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 PETITIONER

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QUESTIONS PRESENTED

Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

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SUMMARY OF ARGUMENT

We contend that this Court should overrule *Grutter v. Bollinger* as a violation of the Fourteenth Amendment and the 1964 Civil Rights Act, and principally hold that institutions of higher education cannot use race as a factor in their admissions policies.

The Fourteenth Amendment enshrines the equal protection jurisprudence of racial equality in both federal and state institutions. This policy was echoed in the temporary nature of Reconstruction-era programs like the Freedmen's Bureau and further reiterated in *Brown v. Board of Education* and Title VI of the Civil Rights Act, which bans discrimination on the basis of race in education. The Court's decision in *Grutter*, which permits the usage of race in admissions, is therefore antithetical to the Court's previously established precedent.

The University of North Carolina's (UNC) admissions policies under *Grutter* are manifestly unconstitutional. UNC has explicitly rejected the race-neutral alternatives proposed by Students For Fair Admissions (SFFA) and instead engaged in racial balancing, which the Court has recognized as a blatant violation of the Fourteenth Amendment in *Grutter*, to the disadvantage and detriment of white and Asian American applicants.

Finally, the current policies of the University of North Carolina fail strict scrutiny. Their system of admissions is not sufficiently narrowly tailored under the Court's jurisdiction in *Grutter*. Furthermore, the rapidly expanding representation of racial and ethnic minorities in institutions indicates that educational diversity may no longer suffice the requirements of a "compelling governmental interest." In conclusion, this Court should

overrule *Grutter* and UNC's race-conscious admittance policies in turn.

ARGUMENT

I. *Grutter* is Inconsistent With This Court's Long-standing Equal-Protection Jurisprudence

A. History and Tradition Affirm The Importance of Race Neutrality in Education

Since its origin, the Fourteenth Amendment enshrines the doctrine of race neutrality in American history and tradition It states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; … *nor deny to any person within its jurisdiction the equal protection of the laws,*" yet the race-based affirmative action admissions policy of the University of North Carolina critically undermines this fundamental right. U.S. Const. amend. XIV, §1 (emphasis added)

To further gain context, one must chiefly examine the Reconstruction period following the Civil War, wherein Congress proposed the Fourteenth Amendment primarily to ensure citizenship for freed slaves. Its ratification in 1868 was notably preceded by the Freedmen's Bureau Act in 1865. This law authorized "a Bureau for the Relief of Freedmen and Refugees" which sought to supply temporary provisions, land, and services to African Americans freed by the Emancipation Proclamation, albeit solely until their citizenship was legally secured. Act of March 3, 1865, ch. 90, § 1. Even

the Framers considered its existence to be provisional, and originally intended to extend it solely for a year. § 1 13 Stat. 507. Even in the era of its ratification, the Bureau's enactment to extend broad Constitutional privileges across America was largely viewed as an unwarranted expansion of federal power and a gradual encroachment of the federal Government into the States. After all, just as the government of the United States may not extensively interfere with the people's rights, Freedmen's Bureau Representative Thomas A. Hendricks stated that "I am not able to see that under the Constitution Congress may enact such a measure as this ....Such a power would swallow up to a very large extent a very important portion of the powers enjoyed by the States" Cong. globe, 38th Cong., 1st Sess. 3346 (1864) Furthermore, as Michael B. Rappaport pointedly elaborates in his amicus brief entitled "*Originalism and the Colorblind Constitution*", Congressional enforcement of the Equal Protection Clause at the passing of Fourteenth Amendment indicated that its legislature was never intended to pertain to the federal government: rather, it was solely designed as an "[attempt]… to eradicate discrimination at the State level". Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 72 Notre Dame L. Rev. 71 (2013). Additionally, concerning the Freedmen's Bureau's numerous authorities, in his article, "*The Power to Do What Manifestly Must be Done*," John M. Bicker additionally notes the claims of Senator Henry Johnson at the time. Senator Johnson proclaimed that no Constitutional authority should assist a freedman merely "because he is black; it must be because he is a citizen; and that reason

being equally applicable to the white man as to the black man, it would follow that we have the authority to clothe and educate and provide for all citizens of the United States." John M. Bickers, *The Power to Do What Manifestly Must be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 Roger Williams U. L. Rev. 70, 103-9 (2006) Congressman Johnson insisted that any additional assistance to freedmen, who were now citizens under the Fourteenth Amendment and therefore enjoyed the full protection of the Constitution, went beyond the intent of the Framers of the Fourteenth Amendment, and was thus unconstitutional. His intentions were later reiterated by President Andrew Johnson, who additionally challenged the Freedmen's Bureau's bill, that there was "[no] good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than for another." Inherently, President John argued that, as such provisional policies have never been extended to "the white race [nor to] the indigent persons in the United States" and that institutions like the Freedmen's Bureau, should be extended to all without the distinction of race. President Andrew Johnson: *Veto of the Freedmen's Bureau Bill* (February 19, 1866) The Framers' strong support for equal treatment among white and African Americans regardless of race, hereafter found expression in the Equal Protection Clause of the Fourteenth Amendment, and ultimately contributed to the legal demise of the Freedmen's Bureau soon after.

