No. 20-843

In the
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioners,

v.

UNIVERSITY OF NORTH CALORINA, ET AL.,
Respondents.

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

BRIEF FOR PETITIONERS/RESPONDENTS

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QUESTIONS PRESENTED

Is race-conscious affirmative action consistent with the Fourteenth Amendment to the United States Constitution?

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JURISDICTION

This case comes to the Court on writ of certiorari from the Fourth Circuit. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Section 1: 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 2-4: Omitted
>
> Section 5: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const., amend. XIV

STATEMENT OF FACTS

This case is similar to the companion case: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard University*, No. 20-1199. The University of North Carolina (UNC) awards racial preferences at every stage of its admissions to African Americans, Native Americans, and Hispanics.

UNC.Pet.App.15 & n.7, 37; UNC.JA407. UNC accomplishes its goal by asking applicants to check a box indicating their race and awarding a plus factor to applicants from favored minorities. Asian American students are not invited to apply to the University unless their SAT scores are above 1400 whereas favored minorities get invited with a significantly lower SAT score of 1250. UNC. Pet.App.47. UNC discounts the test scores of Asian Americans. UNC.JA399; see also UNC.JA1252. Race is often the "determining factor" in a student's admission. UNC. Pet.App.47. For example, Asian Americans in the highest decile of the Academic Index have a 52.8% chance of being accepted into UNC while an African American in the Fourth-highest decile still has a higher chance of 57.74% to be accepted into UNC. The result of UNC's admissions policy is vague, the university cannot even, "say how often race makes the difference in whether or not a student is admitted." UNC.JA692. UNC conceded that the University of Texas's race-neutral 10% plan would achieve more student body diversity (15% to 16% of favored minorities) than its current plan in its amicus brief in *Fisher v. University of Texas*. *See* UNCFisher-Br. 33-34, 2012 WL 3276512. Students for Fair Admissions (SFFA) asks this Court to reverse the lower court's decision, overrule *Grutter,* and maintain the Fourteenth Amendment's race-neutral purpose.

SUMMARY OF ARGUMENT

This Court in *Grutter* explained that there is a compelling government interest in maintaining a "diverse student body." Such interest is neither compelling because the burden of discrimination

outweighs the government's burden to use a race neutral alternative, nor narrowly tailored because of the arbitrary nature of racial classifications. *Grutter is* further inconsistent with the Fourteenth Amendment's Equal Protection and Enforcement Claus's text, history, and tradition therefore, *Grutter* should be overruled. Moreover, the doctrine of *stare decisis* does not prevent the overruling of *Grutter*. *Grutter*'s framework is neither workable because it lacks the standards or definitions for "plus" factor, intent, and application, nor does *Grutter* establish a sufficient reliance interest because race is used as a "plus" factor. The University of North Carolina (UNC) uses race in its admissions policies to further the purported compelling government interest, approved of in *Grutter,* to achieve a "diverse student body". UNC's admissions policies, however, do not survive strict scrutiny because its use of race is not narrowly tailored, is inconsistent with Section 5 of the Fourteenth Amendment, and is inconsistent with this Court's decision in other cases. Therefore, *Grutter* should be overruled, and even if not, the University of North Carolina's race-based admissions policies should be held as unconstitutional because they do not survive strict scrutiny.

ARGUMENT

I. *Grutter* should be overruled because it does not survive strict scrutiny, and is inconsistent with the Fourteenth Amendment.

The Fourteenth Amendment provides in relevant part:

> 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.

U.S. Const. amend XIV § 1

Strict scrutiny must be applied as, "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." This Court previously explained in *Fisher v. University of Texas at Austin* that, *"Grutter* made clear that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Fisher v. University of Texas at Austin*, 570 U.S. 297, 310, 133 S. Ct. 2411, 2419, 186 L. Ed. 2d 474 (2013) (*citing Grutter v. Bollinger,* 539 U.S. 306, 326, 123 S. Ct. 2325, 2337, 156 L. Ed. 2d 304 (2003)). The University of North Carolina (UNC) carries this burden to prove that its admission process is narrowly tailored to further its interest in student

body diversity. *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310.

