No. 20-843

In the

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,

Petitioners,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Supreme Court affirms the findings of lower courts that the University of North Carolina has engaged in legal conduct by using a race-conscious process to expand their ability to recruit a diverse student population.

2. Whether the Supreme Court overrules Grutter and a half-century of court precedent in prohibiting universities in engaging in race-conscious admissions with the purpose of expanding diversity on their campuses.

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SUMMARY OF ARGUMENT

The University of North Carolina contends that its use of a holistic admissions process to determine whether or not a student will be admitted to the school with a purpose of ensuring campus diversity is legal.

The University's case is built on decades of Supreme Court precedent stating a race-conscious process for admissions to build diversity on campus is legal, a compelling interest upheld by University of California Regents v. Bakke. Fisher v. University of Texas at Austin protects a University's right to employ their own methods to accomplish this goal as long as they are consistent with existing standards. Both cases prove the University of North Carolina has cause to enforce their Affirmative Action policies.

Affirmative Action is also a tool to further racial equality in higher education. Grutter v. Bollinger stated the Constitution does not prohibit the use of affirmative action in education, as creating a 'critical mass' of diverse students on campus aligns with principles of racial equality. Furthermore, the XIV amendment does not challenge this as the recruitment of diverse candidates does not inhibit nonminority candidates.

UNC's admissions policy furthers merit-based recruitment. The university wants students of the highest academic caliber, and a race-conscious process that considers racial experience is not

exclusive with meritocracy. Furthermore, given the purpose of affirmative action is to shift the American educated class, the experience of a minority candidate contributes to their worldview and resilience, and forms a part of the equation by which a university is able to consider them.

ARGUMENT

I. Part I

Affirmative Action in education is legal based on Constitutional wording and laws passed by Congress. Grutter v. Bollinger and University of California v. Bakke are constitutional, for reasons already established by the court.

A. Subpart A

The use of the XIV Amendment as a cause for outlawing policy decisions based on race is not a valid argument, as that protection was never intended in the drafting of the amendment and has been violated by every government in the history of the United States. The Constitution does not place a clear restriction on the use of race as a factor in making policy decisions. While it does state that race may not be used as a factor when it comes to stripping individuals of certain rights, that phrasing does not necessitate the government to ignore race in policy. It is for this reason, for example, that government

responses towards the concerns of individuals in analogous situations but with differing races may be different - if the government believes that an individual is disadvantaged in part because of his race, then the government has a duty to intervene, and it should not be blinded by this sentimental idea of promoting 'color-blindness' instead. Furthermore, the passage of the XIV Amendment's aftermath saw myriads of bills passed that favored those emancipated from slavery to ensure that they were not at a continuous disadvantage relative to their white peers. These efforts were not found to be unconstitutional at the time, and are not unconstitutional now. The legal allowance to use race as a basis of policymaking for the government in the interest of pursuing equality is now a part of our legal codex. In the aftermath of the passage of the XIV amendment in 1866, policy was passed that was explicitly not color-blind for the purpose of assisting individuals of color. It can therefore be stated that the intentions of those implementing the policies at the time (who were still in government at the time of passage of these subsequent laws) are consistent with the continued use of government power for the purposes of advancing, or not advancing the interests of a specific racial group. As a public university in particular, the same decision-making process would apply to UNC.

B. Subpart B

The concept of "Temporary Privilege" was born from the philosophy described above as well. This term can be found in the passage of the Freedmen's Bureau, and other government decisions made in the aftermath of the passage of the XIV amendment in the late 1860s. This illustrates that the framers of the amendment, a vast majority of whom were also responsible for passing this future legislation, believed in this concept. The concept refers to the use of privilege in the direction of those who were previously disenfranchised or disadvantaged, and is clearly backed up by decisions made in the aftermath of the XIV amendment, which is used to contest such actions. However, if the argument against "Temporary Privilege" is based on the "Temporary", with the implication that it has some kind of discernible time limit at which it is supposed to expire, that assumption is incredibly flawed. First of all, although this language was used in Grutter v. Bollinger, 539 U.S. 306 (2003) to state that race preferences may not be necessary in 25 years in a form of wishful thinking, it's impossible to place a time limit at which the project of ensuring equality for various groups of people would be completed. Justice O'Connor's opinion can not be interpreted as a binding legal statement, it is simply a statement of hope and optimism for future advancements in equality which she is incapable of predicting. The argument that follows that this opinion represents a legitimate timeline, or that any timeline can

