No. 21-707

In the
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, et al.,
Respondents.

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

BRIEF FOR RESPONDENTS

JEEVUN TARSNEY
Counsel of Record
Glenbrook North High School
2300 Shermer Road
Northbrook, IL 60062

JOHN TARSNEY
Northern Valley Old Tappan Regional High School
100 Central Avenue
Old Tappan, NJ 07675

December 16, 2022

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

SUMMARY OF ARGUMENT

Affirmative action programs in higher education are consistent with the Equal Protection Clause of the Fourteenth Amendment when they are narrowly tailored to achieve the compelling government interest of racial diversity in higher education, as the district court found with respect to the programs of Respondents in this case. These factual findings are reversible only for clear error. *See Lawyer v. Department of Justice*, 521 U.S. 567, 580 (1997).

The Equal Protection Clause of the Fourteenth Amendment was intended to allow race-conscious legislation on behalf of any underrepresented, previously persecuted minorities. The same Congress that sent the Fourteenth Amendment to the States for ratification enacted race-conscious laws to remedy past discrimination. In 1863, a bill was proposed to Congress calling for the creation of the Freedmen's Bureau, an organization originally created for "persons of African descent". Cong. Globe, 38th Cong., 1st Sess. 2801 (1864). This bill was supported by Senators who had also voted in favor of the Fourteenth Amendment, showing positive reception to race-conscious programs by framers of the 14th amendment.

Race-conscious legislation has been enacted since Reconstruction, further showing that Petitioners' claim that the Fourteenth Amendment is "color-blind" is not valid. This Court's decisions have upheld race-conscious laws that remedy past discrimination and seek to bring races together. Laws that exclude or discriminate against one racial group do not survive

the strict scrutiny this Court has applied to all laws using racial classifications. *See*, *e.g.*, *Brown vs. Board of Education*, 347 U. S. 483 (1954).

ARGUMENT

I. The Equal Protection Clause Of The Fourteenth Amendment Was Intended To Allow Race-conscious Legislation On Behalf Of Underrepresented, Previously Persecuted Minorities.

When the Civil War ended on April 9, 1865, millions of slaves were freed in a wartime act by President Lincoln that not only helped his Civil War cause, but provided a direct means of creating racial freedom. The 39th Congress continued to seek equality by passing the Thirteenth Amendment and setting in stone what Lincoln had declared in wartime.

After Lincoln's sudden death, the same 39th Congress attempted to continue the process of creating true equality for the recently emancipated mass of slaves. They never succeeded. The task of remediating centuries of slavery is truly impossible. Remedying discrimination is a hard, challenging process, but the American government has legally attempted to create equality among people of all races. The same 39th Congress that freed the slaves set forth to create a 14th revision to our constitution.

They drafted an amendment which explicitly stated "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," giving formerly enslaved men and women the right to citizenship. U.S. Const. amend. XIV, § 1. The amendment furthers the equality of all people by explicitly stating that no one can pass laws which "deprive any person of life, liberty,

or property, without due process of law", as well as creating "equal protection," under all laws within the United States. *Id.*

Petitioners incorrectly claim that the Fourteenth Amendment and the Civil Rights Act both explicitly forbid any race-conscious laws, programs, or practices. Race has been used under the Fourteenth Amendment for purposes of racial remediation. As demonstrated by the authorities cited below, the framers of the Fourteenth Amendment wanted race to be used to help bring people into prosperity and equality, and would allow race-consciousness in this application, while they would not allow race to be used for the purposes of discrimination.

A. The Equal Protection Clause Permitted Race-Conscious Legislation As A Form Of Racial Remediation.

As the framework for the Reconstruction was being laid following President Lincoln's assassination, most of the Congress believed that, while emancipated, their duty to the freedmen of American was not complete. They created the 14th amendment, which passed in the Senate on June 8, 1866, and was revised until being passed on July 9, 1868.