The 38th Congress's sentiments that Freedmen's Bureau work was intrinsically limited in scope were echoed in

the act's eventual revocation, wherein Representative J.G. Blaine declared that there would no longer be "any distinction between American citizens; that we are all equal before the law; and that all legislation respecting the rights of any person should go through the regular standing committees" Cong. Globe, 44th Cong., 1st Sess. 229 (1875). Alongside his colleagues, Representative Blaine affirmed that the equal-protection jurisprudence of the Fourteenth Amendment principally aimed to embrace the doctrine of racial equality above all else, in accordance with the conclusion of the Select Committee on Freedmen's Affairs. The Freedmen's Bureau's swift disbandment thereafter served as an indication that such race-conscious legislation only existed to promote racial equality, and that all such measures were inherently intended to be temporary. The intentions of the Fourteenth Amendment's Framers continue to underpin relevant dialogue concerning modern-day race-conscious affirmative action. As a matter of course, the judiciary should give deference to the original public meaning of the Equal Protection Clause, which explicitly targeted any state policy or law that seeks to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1 At its origin, the inclusion of race in federal education programs was always a temporary measure to assist newly freed African Americans in their transition to citizenship, as evidenced by the short tenure of the Freedmen's Bureau institution. Above all else, the Framers of the Fourteenth Amendment predominantly desired racial equality among the citizens of the United States and at the time, such policies translated to enforcing the race-neutral

treatment of white Americans and African Americans. However, even though the Framers believed that people of African descent deserved certain temporary race-conscious privileges following their years in slavery, the Framers' intentions at the time of the Reconstruction era cannot be considered analogous to other racial or ethnic groups, or modern-day constructs of sexual orientation or gender identity for that matter.

The national contexts and situation of Hispanic, Asian, and American Indian populations at the time of the Fourteenth Amendment's ratification significantly differed. Regarding Hispanics, as the terminology of the Hispanic identity was not officially adopted by the U.S. government until the case of *Hernandez v. Texas* in 1954, the Framers still regarded and categorized people of Mexican descent as "white under law" for the purposes of naturalization. *Hernandez v. Texas*, 347 U.S. 475 By comparison, However, in contrast, the 1884 decision of *Elk v Wilkins* unambiguously excluded American Indians from the protections of the Fourteenth Amendment's Equal Protection Clause. *Elk v. Wilkins*, 112 U.S. 94 Yet even still, children of American Indian were still forced to attend compulsory federal education initiatives: wherein the curriculum/purpose of these schools were purposely structured to mirror those of schools for freed slaves, by design. Regarding Asian Americans, two central decisions emerged as paramount in fundamentally defining their citizenship and their protection under the Fourteenth Amendment accordingly. *United States v. Wong Kim Ark* established the first expansion of the Equal Protection Clause in relation to Asian Americans, that regardless of their

country of origin or heritage, the children of immigrants attain the benefits of U.S. citizenship at birth and are regarded as citizens under the Fourteenth amendment. Therefore, any policy or legislation that seeks to "[deny] to them the equal protection of the laws… [is an] abridg[ement of] the privileges or immunities of citizens of the United States". *United States v. Wong Kim Ark*, 169 U.S. 649 This jurisdiction was further affirmed under *Yick Wo v. Hopkins* which decreed that a racially neutral law can still translate to discriminatory impacts and even non-citizens may still be protected under the Fourteenth Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356 To conclude, the Framers enshrined policies of racial segregation and simultaneously upheld the race-neutral language and the jurisdiction of the Equal Protection clause under law. Although the Freedmen's Bureau extended provisions and land to African Americans prior to Fourteenth Amendment's ratification, they would not have sought to proffer similar policies to members of different races and ethnicities.