represent the fight for equality, is also highly simplistic. No human person can assert that they can see the future, and by asserting a projection that in a certain time period, the crisis of racial inequality, which has plagued the United States for hundreds of years, will be resolved, that is exactly what the court attempts to do. Furthermore, the maintenance of such equality, and ensuring that all racial groups have equal opportunities and that groups are properly represented in institutions of higher learning is not something that can be restricted without that equality falling apart. The ability of longstanding trends to erode this equality would be extremely damaging for whatever racial group whose status is eroded. This idea of temporary privilege being an extraordinary emergency measure forgets the fact that, if it were not for the continued existence of this measure, we would fall right back into the state of emergency which both sides agree is necessary for the government to avoid. The government's use of the term in the past in describing certain measures that may be biased against an individual racial group, as long as those measures' intent is the expansion of equality and common rights, in itself proves that Temporary Privilege describes an extent, not a timeframe. The fact that this temporary privilege, not stated explicitly within the Constitutional provisions argued by the plaintiffs to be in violation, was instituted by the same individuals who passed the XIV amendment is also a clear indication of the fact that Congress did not intend for the

amendment to be a blanket ban on the use of racial data in policymaking.

C. Subpart C

Additionally, an argument delivered against Grutter fails to demonstrate compelling urgency to overrule years of precedent. Unlike a similar case in the recent past involving Roe v. Wade's overturn, Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022),

in this case there cannot be speculation regarding the 'deeply rooted' nature of this in the text of the XIV amendment. Furthermore, unlike Roe, we are not examining restricting an individual freedom, but rather regarding a basis of government policy. It would be a restriction on government policy that affects past and future decisions, which is a brash measure that will entirely compromise the integrity of centuries of policymaking. There is no urgent cause by which the Court could overrule hundreds of years of government decisions, dozens of Supreme Court decisions and fundamentally reshape American society, unless this case meets the same kind of qualities. It does not. An argument that this case meets the similar guidelines by virtue of violating Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), which may be delivered by the Plaintiff, would also fail. This is because the creation of 'separate but equal' admissions processes or facilities is not what is being argued in this case. We are arguing for the same admissions process to weigh race equally with any other considerations

regarding an applicant. There is no restriction on White or Asian students being admitted to the university, they are still admitted under the same admissions process, therefore this urgency does not appear because this decision does not violate Brown v. Board. Furthermore, if anything, Brown v. Board strengthens the argument that race-conscious government policymaking is legal. The case uses explicit racial characterizations, and asserts that the use of them is necessary to accomplish equality. It is the petitioners, not the respondents, in this case, that are attacking the legacy of Brown, as implementation of their suggested corrections would compromise the ability of diverse students to receive a proper education with their white peers, given that the government will not be allowed to consider individuals race when making decisions regarding school placement, and will therefore be unable to help diverse students make inroads in non diverse communities' better funded schools. Another reason why considering overturning this precedent should be a nonstarter is the fact that, in the opinion of Dobbs, overturning Roe, the Court looked at a variety of laws introduced in the immediate vicinity of the Fourteenth Amendment, essentially proving that no right to abortion was granted to individuals up to that point, therefore the Fourteenth Amendment did not change that freedom. Unlike that case, there is clear precedent of government use of race in decisions - although parts of that has been

overturned in subsequent Supreme Court cases, there is no basis to say that either the Fourteenth Amendment or Brown v. Board had, in their immediate vicinity, an all-out restriction on the use of race in decision making.