This court should overrule *Grutter v. Bollinger*. *Grutter* held that universities and higher education have, "a compelling interest in attaining a diverse student body" *Grutter v. Bollinger*, 539 U.S. 306, 328 and the use of race in admissions is permissible if each applicant is, "evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at 337. *Grutter* is wrong because, the race-based admissions approved of in *Grutter* is not narrowly tailored, the interest in a diverse student body is not compelling, and is inconsistent with the Fourteenth Amendment's text, history, and tradition.

A. Race-based admissions policies are not narrowly tailored to further a compelling government interest.

Race-based admissions policies are too arbitrary to further the government's interest in student diversity. Statutes impeding constitutional rights must be narrowly tailored with the, "least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S. Ct. 2746, 2757–58, 105 L. Ed. 2d 661 (1989). This means that the regulation must impose upon a government aim that, "would be achieved less effectively absent the regulation" without room for improvement upon the statute. *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 2906, 86 L. Ed. 2d 536 (1985)(*see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296, 104 S. Ct. 3065, 3071, 82 L. Ed. 2d 221 (1984)). A race-based plus factor is under the strictest standards of narrow tailoring. A government action is

not narrowly tailored if it entitles a "[B]lack, Hispanic, or Oriental (Asian)" to enjoy, "an absolute preference over other citizens based solely on their race." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 471, 109 S. Ct. 706, 710, 102 L. Ed. 2d 854 (1989). Moreover, the action must, "be narrowly tailored to advance that objective," of the government. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 123, 112 S. Ct. 501, 512, 116 L. Ed. 2d 476 (1991).

Any plus factor towards any race does not account for racial diversity because racial diversity is too broad. The U.S. Census, for example, identifies only 6 race categories: White, Black/African American, American Indian and Alaskan Native, Asian, Native Hawaiian and Pacific Islander, and two or more races. United States Census Bureau, *Race,* (available at https://www.census.gov/quickfacts /fact/note/US/RHI625221#:~:text=OMB%20requires%20that%20race%20data,report%20more%20than%20one%20race Late visited 12/5/22). Those definitions are extremely broad, for example, "Asian" includes any person, "having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent." *Id.* Such broad definitions are not narrowly tailored because of the large amount of area that it encompasses. "It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share." *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365, 414. Universities can have a proportional amount of Blacks or Hispanics without diversity because each person is from the same country or area. If universities were able to look at diversity with regard to background and socioeconomic status, students would not receive

absolute preference solely based on their race, and the government would achieve the interest of student body diversity with a less restrictive alternative.

Here, *Grutter*'s framework permits the use of race in admissions as a "plus" factor. Due to the arbitrary nature of racial classifications, even as a "plus factor", the use of race in admissions policies is not the least restrive alternative.

In *Grutter,* this Court also placed an emphasis on time which changed the meaning of a diverse student body. The *Grutter* Court expected that "25 years from now [2003], the use of racial preferences will no longer be necessary to further the interest" in a "diverse student body." *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003). By placing a time limit on the governmental interest, this interest that *Grutter* approved of is extended beyond the simple, forever-needed interest in a diverse student body. In *Grutter,* this court explained that such discrimination will not be relevant when "the number of minority applicants with high grades and test scores has indeed increased" to roughly equal levels. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). However, that governmental interest which is being extended is inconsistent with Justice Powell's dicta in *Bakke* explaining that race-conscious admissions policies are not permitted for "societal discrimination" which is "an amorphous concept of injury that may be ageless in its reach into the past." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307, 98 S. Ct. 2733, 2757, 57 L. Ed. 2d 750 (1978). The *Grutter* court's addition of other discrimination makes its framework less narrowly tailored to further the compelling government interest because *Grutter*

broadens the absolute preference of students solely based on their race.

Therefore, the *Grutter* framework, with an emphasis on race-conscious admissions, is not narrowly tailored to further the interest in a diverse student body and should be overruled.

B. Achieving a diverse student body is not a compelling government interest.

UNC's admissions policies need to further a "compelling *government* interest" *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310, 133 S. Ct. 2411, 2419, 186 L. Ed. 2d 474 (2013)(*citing Grutter*, 539 U.S., at 326)(emphasis added). An infringement upon a constitutional right must "be justified only by a compelling interest." *Fulton v. City of Philadelphia, Pennsylvania*, 210 L. Ed. 2d 137, 141 S. Ct. 1868, 1877 (2021).