In a similar vein, regarding the Framers' relation to gender and sexuality, at the time, the Framers of the Fourteenth Amendment did not have the lexicon or terminology to describe modern-day constructs of sexual orientation or gender identity. However, judicial inferences can still be drawn from the Colonial era, anti-sodomy laws that persisted well into the 2000s, the Reconstruction-era schools that continued to be divided on the basis of sex, and the severe disadvantages that women confronted daily, having been fully unable to obtain all the benefits of citizenship. Legal differences existed as well, wherein racial and ethnic discrimination,

which requires strict scrutiny, and discrimination on the basis of gender is judged under intermediate scrutiny. Although the language in the fourteenth amendment is inherently gender neutral, race and ethnicity cannot be held analogous to gender and sexuality and the Framers would not have extended such policies of affirmative action to the different sexual orientations and gender identities of today.

B. *Grutter* Fundamentally Deviates From The Equal-Protection Jurisprudence Which The Court Established in *Brown v. Board of Education*

UNC's inclusion of race in the admissions process under *Grutter* must be struck down as a fundamental violation of this Court's equal-protection jurisprudence of racial equality, as reiterated in both the 1964 Civil Rights Act and *Brown v. Board of Education* in 1954. Throughout the Civil Rights movement of the 1960s, Black Americans advocated for the abolishment of Jim Crow laws, prevailing discrimination in legislation, and principally, institutional segregation. The resulting legislature of the movement was foundational in establishing the doctrine of race-neutrality in national laws and statutes to this day. One such statute was Title VI of the 1964 Civil Rights Act, which principally enshrines the doctrine of equality for higher education and institutions everywhere: that discrimination "on the basis of race, color, religion, sex or national origin" was unconstitutional under federal law and enforcement. 42 U.S.C. §2000

In 1954, *Brown v. Board of Education*, this court banned the institution of segregation across the United States in the American education system, alongside discriminatory policies that severely limited African American access to K-12 and higher education and established that "a racial[ly] integrated school system" is necessary in regard to the Equal Protection clause of the Fourteenth Amendment. The Court's decision in *Brown* prohibited racial discrimination, segregation, and the "separate but equal" policy established in *Plessy v. Ferguson* in order to principally institute the importance of race neutrality in the admission process. In essence, the foundation of *Brown* succinctly draws on Justice Harlan's sole dissent in *Plessy v. Ferguson*, nearly sixty years prior, "that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) Regarding the policy of race-conscious affirmative action, *Brown*'s jurisdiction of racial equality was further reiterated in the decision of *Parents Involved in Community Schools v. Seattle School District No. 1* in which Chief Justice Roberts established that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."*Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) *Brown* outlawed racially segregated schools to establish the court's equal protection jurisprudence.

However, in *Regents of the University of California v. Bakke* and *Grutter v. Bollinger*, the court fundamentally contradicted the same jurisprudence enshrined in *Brown*

by affirming the inclusion of race in education in order to discriminate between applicants. In particular, the Court's decision in *Grutter* principally violates the doctrine of racial equality. *Grutter* is a harmful precedent that affirms discrimination on the basis of race in the UNC college admissions process, specifically to the disadvantage and detriment of Asian American applicants. As a result, UNC admittance policy is a blatant violation of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act.

The use of affirmative action in the admission process must be overturned. Race-conscious admissions are not a sacrosanct principle. Just as this Court recognized in the recent case of *Dobbs v. Jackson Women's Health Organization*, even the most established precedent is not immune to being overturned by the jurisdiction of the Court. As Justice Alito detailed in the *Dobbs* decision, "Stare decisis, the doctrine on which Casey's controlling opinion was based, does not compel unending adherence to… [any] abuse of judicial authority." When a decision is "egregiously wrong from the start… exceptionally weak, and the decision has had damaging consequences", the Court may consider the discourse of action in which to revoke the policy. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. Inherently, as the majority in *Dobbs* aptly concluded, because the Court has an obligation to strike down harmful judicial precedents, the doctrine of stare decisis does not mandate the continuation of precedent when it is divisive or harmful.

Just as *Brown* overturned *Plessy v. Ferguson* and *Dobbs* revoked *Roe v. Wade* and *Planned Parenthood v. Casey*, the decision of *Grutter* is fundamentally antithetical to the Court's long standing jurisprudence of equal protection and racial equality under law, and it must be struck down accordingly.