II. Part II

Affirmative Action in admissions is legal based on decades of Supreme Court precedent as it furthers a compelling interest of the university. The plaintiffs have no cause to overrule this massive amount of precedent and, furthermore, doing so would heavily impact universities' abilities to ensure a quality pool of their students. Affirmative action in the form in which it's used at UNC, which is the party represented by us in this case, is written precisely to place as few restrictions as possible on the admissions chances of those seeking admission, while also furthering diversity through a non-quota approach.

A. Subpart A

Universities have a compelling interest in achieving diversity on their campuses. This was established by Regents of the University of California v. Bakke, 438 U.S. 265 (1978)) and Grutter, key cases being argued, but has

roots even beyond their existence. The justification of the existence of this compelling interest stems, first and foremost, from the fact that it is a legitimate purpose for an educational institution to not be homogenous. Having individuals of only one race, from only one specific community, all attending the same college, ignores the purpose of a higher education, which is to prepare students to exist in a society outside of school which is not homogenous. This reasoning should exist regardless of whether the court finds Bakke to be constitutional or not - racial diversity being a legitimate interest of higher education institutions to further their education processes is not connected to the legality of affirmative action. Furthermore, as it's understood in Grutter v. Bollinger that the court "does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body", we have already seen courts recognize the fact that these benefits do exist, and therefore we have a significant amount of leeway in terms of the implementation of the procurement of this compelling interest. The logic behind this compelling interest stands even if affirmative action does not - both sides can agree that there is benefit from diversity on campuses, and that as that is an action that is beneficial for institutes of higher education to take, the law must be focused on what methods the institutions can take to accomplish them.

B. Subpart B

Affirmative action is the least restrictive, most narrowly tailored, and generally the best way to achieve this compelling interest. The general roadmap laid out in University of California

Regents vs. Bakke states that the least restrictive measure that can be used to increase diversity on campus, which, importantly, is not a quota system, is considered legal. University of North Carolina's policy meets these standards. First of all, affirmative action can not be considered a quota system in the way it is used in the North Carolina admissions policy. The UNC plan repeatedly cites Supreme Court precedent in its outline of what admissions officers can and cannot do; furthermore, UNC does not explicitly tell admissions officers a certain number of students to recruit per racial category (i.e. a quota), nor are candidates separated in consideration by racial group in any form. UNC does, in fact, directly instruct their admissions officers to recruit based on a diversity of experiences, including racial experiences which, for reasons described in Part III, is separate from a race-based system while also being race-conscious. Furthermore, it cannot be claimed that race is a deciding factor in the process: experts in the lower courts during this trial stated explicitly that race, if used in the form it is in UNC, would decide less than 5% of admissions decisions. Furthermore, the plaintiff cannot prove, as it is impossible to prove, that there is an alternative that makes no consideration of race whatsoever. This gold standard is unachievable, and inevitably results in a significant loss of diversity on student campuses.

III. Part III

The petitioners have no reason to file suit against the university as the university has succeeded in ensuring that their merit as candidates is considered foremost.

A. Subpart A

The merit of an individual candidate is based partially on their diverse experiences. This is because their diverse experiences are directly correlated with merit as candidates. It is an extremely simplistic approach to merely believe that a college admissions board functions by taking an individual's grades and SAT scores and putting them together. Grades in the United States, as proven by scientific studies, are not the most consistent way to detect whether or not a student is likely to be successful in the future. Placing all of the university's 'bets' on IQ neglects the consideration of an applicant's experiences, triumphs and other accomplishments, and barriers that they had to overcome in order to accomplish these triumphs. If a group is underrepresented naturally in a certain field, it follows that race is a barrier to students who identify with that group. In fact, this kind of action towards the students it is targeting in our times does not restrict it to be used for the benefit of other groups in the future; it is merely a guarantor of equality by ensuring that underrepresented groups have an opportunity to succeed. Diversity of perspectives has been found to increase productivity in corporate teams and teams in other aspects of American society. If diversity increases the productivity of a team, it therefore follows that a more diverse group is a group with more merit. Universities have an obvious compelling