For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* this Court held that the governmental interest in public health was not compelling enough to outweigh the infringement upon the "right to engage in religious activity." 508 U.S. 520, 562, 113 S. Ct. 2217, 2242, 124 L. Ed. 2d 472 (1993). The *Likumi* court said that "'balance depends upon the cost to the government of altering its activity" against the cost to excercising the constitutional interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 529, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1484 (S.D. Fla. 1989), *aff'd sub nom. Church of Lukumi v. City of Hialeah*, 936 F.2d 586 (11th Cir. 1991), (*quoting Grosz v. City of Miami Beach,* Fla., 721 F.2d 729, 734 (11th Cir. 1983). This

Court explained that the cost to the government of accommodating religious practices was insufficient to justify or warrant a constitutional infringement. This Court has therefore defined a compelling governmental interest as an interest of the *government* that can balance out the infringement of a constitutional right.

Here, the interest, approved of in *Grutter,* in a "diverse student body" does not serve a governmental interest as much as it serves the interest of the students to achieve, "the educational benefits of diversity." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 312 (2013). The right of students to be free from racial discrimination outweighs the government's interest in a diverse student body because, first, the students have an interest in a diverse student body, not the government,; and, second, purported educational benefits of diversity is generalized and amorphous while the cost to the discriminated students is definite and exact.

Therefore, the interest in a diverse student body is not a compelling interest, and this Court should overrule *Grutter*.

C. *Grutter* is inconsistent with the text, history, and tradition of the Fourteenth Amendment.

Grutter is inconsistent with the text of the Fourteenth Amendment because the Equal Protection clause grants equal protection of laws, and Section 5 of the Fourteenth Amendment grants congress the authority to enforce the clauses of the Fourteenth Amendment. The Fourteenth Amendment provides that no state shall, "deny to any person within its

jurisdiction the equal protection of the laws." or other rights unequally. U.S. Const. amend XIV § 1. The Fourteenth Amendment also provides, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV § 5. To find the original meaning of the Constitution's amendments, one must specifically use the words in, "the text." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 213 L. Ed. 2d 387, 142 S. Ct. 2111, 2137 (2022). Here, Section 1 of the Fourteenth Amendment is clear, it guarantees no race-conscious legislation as constitutional. In Section 5 of the Fourteenth Amendment, "appropriate" legislation means the, "most suitable, fit or proper" legislation. Goodrich, Chauncy A., Porter, Noah, *An American Dictionary of the English Language* 63 (1862) (*available online at:* https://archive.org/details/americandiction00webs/page/60/mode/2up?ref=ol last visited 12/12/22). The purpose of this amendment, as explained in John Binham's introduction, was to, "arm the congress with the power to enforce the bill of rights as it stands in the constitution today" Cong. Globe, 39th Cong., 1st sess. 14 (1865). In the sheer text of the Fourteenth Amendment, the Constitution grants Congress the authority to regulate and enforce the clauses of the Fourteenth Amendment. Here, the *Grutter* court ruled on, and enforced, the Fourteenth Amendment. The *Grutter* court, therefore, usurped Congress's authority to enforce the clauses of the Fourteenth Amendment. Therefore, this court should hold that *Grutter* was wrong because *Grutter* wrongly decided to enforce the Fourteenth Amendment in place of Congress.

The history of the ratification of the Fourteenth Amendment and its meaning in context demonstrates

