowly tailored practices to achieve it. In many of the crucial regards this Court allowed in *Grutter*, UNC simply does not match up.

This Court upheld the premise of the University of Michigan Law School's admissions practices in *Grutter* because they "[bore] the hallmarks of a narrowly tailored plan." *Id.* at 334. Yet, when comparing UNC's practices directly to the explicit standards established by *Grutter*, UNC's practices clearly fail. They have few if any such hallmarks.

First, this Court reaffirmed the notion that universities "may consider race or ethnicity only as a 'plus' in a particular applicant's file." *Id.* at 309. As previously analyzed, the very nature of higher-education admissions in America rejects the feasibility of 'plus'-only orientation. When changing just the race of an applicant from African American to white results in a 88% reduction in admissions chances, there can be no doubt race plays an inherent negative role in many ways. UNC.JA1102. These disparities, products of considering race, are baked into the highly selective nature of UNC's admissions process. Indeed because "discriminatory treatment

exerts a pervasive influence on the entire educational process," consideration of race deals considerable damage. *Norwood v. Harrison*, 413 U.S. 455 (1973). Students are evaluated under seemingly different academic and personal lenses by the mere factor of their race. Different SAT score standards are used from recruitment to admission. In the District Court trial, the evidence "show[ed] that URM students were, on the whole, more likely to score above a 5 on their personal ratings than their white and Asian American peers." UNC.JA.App.1. Despite being bound by this Court's assertion that universities must place students "on the same footing for consideration," there exists a different reality. *Grutter*, 539 U.S. at 309. The truth is this: if one student has to excel deciles above another in order to receive an equal admissions footing, his or her race is a hindrance. UNC.JA576-79. UNC does not adhere to a narrowly tailored 'plus'-only consideration because such consideration is consistently impossible to achieve when considering race.

Second, this Court asserted that an applicant's "factors" can be "meaningfully considered *alongside* race." *Id.* at 337 (emphasis added). However, UNC considers all factors in the light of an applicant's race. It looks at all factors *with* a racial lens, not alongside other outstanding features of an application. Statistical evidence for SAT decile acceptance rates by race demonstrate that the impressiveness of an applicant's score is weighted in accordance with race. UNC's very words that certain races "test higher" and must thereby be taken "into account" are testaments to this fact. UNC.JA399. Race cannot practicably be

claimed as a mere sideline supporter; it is the very basis with which an applicant's factors are weighted.

Thus, UNC does not even follow the standards of *Grutter*. It fails strict scrutiny. America as a whole has seen that "once race is a starting point, educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that should make difficult, manageable standards consistent," *Defunis v. Odegaard,* 416 U.S. 312 (1974). UNC is not immune to the strictest standards because it claims deference as educational experts. Overall, "the Equal Protection Clause would be a sterile promise" if the State was protected "from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal" *Norwood,* 413 U.S. 455. So called higher goals of student body diversity should not result in protecting "persons perceived as members of relatively victimized groups at the expense of other innocent individuals." *Bakke,* 438 U.S. at 307. In aggregate, entrenched throughout UNC's admissions system is racial consideration. Despite this, it has failed to offer "sufficient evidence to prove that its admissions program is narrowly tailored." *Fisher I*, 570 U.S. 297 (2013).

"In application, the strict scrutiny standard will operate … with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort." *City of Richmond,* 488 U.S. 469. Seeing as UNC's current practices fail strict scrutiny for their lack of tailoring,

inevitably, UNC is drawn to the fated conclusion that it must use race-neutral means.

B. Effective Race-Neutral Means Of Admission Are Feasible

Considered "inherently suspect," any matter of racial classification is immediately subject to the "most exacting judicial scrutiny" *Bakke,* 438 U.S. at 267. Thus, policies that consider race or ethnic background must be the "least restrictive means" to achieve a compelling state interest. *Id.* While other policies find compelling interests in remediation or other defined, necessary means, race-conscious policies justify their classifications with the notion "of promoting a diverse student body." *Grutter,* 539 U.S. 309. As it stands, UNC does not use and refuses to use much more narrowly tailored and effective alternatives to promote that diversity.