II. The University of North Carolina's Admissions Policy Violates the Fourteenth Amendment and Title IV of the Civil Rights Act

A. The University of North Carolina Does Not Utilize Race as a Mere "Plus" in Admissions

The inclusion of race in the University of North Carolina's admissions policies unduly advantages certain minority applicants, to the detriment of Asian-American and white applicants. In the majority opinion in *Bakke*, this Court deemed that "race or ethnic background may be deemed a 'plus' in a particular applicant's file" insofar that, according to the Court's further elucidation in *Grutter,* a "plus" must merely be "flexible enough … to place [each applicant] on the same footing for consideration." *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) *Grutter*, 539 U.S. at 329. However, the University fundamentally violates this standard as the inclusion of race at the University of North Carolina is fundamentally an impactful addition to any applicant's file. This is evidenced by regression analyses performed by the Students For Fair Admissions organizations on UNC's admissions data and "academic

index" of candidates (wherein the "index" reflected the total sum of their test scores and GPA). Immediately, racial disparities emerged in both the out-out-state and in-state applicant pool. One such study of out-of-state students revealed a clear bias in favor of African American and Hispanic applicants over white and especially Asian American applicants. The study concluded that "an African American in [the fourth-highest] decile has a higher chance of admission (57.74%) than an Asian American in the top decile (52.89%)". UNC.JA1083. These studies arrive following the conclusions of the Court's own analysis of the University's applications that "whites and Asian Americans scored better on UNC's program rating, performance rating, extracurricular rating, and essay rating than African Americans and Hispanics. Although UNC claims that it does not hold a strict percentage or quota, when the inclusion of race is a pivotal or determinative factor, it becomes far more impactful than the mere "plus" standard. *Grutter*, 539 U.S. at 329

Furthermore, in *Gutter* this Court pointed to Justice Powell's ruling in *Bakke* to clarify what a "critical mass" entails, as opposed to a defined quota or percentage. Within *Bakke*, the Court elucidates that "the Law School's goal of attaining a "critical mass" of underrepresented minority students must not simply be an interest in "'assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" Ante, at 329 (quoting *Bakke*, 438 U. S., at 307 (opinion of Powell, J.)). The Court recognizes that such an interest "would amount to outright racial balancing, which is patently

unconstitutional." Ante, at 330. However, although UNC claims that it does not prescribe racial quotas, its desire to achieve a "critical mass" of diverse students effectively functions as one to critically limit the number of Asian American applicants. *Bakke* 438 U.S. 265

Originally, in accordance with their 1981 Consent Decree with the United States, UNC originally only identified the racial or ethnic groups of "African-American", "American-Indian", or "Hispanic" as Underrepresented Minorities (URM). The University has now expanded this definition of URM as follows: Black or African American, Hispanic, Latino or of Spanish Origin; Multiple Race – Hispanic; American Indian or Alaskan Native; Native Hawaiian or Other Pacific Islander. In *Gutter*, this Court determined that engagement in racial balancing occurs if the institution in question "seek[s] 'some specified percentage' of a particular race" *Grutter*, 539 U.S. at 329. The racial percentages of URMs at UNC has largely stayed consistent with little variance while the broad inclusion of race in the admissions process systemically works to the benefit and detriment of certain applicants. Overall therein, UNC does not seek "the benefits of [broader] student body diversity." but rather simply achieving "'racial diversity'" through racial balancing which (as this court affirms in *Parents Involved in Community Schools*) is patently unconstitutional. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701

It is for these reasons that, even if this Court does not directly act to overturn *Grutter*, the policies of the University of North Carolina still remain manifestly

unconstitutional. Inherently, the inclusion of race in the admissions process has ramifications both on the student's chance of acceptance and the students themselves. When race becomes a punitive factor, students are increasingly incentivized to conceal their race and even when race has tangible benefits, it mitigates the accomplishments and stigmatizes the admissions of minority applicants. Furthermore, the very inclusion of race in the admissions process only serves to reinforce harmful racial stereotypes. Affirmative action, or discrimination on the basis of race, favors select racial groups over others and serves as a violation of the 1964 Civil Rights Act.

III. The Fourth Circuit Erred in Affirming the University's Admissions Policy

A. The University of North Carolina's Admissions Policies are Not Sufficiently Tailored Under Strict Scrutiny

The strict scrutiny standard of modern-day affirmative action was first established in *Fisher v. University of Texas at Austin*. *Fisher* first established that, "under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications" *Fisher v. University of Texas at Austin (Fisher I),* 570 U.S. 297 (2013) (quoting *Grutter*, 539 U.S. at 329) The court further establishes in *Grutter* that a race-conscious admission policy has to be narrowly tailored. To explain further, the Court's decision in *Grutter* proposes a four-part test that establishes the Court's discretion for what constitutes a narrowly

tailored policy within the means of strict scrutiny and to determine whether the admission policy is permissible or not under the Fourteenth Amendment.

UNC admissions policies are not narrowly tailored under the *Grutter* test. In the first part, the court deemed any use of a definitive quota of the number of students of a specific race unacceptable, as "[u]niversities cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks." *Grutter*, 539 U.S. at 329 Although the University of North Carolina itself does not mandate quota, its affirmative action admissions policies are not sufficiently "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application.'' *Grutter*, 539 U.S. at 306, 330. In contrast, race is a significant factor within UNC's admission process, and places an undue burden on Asian American applicants as opposed to African American and Hispanic applicants. In effect, the usage of race as one of many factors still unduly benefits or disadvantages the applicants based on race and gives Asian American students an unfair disadvantage upon being considered.