that *Grutter* is antiquated in its approach and cannot apply now. History demonstrates a further understanding of the Fourteenth Amendment beyond the text. "[T]he most universal and effectual way of discovering the true meaning of the law, when the words are dubious, is by considering the *reason* and *spirit* of it." I Sir William Blackstone, *Commentaries on the Laws of England* 61 (1765-1769) (see Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the 14th Amendment: Its letter & Spirit* 10 (2021)). The spirit of the Fourteenth Amendment was to give former slaves equal opportunity and rights because, "If they are put upon the same footings as white people, then they have the same remedies as white people." *See* e.g. Cong. globe, 39th Cong., 1st Sess. 240 (1866). That reasoning is additionally explained in the initial statements of the Framers such as Senator John Bingham. Bingham explained that, "[t]he spirit, the inherent, the purpose of our Constitution is to secure equal and exact justice to all men." Cong. Globe, 39th Cong, 1st sess. 157 (1866). The words "secure" and "exact" were defined as, "to ensure, in property" and "closely correct or regulate" respectively.Goodrich, Chauncy A., Porter, Noah, *An American Dictionary of the English Language* 416, 999 (1862) (*available online at:* https://archive.org/details/americandiction 00webs/page/60/mode/2up?ref=ol last visited 12/12/22). The spirit of the Fourteenth Amendment is also explained "[b]y the first clause, each state is prohibited from restricting these fundamental rights of citizens, whatever may be their nature and extent." *Notes of Jacob Howard on the Fourteenth Amendment's Privileges or Immunities Clause* (1866), https://www.tifs. org/courses/Howard. pdf at 3. See

Christopher R. Green, *Incorporation, Total Incorporation, and Nothing but Incorporation*. 24 Wm. & Mary Bill Rhts. J. 93, 109 (2015) (discussing Howard's notes)(see Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the 14th Amendment: Its letter & Spirit* 141 (2021)). There, the rights of citizens cannot be inhibited based on any intent.

Here, *Grutter* relied upon the intent of discrimination in race-based affirmative affirmative action. The *Grutter* court held that a diverse student body was a compelling government interest as long as there is a "serious, good faith consideration of workable race-neutral alternatives." Grutter v. Bollinger, 539 U.S. 306, 339 (2003). The *Grutter* Court's holding that racial discrimination is permissible in "good faith" does not secure equal or exact justice for all students and instead restricts their fundamental rights to not be discriminated against by the State.

Moreover, *Grutter* is an outlier in the history of equal protection. The Fourteenth Amendment has been historically race-neutral, unlike *Grutter*. For example, Congress, around the same time period, lesislated the act establishing the Freedman's Bureau. The Bureau was enacted to aid both recently freed slaves AND (mostly white, southern) refugees. Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J.S. Hist. 271, 291-92. Moreover, the legislation enacted was not intended to be race-conscious, and it still would have survived strict scrutiny at that time. Rappaport, *Originalism and the Colorblind Constitution*, 89 Notre Dame L. Rev. 71, 102-103 (2013). Other histories in the ratification of

the Fourteenth amendment further demonstrated an emphasis on colorblindness, mandating complete colorblindness in the Amendment's enforcement. *See*, e.g., Cong. Globe, 39th Cong., 1st Sess. 1287 (1866) Directly after the ratification, the explanation of such a mandate was to support the "abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874) (*available at https://www.govinfo.gov/app/details/GPO-CRECB-1874-pt7-v2/GPO-CRECB-1874-pt7-v2-1/context)* This Court has also previously explained that the "core purpose of the Fourteenth Amendment" is to "do away with all governmentally imposed discriminations based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S. Ct. 1879, 1881, 80 L. Ed. 2d 421 (1984)

In this case, *Grutter* defined race consciousness as permissible in the context of higher education. As the core of the Fourteenth Amendment is colorblind, however, *Grutter*, therefore, offends the constitution and should be overruled.

II. The doctrine of *stare decisis* does not require that this Court uphold *Grutter*.

A. The test approved by Justice Powell in *Bakke* and affirmed in *Grutter* has proven to be unworkable.

Grutter does not stand alone. Precedents throughout the past century have defined the standard of racial classifications in schools. In 1954, *Brown v. Board of Education* held that racial discrimination in elementary schools, "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 495, 74 S.

Ct. 686, 692, 98 L. Ed. 873 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). About 30 years later, this *Brown's* rule was addressed in the context of higher education. Applying Intermediate Scrutiny, *Regents of California v. Bakke* identified a legitimate governmental interest, "in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination" on a much more focused scale than the, "remedying of the effects of "societal discrimination," which causes injury. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307, 98 S. Ct. 2733, 2757, 57 L. Ed. 2d 750 (1978). There, Justice Powell, writing for a fractured court, "approved the use of race to further an interest in student body diversity in the context of public higher education." *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). This court, in *Grutter* contrastingly applied strict scrutiny with a, "compelling interest in a diverse student body" by defining this diversity as "a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body." *Grutter*, 539 U.S. 306, 329 (2003).