The legislation coinciding with and directly after the passing of the Fourteenth Amendment shows how race-consciousness was allowed and intended by the the Equal Protection Clause of the Fourteenth Amendment. Secondly, in the 20th century, race-consciousness was still allowed within the legislative boundaries created by the Fourteenth Amendment.

1. Congress Enacted Race-conscious Laws for Different Racial Groups Directly Following Passage of the Fourteenth Amendent.

When the framers of the Fourteenth Amendment were debating the Equal Protection Clause, race-consciousness was not an abstract topic. Race-consciousness was being used and implemented following the Civil War for the purpose of the Reconstruction.

In 1863, Congressman Elliot proposed a bill to create The Freedmen's Bureau, which was an organization originally created for "persons of African descent". Cong. Globe, 38th Cong., 1st Sess. 2801 (1864). Throughout the next three years, the 39th Congress was tasked with passing both the 14th amendment and perfecting the Freedmen's Bureau. As both bills were being revised, there was a clear alignment between them. Congressman Stevens, Senator Wade, and Congressman Bingham sponsored the 14th amendment, and voted for the Freedmen's Bureau in all 3 years bills were presented to Congress (1864, 1865, 1866). Senator Trumbull and Congressman Eliot sponsored the Freedmen's Bureau and voted for the Fourteenth Amendment. The Freedmen's Bureau Acts were opposed by President Johnson, and backed by the same group of Republicans within Congress that drafted the Equal Protection Clause.

This evidence clearly shows a consent to race conscious programs by the framers of the Fourteenth Amendment, and like-minded thinking among the

framers of each bill. Senator Trumbull sponsored the Civil Rights Act of 1866 as well as the Freedmen's Bureau.

As the Freedmen's Act was created, racism plainly drove opposition to the bills. Representative Knapp voices his opinion, saying "I ask why not support all the bruised and maimed men, the thousands and tens of thousands of widows, and the still larger number of orphans left without the protection of a father? . . . If this bill is to be put upon the ground of charity, I ask that charity shall begin at home". While Representative Knapp is entitled to ask that this money be put towards other causes, he and many opposers of the Freedmen's Bureau suggested that charity should start "at home", which suggests that emancipated blacks were not part of the country in the same way widows and orphans were. Knapp also clearly states his bias, saying "Every sympathy of my nature in favor of those of my own race" Cong. Globe, 38th Cong., 1st Sess. App. 54 (1864). As this history makes clear, Congress clearly knew these laws constituted racial classifications. Yet, this same Congress sent the Fourteenth Amendment to the states for ratification.

Second, the debates in Congress further demonstrate that the protection of the Fourteenth Amendment is not confined to blacks or former slaves. The framers of the bill, and the 38th Congress as a whole, extended the Freedmen's Bureau beyond just supporting blacks. It was initially opposed in 1864 because of its racial limits, "A proposition to establish a bureau of Irishmen's affairs, a bureau of Dutchmen's

affairs, or one for the affairs of Caucasian descent generally, who are incapable of properly managing or taking care of their own interests . . . would . . . be looked upon as the vagary of a diseased brain" H.R. Rep. No. 2, 38th Cong., 1st Sess. 2-4.

The framers of the bill agreed, and it was expanded in 1865 to The Bureau of Refugees, Freedmen, and Abandoned Lands. The Freedmen's Bureau bill of 1866 was opposed by almost nobody in Congress, was vetoed by President Johnson, who wrote a series of reasons for his veto. While President Johnson thought that the bill was unnecessary and should be left to the states, Congress did not agree. 5 *Messages and Papers of the Presidents* 3596-3603. By 1866 the last Freedmen's Bureau Bill was pushed through as a companion to the Civil Rights Act of 1866, Civil Rights Act of 1866, ch. 31, 14 Stat. 27. Provisions as 42 U.S.C. §§ 1981, 1982. Passing as a companion under the Civil Rights Act shows its application under the Civil Rights Act was clearly accepted as constitutional.