"Ideally," UNC claims, they would "achieve this diversity without considering race" Br. 2. UNC has been approached with a plethora of highly effective, expertly constructed alternatives to affirmative action, and they have repeatedly refused to consider them for the most inconsequential of flaws.

As previously alluded to, one proposed race-neutral alternative is the Modified Hoxby Simulation, which reserves 750 spots out of approximately 4,200 for socioeconomically disadvantaged applicants. UNC.JA574-76; UNC. Pet.App.134 n.43. The rest of the spots are filled with UNC's normal holistic review policy, absolved of the consideration of race. *Id.* UNC and the district court

dismissed the Modified Hoxby Simulation because underrepresented minority admissions would decline just 0.5%, average SAT scores would be in the 90th percentile instead of the 92nd percentile, and UNC would have to admit a small portion of their students based on academic criteria alone. UNC.Pet.App.134 n.43; see UNC.JA1157. Slight adjustments and variations in its statistics cannot justifiably allow UNC to continue a course of action that considers race, a means meant to be used in dire circumstances when no other feasible options are available. The Modified Hoxby Simulation is undoubtedly feasible.

"Percentage plans" are another race-neutral means of admissions proposed to UNC that protect and enhance diversity interests. UNC.JA570-74, 1152-55. This process automatically grants admission to the top students from each North Carolina high school. *Id.* One "top X percent" plan that admitted the top 4.5% of North Carolina high schoolers found the percent of in-state underrepresented minorities, 16.0%, to stay the same. *Id.* At the same time, it saw an increase in African American students from 9% to 10% of the class. *Id.* Average GPA decreased negligibly. *Id.* However, UNC rejected this plan because the average SAT score of the admitted class would decrease from 1311 to 1280. UNC.Pet. App.131-32. The top 7.95% plan created by UNC's expert, Professor Hoxby, showed an increase in underrepresented minority students and a rise of 19% in African American enrollment. UNC.JA 1153, 1155. UNC dismissed this plan as unworkable because the percentage of Native American students

dropped, and because the average SAT scores fell by 77 points. *Id.*

"The reason for the separate treatment of minorities as a class is to make more certain that racial factors do not militate *against an applicant or on his behalf,*" identified Justice Douglas in *DeFunis*. 416 U.S. 312 (emphasis added). The race-neutral alternatives suggested by SFFA assure that race does not work against or in favor of the applicant, demonstrating that separate treatment is not necessary. In stark contrast, the racial factors involved currently indeed work against Asian American and white applicants. For a race-neutral alternative to be considered workable, it must achieve the compelling interest "about as well" and "at tolerable administrative expense" *Fisher II,* 579 U.S. 365. As suggested by the word "about," there is permitted a small degree of variation in results. *Id*. The reasons that UNC provides for rejecting each race-neutral alternative are minor disadvantages compared to the incredible disadvantages of using a measure as easily abused as race in admissions. While none of the alternatives *perfectly* achieve the compelling interest of diversity, they more than sufficiently address the issue. "In determining whether race-conscious remedies are appropriate, we look to several factors, including … the efficacy of alternative remedies" *United States v. Paradise,* 480 U.S. 149 (1987). These alternative admissions policies are more narrowly tailored towards the goal of diversity. At the same time, UNC does not jeopardize "maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to

members of all racial groups." *Grutter,* 539 U.S. at 339.

"The fact that the implementation of a program … might present administrative challenges does not render constitutional an otherwise problematic system." *Gratz v. Bollinger*, 539 U.S. 244 (2003). Minute differences in underrepresented minority enrollment and 2 percentile point decreases in SAT scores cannot seriously stand as the fortress defending last-resort racial classifications. More narrowly tailored, race-neutral plans exist. UNC must adopt them.

In the end, the most surefire and effective "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved,* 551 U.S. at 748 (plurality). For after all, "our Constitution is color-blind … the law takes no account … of color." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Indeed, it is time to make good on the American promise of equality before the law and end race-conscious admissions. Higher-education as it stands in America depends on it.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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12/16/22