The use of *stare decisis*, in this case, is invalid because it must be applied only when the previous court decisions are workable and establish a reliance interest. Applying the workable doctrine, even if legally misplaced, is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991) The doctrine, moreover, "keep[s] the scale of justice even and steady, and not

liable to waver with every new judge's opinion." 1 W. Blackstone, *Commentaries on the Laws of England* 69 (1765) (see *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part)). *Stare decisis* can only prevent a previous decision's overruling if the case has not "proved to be unworkable" *Swift & Co. v. Wickham*, 382 U.S. 111, 116, 86 S. Ct. 258, 261, 15 L. Ed. 2d 194 (1965). "[This Court's] precedents counsel that [an] important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner." *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2272 (2022)(citing *Montejo v. Louisiana*, 556 U.S. 778, 792, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283–284, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988)). In *Dobbs,* this court held that a standard-less test cannot be understood or applied in a consistent or predictable manner.

Here, the *Grutter* framework is unworkable because it lacks standards for three reasons.

First, the *Grutter* framework gives no standard or definition for a diverse student body or limits in which discrimination can occur. This Court simply stated, "a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body." Grutter v. Bollinger, 539 U.S. 306, 339 (2003). Under the *Grutter* framework, schools have no guidance about the number of diverse students; universities cannot define a student body as diverse without standards.

Second, the framework in *Grutter* provides no guidance for a "plus" factor. *Grutter* holds that Universities can, "consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant" to explain diversity. *Grutter v. Bollinger,* 539 U.S. 306, 334 (2003). This Court did not add to that definition in any equivalent manner more than the use of a "plus" factor to consider race in admissions. This Court stated that a "plus" factor would assure that, "qualifications would have been weighed fairly and competitively," *Id.* at 341. However, that "plus" factor does not explain the quantity of bias that can be given by schools and universities. Universities are left with an explanation without a test or examination of supposedly permitted biases.

Lastly, *Grutter* fails to distinguish the intent of racial discrimination. *Grutter* defines policies to be narrowly tailored if they act with a, "good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). Universities are then left to the decision of how to work a good faith consideration without further guidance. Therefore, the lack of standards presented in *Grutter*'s framework makes its decision unworkable.

B. The multifactor test approved in *Grutter* does not create sufficient reliance interest to support the application of *stare decisis.*

When considering overruling *Grutter*, this Court must consider whether overruling will "upend substantial reliance interests." *Dobbs v. Jackson*

Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2276 (2022) (citing See *Ramos*, 590 U.S., at —, 140 S.Ct., at 1418-1419 (opinion of KAVANAUGH, J.)) "Traditional reliance interests arise 'where advance planning of great precision is most obviously a necessity.'" *Dobbs v. Jackson Women's Health Org*., 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2276 (2022) (quoting *Casey*, 505 U.S. at 856, 112 S.Ct. 2791 (joint opinion)

Here, the University of North Carolina asserts that race is just one of many factors used in the admission of students to the University (See Parts V, VI, supra.) (J.A. 116). Therefore, if this Court overrules *Grutter,* UNC will not require "advance planning of great precision" to change its admissions policies because race is simply one factor of many that affects the University's admissions.

III. Even if *Grutter* is not overturned, SFFA still prevails because UNC's race-based admissions policies are not narrowly tailored and are inconsistent with Congress's exercise of Section 5 of the Fourteenth Amendment.

A. UNC's race-based admissions policies are not narrowly tailored because there are effective race-neutral alternatives used by other university systems.

UNC's Admissions process takes race into account in maintaining a diverse student body. However, UNC's admissions do not survive strict scrutiny because they are not narrowly tailored. Narrowly tailored regulations require minimal restriction and, "if a less restrictive alternative would

serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865 (2000) (Citing *Reno*, 521 U.S., at 874, 117 S.Ct. 2329) As *Brown* explains UNC should, "'determin[e] admission … on a nonracial basis.'" *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 710, 747-48, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (plurality) (quoting *Brown v. Bd. of Educ. of Topeka* (Brown II), 349 U.S. 294, 300-01 (1955)).