The Civil Rights Act is considered the precursor bill to the Fourteenth Amendment. The Bureau now had access to federal land, funds, and helped assign land to almost 7000 freedmen and 200 refugees before the end of 1866. Other race-conscious bills were also passed for relief for emancipated people in 1867, including a "Resolution for the Relief of the Destitute in the Southern and Southwestern States", which helped move blacks out of peril in the south. Resolution of March 16, 1867, No. 4, 15 Stat. 20. The Bureau was intended to be shut down in 1868, however, Congress saw fit to extend the Bureau of

Freedmen and Refugees until 1872 with an overwhelming majority. The Bureau was still needed to support educational universities for freedmen. This extension also mean that the Freedmen's Bureau was in Congress every year from 1866 to 1872, and Congress repeatedly confirmed the Act to keep helping freedmen, even under the scope of the 14th amendment, which was passed in 1866.

While an overwhelming majority of slaves were African-American, and thereby demonstrates an effort of race remediation, the Freedmen's Acts did give racial consideration when it came to its application. In 1866, the Freedmen's Bureau was authorized to aid Black persons in any manner "in making the freedom conferred by proclamation of the commander-in-chief, by emancipation under the laws of the States, and by constitutional amendment," while it only gave protection to refugees to the extent that "the same shall by necessary to enable them . . . to become self-supporting citizens." Freedmen's Bureau Act, § 2, 14 Stat. 173, 174 (1866).

In education and land, black emancipated people were the recipients of property set aside for the Freedmen's Bureau, which was given to the Bureau for "the education of the freed people." Freedmen's Bureau Act, § 12, 14 Stat. at 176. This evidence shows that the Freedmen's Bureau was not intended as a support for freedmen and refugees, but was intended to further and aid the impoverished, black, former slaves.

While an overwhelming majority of slaves were

African-American, and thereby demonstrates an effort of race remediation, the Freedmen's Acts did give racial consideration when it came to its application. In 1866, the Freedmen's Bureau was authorized to aid Black persons in any manner "in making the freedom conferred by proclamation of the commander-in-chief, by emancipation under the laws of the States, and by constitutional amendment", while it only gave protection to refugees to the extent that "the same shall by necessary to enable them . . . to become self-supporting citizens" Freedmen's Bureau Act, § 2, 14 Stat. 173, 174 (1866).

In education and land, black emancipated people were the receptors of property set aside for the Freedmen's Bureau, which was given to the Bureau for "the education of the freed people." Freedmen's Bureau Act, § 12, 14 Stat. at 176. This evidence shows that the Freedmen's Bureau was not intended as a support for freedmen and refugees, but was intended to further and aid the impoverished, black, former slaves.

In 1866 and 1867, Congress created laws independent of the Freedmen's Bureau to protect the rights of Black soldiers, who received bounties for enlisting in the Union Army during the Civil War. Congress, concerned that some Black soldiers were not receiving the bounties they should out of racism, created race-conscious measures to make sure the Black soldiers got their bounties. *See* Joint Resolution of July 26, 1866, No. 86, 14 Stat. 367, 368, Resolution of Mar. 29, 1867, No. 25, 15 Stat. 26, 26-27, *see also* Act of Mar. 3, 1869, ch. 122, 15 Stat 301, 302

(demonstrating evidence of the bounties paid to Blacks).

Other military race-conscious measures enacted by Congress during Reconstruction included extra rewards for black troops to which white troops could not gain access. Black troops were provided one chaplain "[f]or each regiment of colored troops, whose duty shall include the instruction of the enlisted men in the common English branches of education." Act of July 28, 1866, ch. 299, § 30, 14 Stat. 332, 337. These chaplains educated the black soldiers, and "chaplains for white troops had no similar responsibilities, and education for white troops remained an unfunded 'optional service' during and after Reconstruction." Stephen A. Siegel, *The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 560-61 (1998). These Acts also included money "for the National association for the relief of destitute colored women and children," Act of July 28, 1866, ch. 296, 14 Stat. 310, 317. Another Act was created "for the purpose of supporting . . . aged or indigent and destitute colored women and children." Act of Feb. 14, 1863, ch. 33, 12 Stat. 650. These Acts were intended "for the relief of freedmen or destitute colored people in the District of Columbia," Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20. This legislation "expressly referred to color in the allotment of federal benefits." Jed Rubenfeld, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754-84 (1985). These various examples of Reconstruction legislation aimed specifically at colored people demonstrate the Reconstruction Congress' commitment to racial

remediation under the Fourteenth Amendment.