interest to ensure excellence and productivity on their campuses, therefore it follows that undermining their ability to recruit students with varying experiences, including racial experiences, would harm their ability to not only pursue their previously established compelling interest for diversity, but would also harm their more overlying interest in ensuring academic success of their students. Furthermore, as race is a subcomponent in a greater category of 'life experiences', and life experiences in themselves are a subcomponent of a greater category of non-academic merit, which in itself makes up only a part of the reasoning behind a selection of the candidates for university admissions, plaintiff's connection between this one specific factor and someone's admission or non admission to a university is weak. The court has also previously found that this exact kind of structure is legal: Fisher v. University of Texas at Austin, 579 U.S. ___ (2016) focused on a system of the exact same type and found that it was legal and survived strict scrutiny. Even if the function of race is as prominent as in the Fisher case (which it isn't, as the University specifically adapted to that Supreme Court precedent), the court has already asserted that this kind of standard is legal and has no reason to reverse its previous decision. The cost and benefit of removing this category is also drastic. If it is impossible to properly evaluate a candidate's life experiences without factoring in their racial identity (which it is, considering the impact of racial identity on people's life experiences in the United States), and it is impossible to evaluate a candidate's non-academic merit without evaluating their life experiences (which it is, as removing that category

would stop colleges from considering students' personal accomplishments, a major factor in admissions), and it is impossible to evaluate a candidate's general qualifications without evaluating their non-academic merit (which it is, considering the fact that, as previously stated, academic merit doesn't come close to being the only factor in determining candidates' success), then it follows that forcibly removing race as a factor in admissions will compromise the entire delicate equation by which admissions are built, and destroy colleges' abilities to make informed considerations regarding their candidates' qualifications. This amounts to nothing less than a complete destruction of the entire candidate recruitment process.

B. Subpart B

Petitioners cannot prove, as it is impossible to prove, that they would have been admitted to UNC had it not been for this policy, and that they in fact had some kind of legal claim to admission based exclusively on academic standards. Therefore, the plaintiffs have no standing to file this suit. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) laid out clear standards for what was acceptable standing to file a lawsuit. The petitioners do not meet those standards. One important component of that is the fact that petitioners' claim that they can prove through some kind of data comparison that less qualified students are admitted to universities while they are denied is wrong. Universities cannot make admissions decisions exclusively based on

academic stature and metrics. This is the reason why admissions based on sports achievements, achievements in the arts or other fields, are possible. There's even more non-racial considerations that a university can take into account: it's a frequent practice, for example, to recruit students from the local community. Beyond our assertion in A. Subpart A that diversity of experience should be considered as a separate category when determining admissions, it's a question whether academic prowess should be defined as being the standard by which universities should admit in the first place, or whether it's the most indicative of future success. If the plaintiff wishes for UNC to revoke its use of diverse experiences as a part of the formula in deciding admissions policy, and the court approves of this policy, then it follows that universities are not free to make their own decisions regarding admissions policy as a whole. This compromises universities' selectivity and varying priorities, and there is no metric that leads plaintiffs to assume that they would have been admitted under a policy without these racial considerations. Simply stating an academic metric and comparing that specific metric between candidates ignores the fact that universities take other non-racial characteristics, such as athletic performance, into account when making admissions decisions. Furthermore, it's also impossible to state that there was not some kind of further talent on the part of the Black student that warranted their admissions.

Unless the petitioner can provide a rationale that explains that he/she was rejected in favor of a specific student (which is impossible, as that is not the way the admissions process works, it is not a head-to-head, points-based matchup), and was greater than that student on every single metric warranting consideration in the opinion of the university (athletics, academics, extracurriculars, interview performance, essays, local origins) on some kind of objective basis, the petitioners have no basis to file a lawsuit against UNC in the first place. Furthermore, saying that race, which makes up, as previously stated, a subcomponent of a greater category, life experiences, which in itself makes up a subcomponent of a greater category, non-academic accomplishments, was the core decision maker in admissions, beyond being unprovable, is simply not possible considering the small weight that, even according to plaintiff's assertions, it has on the general process.

CONCLUSION

For the reasons we have stated, UNC's affirmative action practices, and affirmative action as a whole, should be declared constitutional.

Respectfully submitted,

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