1. Texas

There are admissions policies, successfully used by other universities and jurisdictions that further the interest of maintaining a diverse student body without harm to students of other racial groups. One example of unbiased admissions policies is taken from the University of Texas at Austin. The university implemented the ten percent (now the six percent) policy where students within this percentage of their high school automatically get accepted into the University. This policy benefits the student body by, "increasing geographic diversity and providing more accessibility to UT Austin to students from all schools around the state." UT Texas News, *Top 10 Percent Law* (available online at: https://news.utexas.edu/topics-in-the-news/top-10-percent-law/ Last visited 12/12/22). Due to the nature of school diversity, with a large number of racial groups at one school and a smaller number at the other, the natural diversity does not take race into account, but it furthers the interest of a diverse student body. Therfore less restrictive means of obtaining racial diversity can be used by UNC.

B. UNC's race-based admissions policies are inconsistent with Congress's exercise of authority pursuant to Section 5 of the Fourteenth Amendment and the following legislation.

1. Title iv

Section 5 of the Fourteenth Amendment provides, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV § 5. When Congress has been given the authority to enforce a part of the Constitution, the question is if, "Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council,* Inc., 467 U.S. 837, 842, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984). Congress exercised the authority to enforce the Fourteenth Amendment by passing the Civil Rights Act of 1964 which 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." 42 U.S.C.A §2000d. Congress has therefore spoken on the use of race in any government agency.

Here, there is no doubt that §2000d applies to the University of North Carolina because UNC receives Federal financial assistance and, "receives a portion of its funding from the State of North Carolina and enrolls students who receive financial assistance from the Federal Government." (ECF No. 30 at 19.). It is also beyond doubt that UNC violates §2000d because it denies SFFA the benefits of admissions to

the University of North Carolina (See ECF No. 163-1 at 9–10; ECF No. 113-9 at 2; ECF Nos. 114-5, 114-6.).

Moreover, Congress passed this act to prohibit te use of race, and it did not make exceptions by authorizing race-conscious admissions. Petitioner's interpretation of Title vi is consistent with other congression legislation enforcing the Fourteenth Amendment because the use of race is not allowed in areas such as housing, employment, or public facilities. cite statute the *see also, Guardians Ass'n v. Civ. Serv. Comm'n of City of New York*, 463 U.S. 582, 591, 103 S. Ct. 3221, 3226, 77 L. Ed. 2d 866 (1983) ("disproportionate-impact discrimination is subject to the Title VI regime"); *Barnes v. Gorman*, 536 U.S. 181, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002) ("Title VI which prohibits discrimination in program or activity which receives federal funds invokes Congress's power under the Spending Clause to place conditions on the grant of federal funds.")

Therefore, this Court should hold that UNC's admissions policies are inconsistent with the Fourteenth Amendment.

C. UNC's race-conscious admissions policies are inconsistent with the government's interest in other decisions by this Court.

This Court's decision should be informed by *Bob Jones University v. United States*. 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) In that case, the Internal Revenue Service (IRS) revoked the tax-exempt status of private schools that engaged in racial discrimination. More specifically, these schools included Bob Jones University, which prohibited interracial dating and marriage due to the school's

religious beliefs. The University, on the other hand, charged that the Irs's revocation of their tax-exempt status went against its religious liberty. There, the Court held that the IRS was able to revoke the school's tax-exempt status because the status must provide, "beneficial and stabilizing influences in community life" *Walz v. Tax Comm'n,* 397 U.S. 664, 673, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970), which is not met dues to the school's racial discrimination policies. This Court, in *Bob Jones*, specifically explained how, "racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983).

Here, UNC has taken race into account of its policies. UNC is a public school that receives funding. UNC cannot take race into account because racial discrimination in schools is against the fundamental national public policy of indiscrimination. UNC cannot provide influences on community life that are stabilizing or beneficial due to its taking of race into account in UNC's admissions policies. Moreover, UNC has no liberties that have been violated, but, even in the context of liberties, UNC's liberties can be reasonably limited because race violates the most "fundamental national public policy." *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) Therefore, the University of North Carolina is inconsistent with other well-established decisions by this Court, such as *Bob Jones.*

CONCLUSION

This Court should reverse the lower court's decision and overrule *Grutter*.

Respectfully submitted,

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