The second part to the *Grutter* test is whether the University had already considered the other possible race-neutral alternatives fully. The district court ruled that UNC does not need to "exhaust every conceivable race-neutral alternative or mandate that a university choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups" *Grutter*,

539 at 329. However, the district court also established that "narrow tailoring does require serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 at 329. In 2016, *Fisher v. University of Texas* further determined that the alternatives must plausibly provide "a workable means for the University to attain the benefits of diversity it sought." *Fisher v. University of Texas at Austin* (*Fisher II*), 579 U.S. 365 (2016) The University of North Carolina currently details three race-neutral strategies within their admissions process: the Carolina Covenant, which financially supports low-income student, the Carolina College Advising Corps, which places recent UNC graduates as advisors in underserved high schools, and the Carolina Student Transfer Excellence Program (C-STEP), identifies talented applicants from fourteen local community colleges. Within these programs, only the C-STEP program actively seeks to recruit minority applicants in a race-neutral fashion and even then, it does not particularly target socioeconomically or racially diverse institutions. In addition, UNC has also explicitly rejected the race-neutral alternatives proposed by the Students For Fair Admissions membership organization and the state of North Carolina. Thus, the University of North Carolina has not sufficiently exercised a "serious, good faith consideration" of the available race-neutral alternatives. *Grutter*, 539 at 329. The decision of *Fisher* decision further affirms therein that race-based admissions are within the institution's constitutional jurisdiction to include, but only as long as they are "'necessary'" to achieve the educational benefits of diversity. *Fisher I*, 570 U.S. 297 (2013) The University of

North Carolina's current policy of the race-conscious holistic admissions process is therefore not necessary as the educational benefits of overall student body diversity would not suffer if they were eradicated. Race-neutral alternatives are not only available, but extremely viable for implementation. The University of North Carolina, having rejected these options, has not yet tailored their admissions policy within the limitations of strict scrutiny.

Furthermore, the *Grutter* test details that a policy must not unduly harm non-minority applicants. UNC's admissions system is not sufficiently tailored under their qualification because not only does the UNC's admission policy critically disadvantage white applicants, as compared to minority applicants. As aforementioned above, the admittance policies of the University of North Carolina weigh race significantly more than what a mere "plus" might plausibly constitute under this Court's jurisdiction.

Finally, the final part of the *Grutter* test details that if an admission policy is tailored to help the minority students, the policy must intrinsically be limited in time. UNC's policy has no foreseeable end and by the respondents' own admission, will continue indefinitely in the future. Today, UNC is needlessly extending their discriminatory admissions process beyond its expiration date. In contrast to UNC's insistence that affirmative action is a longstanding precedent of the United States, historical legislation leans on race neutrality and the Court's decision *often remains divided* on whether the inclusion of race is still viable and necessary: for

instance, the Court's split conclusion in *UC v. Bakke* and its closely contested 5-4 ruling in *Grutter v. Bollinger.* Such measures may indicate that it is time to disregard race entirely so that the court no longer bears the burden to uphold *Grutter v. Bollinger* and the institution of affirmative action. After all, six decades following the Civil Rights movement, the education system has made significant strides in achieving racial-ethnic diversity, equity, and inclusion: to the extent that *Grutter* predicted "25 years from now, the use of racial preferences will no longer be necessary." *Grutter*, 539 U.S. at 329 Therefore, even if the precedent of *Grutter* is overruled, higher education and similar federal institutions (such as the military) will no longer need to utilize race as a factor in admissions or recruitment. The evident demographic shifts in the American military and universities alike is evidence of the rapidly expanding representation of racial and ethnic minorities. Therefore, in this current era of thriving diversity, educational diversity may no longer qualify as a sufficiently compelling interest to necessitate the inclusion of race in the college admissions process. The precedent set by *Grutter* should similarly be overturned.

CONCLUSION

For the foregoing reasons, we pray that the Court reverses the District Court's holding and strikes down the Court's previous decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and holds accordingly that institutions of higher education cannot use race as a factor in admissions. The institution admissions policies of the University of North Carolina in turn violate the longstanding equal-protection jurisprudence of the Fourteenth Amendment, alongside Title VI of the Civil Rights Act of 1964, which provides, *inter alia*, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance, and 42 U. S. C. § 1981 which guarantees equal rights under law.

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