Petitioners argue that race-conscious laws enacted by the federal government are not relevant to what States can do under the Equal Protection Clause of the Fourteenth Amendment. This argument has no direct support in the debates of Congress at the time. Rather, opponents of the affirmative action programs used the 14th amendment as an argument against affirmative action programs, saying that race-conscious programs like the Freedmen's bureau were "making a distinction on account of color between the two races." Cong. Globe, 39th Cong., 1st Sess. 397 (1866).

The Framers of the Freedmen's Bureau and their opponents assumed that they were required to respect the equality of all persons and races, being bound by the 14th amendment, and they still passed the Freedmen's Bureau and other race-conscious programs with an overwhelming majority. *See* Mark G. Yudof, *Equal Protection, Class Legislation and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 Mich. L Rev. 1366, 1376 (1990). ("The idea that laws should be general and not tainted by considerations of class or caste was widely recognized and accepted before the fourteenth amendment was enacted. It was part-and-parcel of the presumed fairness of governmental processes, of due process of law."); Cong. Globe, 39th Cong., 1st Sess. 1094 (1866). Congress obviously thought that they were bound by the Fourteenth Amendment, both in the process of making the Fourteenth Amendment and after its passing, throughout Reconstruction.

2. Race-Conscious Laws Enacted Since Reconstruction Are In Line With The Fourteenth Amendment.

Reconstruction was a period from 1865, the end of the civil war, to 1877. This period included the difficult legal and political task of re-uniting the United States of America. It required many different political acts and jurisdictional abnormalities to accomplish the integration of 11 states and to accomplish freeing 4 million people from slavery.

At the time of the Equal Protection Clause's writing, its framers intended that racial remediation would be used beyond the scope of the Reconstruction, instead of only as a short-term solution to remedy past discrimination.

As the Freedmen's Bureau Bill was being debated in Congress, Congressman Eliot, the sponsor of the bill, stated "We owe something to these freedmen, and this bill rightly administered, invaluable as it will be, will not balance the account. We have done nothing to them, as a race, but injury." Cong. Globe, 39th Cong., 1st Sess. 2779. The idea that this bill or any Reconstruction bill will not be enough was shared in Congress, so that they extended the Freedmen's Bureau for 4 more years until 1872. Act of March 3, 1871, ch. 113, 16 Stat. 475. General Howard, when speaking to Congress about the need to keep the Bureau, stated, "If the protecting care of the General Government . . . should be removed, there is no doubt at all that schools would be abolished and a war upon the freemen be begun" Cong. Globe, 40th Cong., 2d Sess. 1816 (1868).

This again shows the need to keep racial remediation, as well as offering us an insight into the racism that still existed in many states for freedmen, which creates yet another reason why the original framers of the 14th amendment, Stevens, Wade, and Bingham, would have intended for racial remediation to continue. These examples demonstrate that, because of the support of the Freedmen's Bureau, the "Resolutions for Relief of the Destitute", and other remediation bills that the creators of the Equal Protection Clause supported, these Congressman, and Congress as a whole, intended for racial remediation.

Throughout Reconstruction and thereafter, racial remediation legislation was passed for Native Americans. This Court stated in *Rice v. Cayetano* that it has "established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Rice v. Cayetano*, 528 U.S. 495, 519 (2000) (*citing Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S.658, 673, n. 20 (1979) (treaties securing preferential fishing rights);*United States v. Antelope*, 430 U. S. 641, 645-647 (1977) (exclusive federal jurisdiction over crimes committed by Indians in Indian country); *Delaware Tribal Business Comm. v. Weeks*,430 U. S. 73, 84-85 (1977) (distribution of tribal property); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 479-480 (1976) (Indian immunity from state taxes); *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390-391(1976) (per curiam) (exclusive tribal court jurisdiction over tribal adoptions)).

As they stated in Congress, the Fourteenth Amendment is "the amelioration of the condition of freedom" Cong. Globe, 39th Cong., 1st Sess. 2459 (1866). The idea of helping the persecuted regain their positions in society is clearly very much morally aligned with the idea of freedom spoken of by the Congressmen who created the Equal Protection Clause.

B. On Its Face, The Fourteenth Amendment Is Not Color-blind As Argued By Petitioners.

The text of the Fourteenth Amendment does not explicitly say that race can never be employed for any purpose. The amendment gives freed slaves the right to citizenship, stating "all persons born or naturalized in the United States . . . are citizens of the United States," and gives "equal protection under the laws." U.S. Const. amend XIV, § 1. Neither of these statements forbid the use of race at any time.

Rather, the Fourteenth Amendment allowed for racial remediation because it actually, explicitly, made a racial classification that allowed different treatment for a minority. The Fourteenth Amendment itself acknowledges that Indians may continue to be singled out, excluding "Indians not taxed" for apportionment purposes. U.S. CONST. amend. XIV, § 2.

The explicit commitment to equality for slaves, who were black, and the reference to another racial group, shows the text of the Fourteenth Amendment does not indicate that race never can be taken into account in a law.

II. Grutter Should Be Affirmed An Appropriate and Narrow Use of Race That Is Consistent With The Intended Application Of The Fourteenth Amendment.

The Petitioners' attempt to have *Grutter v. Bollinger*, 539 U.S. 306 (2003), overruled is wrong for multiple reasons. Anyone attempting to overturn precedent on historical grounds have the "burden" to point to evidence that settles "the historical question with enough force" to displace precedent. *Gamble v. United States*, 139 S.Ct. 1960, 1974 (2019). The burden is on the petitioners to show that, under the burden of stare decisis, *Grutter* was wrongly decided.

Stare decisis is a "foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). Because precedent is usually accepted as factual, "adherence to precedent is the norm," "to overrule a constitutional precedent, the Court requires something over and above the belief that the precedent was wrongly decided." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1413-14 (2020).

Stare decisis has three pillars that need to be proven for this Court to overrule *Grutter*. First, a decision must be "grievously or egregiously wrong." *Id.* at 1414. Second, there must be clear evidence of negative consequences from the decision of *Grutter*. Lastly, and most importantly, this Court does not discard precedents that have proven workable or induced significant reliance interests. *Janus v. AFSCME*, 138 S.Ct. 2448, 1478-79 (2018). Further, "[u]ncertainty" over whether precedent was correctly decided "counsels retention of the status quo." Amy C.

Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1711 (2013).

A. Grutter is Not Grievously Wrong.

This Court's decision in *Grutter* does not meet the criteria of "grievously wrong," but rather complies with the Fourteenth Amendment and aligns with this Court's other race-related precedents.

1. Grutter Complies With The Equal Protection Clause's Original Meaning And Purpose.

Understanding the Fourteenth Amendment requires an explanation of the context in which the amendment was created and the purposes of its creation. The Fourteenth Amendment was passed in Reconstruction, for the purpose of creating racial equality, and trying to remediate the acts of slavery by firmly prohibiting racial discrimination. Further, the Fourteenth Amendment was not "colorblind," as Petitioners contend.

The Amendment's framers "considered and rejected a series of proposals that would have made the Constitution explicitly color-blind." Andrew Kull, The Color-Blind Constitution 69 (1992). This exemplifies a commitment to racial remediation, through the Framers' support for Acts like the Freedmen's Bureau, and through the direct rejection of a "colorblind" constitution. The framers would not have dismissed colorblind policies unless they knew that racial remediation would have a purpose in the future.

The framers developed this opinion while debating the 14th amendment. The framers initially adopted a

proposal providing that "[n]o discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." Benjamin Kendrick, Journal of Joint Committee of Fifteen on Reconstruction 83 (1914).

This black and white version of the 14th amendment, however, was ultimately abandoned. At the suggestion of Representative John Bingham, the framers instead adopted a proposal guaranteeing "equal protection of the laws." *Id.* at 106, 116. The framers decided that implementing "no discrimination" into the constitution would ultimately lead to a lack of racial remediation, and they changed their policies.

Further, this "equal protection" language was understood to prohibit "class legislation," and thus eliminate "the injustice of subjecting one caste of persons to a code not applicable to another," such as the infamous Black Codes used to subordinate African-Americans after emancipation. Cong. Globe, 39th Cong., 1st. Sess. 2766 (1866). The equal protection language was not understood by the framers as an attempt to prohibit any race-consciousness, but to prohibit subjection and discrimination.

As demonstrated earlier in this brief, the Reconstruction Congress that passed the 14th amendment consistently passed race-conscious acts. One of the many examples of this include special financial protections for African-American soldiers, sailors, and marines that did not apply to white servicemen. Resolution of Mar. 29, 1867, No. 25, 15

Stat. 26, 26. Further, arguments that these laws violated the 14th amendment were rejected, saying they were consistent with "the principle of equality" established by the 14th amendment. Cong. Globe, 40th Cong., 1st. Sess. 79 (1867). This demonstrates clear race-conscious legislation by the Reconstruction Congress, intended at only colored people.

This Court's decision in *Grutter* is in alignment with the intention of the framers of the Fourteenth Amendment. The *Grutter* case consisted of a white student suing the University of Michigan Law School under the argument that the school violated Grutter's right to "equal protection under the laws", by using race as "a predominant factor." 539 U. S. 306 (2003). The Court held that Michigan "follows an official admissions policy that seeks to achieve student body diversity," *id.*, by complying with the previously described Bakke case.

Grutter allowed for race-conscious legislation is order to remediate, or to help bring minorities back into equality. This is very consistent with the earlier proven aims of the 14th amendment, and its obvious allowances for programs that help minorities in remediation. Grutter helps minorities that have been victims of persecution escape that persecution through remediation, while the 14th amendment directly allowed programs that did the same thing.

Grutter is obviously very consistent with the 14th amendment's allowance for race-consciousness, and is not grievously wrong because of its standing and foundation in constitutional law.

2. *Grutter* Is Aligned With This Court's Fourteenth Amendment Equal Protection Clause Race-Related Precedents.

Throughout the 145 years since Reconstruction, this Court has consistently (with the notable exception of *Plessy v. Ferguson*, 163 U.S. 537 (1986)) invalidated laws which single out racial minorities unfairly, and at the same time has upheld the constitutionality of narrowly tailored race-conscious laws that seek to remedy past discrimination or bring races together.

First, in 1886, less than 20 years after ratification of the Fourteenth Amendment, this Court extended the protection of the Fourteenth Amendment equal protection clause to non-citizen Chinese workers singled out for discrimination by a California law. In *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), a Chinese man (non-US citizen) named Yick Wo was discriminated against by the state government in California by not being provided with a laundromat license. The Court found that Yick Wo, and "Chinese laborers, or Chinese of any other class", *id.* 368, deserved compensation for the wrongful political actions. "[T[he Government of the United States will exert all its powers to devise measures for their protection, and to secure them the same rights, privileges, immunities and exemptions." *Id.* at 369. This holding demonstrates that this Court has focused not merely on whether there is a racial classification, but rather on whether a law has been passed and is being used to discriminate against a racial group.

Second, in *Brown*, the Court reversed the "separate but equal" doctrine of *Plessy*. *See Brown*, 347 U. S. at 483. This Court found that the Equal Protection Clause and its framers would not have allowed the application of its legislation to create educational segregation because the evidence presented demonstrated that such a racial classification generates a "feeling of inferiority" among minorities. *Id.* at 494. The Brown Court did not find that the history of the Fourteenth Amendment suggested it was "colorblind," as Petitioners contend. *See id.* at 483.

Brown was a clear example of racial integration, and using the 14th amendment for its righteous purpose of bringing people out of discrimination and into equality. This reveals the true meaning of the 14th amendment. It was supposed to be a piece of legislation that dictated when, not if, race could be used in affirmative action.

When race is used as a tool to bring people out of discrimination, as in Brown, and in the admissions of North Carolina, race can be used under the watch of strict scrutiny. When race is used as a lens through which to view someone, when race is used to create inferiority, or when race creates any sort of discrimination, violation of "equal protection under the laws" is clearly visible, and the 14th amendment prohibits the use of race.

Third, the Court in *University of California Regents v. Bakke,* 438 U. S. 265 (1978), revisited racial segregation in the form of education at the college level. In *Bakke*, the respondent applied twice to the

Medical School at the University of California, and "[i]n both years special applicants were admitted with significantly lower scores than respondent's." *Id.* at 270. The respondent filed an action that "the special admissions program operated to exclude him on the basis of his race", which allegedly violated Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment.

The Court affirmed the view that the respondent was a victim of unequal treatment under the law and discrimination because the race-conscious program needed "admission of a specificized number of students from certain minority groups" *Id.* at 270. However, "the court's judgement enjoining petitioner from according any consideration to race in its admissions process must be reversed." *Id.* at 272. In conclusion, Bakke won the case, but California was able to narrowly tailor its system and continue using race in university admissions. If race is used, it must be used as one part of a whole process, and must be "narrowly tailored," and there must not be a racial quota. *Grutter*, 539 U. S. at 307.

Later, in *Parents Involved in Cmty Schs. V. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), a majority of justices on this Court held that schools may adopt race-conscious policies "to reach *Brown*'s objective of equal educational opportunity" and to "encourage a diverse student body." *Id.* at 788, 865. This exemplifies multiple cases that concur with the belief that race-consciousness can contribute to equality and diversity in admissions.

Despite these timeless alignments, Petitioners argue that legislation since *Grutter* have undermined its holding in educational diversity. However, the major race related cases since *Grutter*, *Parents Involved* and *Fisher*, cited *Grutter* approvingly, saying *Grutter* continues to apply the "unique context of higher education." 551 U.S. at 725.

Grutter is clearly aligned with all of this court's race-related precedents.

B. *Grutter* Has Been Applied As The Accepted Practice In Race-based Admissions, And Contributed To Many Reliance Interests.

Grutter cannot be overruled unless it does not endanger reliance interests. It will be proven that *Grutter* contributed to many reliance interests over the 20 year period where it was the standard for race-based admissions.

For decades, hundreds of "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." *Grutter*, 539 U.S. at 323. They have also expended financial and other resources to ensure they implement those policies in compliance with this Court's guidance. They have devoted time and effort to construct a narrowly-tailored race-conscious admissions process that is legal. These efforts include training thousands of application readers on how to faithfully apply this Court's guardrails on the use of race in admissions. UNC has invested in its admissions process in

precisely these ways, and many other schools have as well. *See* J.A.631- 34, 1381-82.

If this Court overrules Grutter, many universities will have their First Amendment rights to academic freedom in the form of admissions stripped of them as they are forced back into admissions programs without race.

Similarly, the *Grutter* decision has impacted deliberation, from schools to Congress. This Court's decision has encouraged an ongoing "dialogue regarding this contested and complex policy question." *Schuette v. BAMN*, 572 U. S. 291, 301 (2014), *see Fisher-II*, 579 U. S. at 388.

CONCLUSION

For the reasons stated above, Respondents respectfully urge this Court to affirm the decision of the First Circuit Court of Appeals.

Respectfully submitted,

JEEVUN TARSNEY
Counsel of Record
Glenbrook North High School
2300 Shermer Road
Northbrook, IL 60062

JOHN TARSNEY
Northern Valley Old Tappan Regional High School
100 Central Avenue
Old Tappan, NJ 07675

December 16, 2022