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

Race-conscious affirmative action is not consistent with the Fourteenth Amendment and violates the equal protection clause.

Since the emancipation of slaves and the Civil Rights Movement triumphs, America has resisted racial classification and promoted race-neutrality, the idea that "the way to stop discrimination…is to stop discriminating on the basis of race," according to Chief Justice Roberts. *Grutter v. Bollinger, 539 U.S. 306 (2003).* This agrees with the Court's ruling in *Brown v. Board of Education (1954).* However, *Grutter v. Bollinger (2003)* and the University of North Carolina's college admissions contradict *Brown* and reject racial neutrality. *Brown v Board of Education of Topeka, 347 U.S. 483 (1954).* The court should overturn *Grutter* and rule in favor of *Students for Fair Admissions* for three reasons.

Historically, the Framers of the Fourteenth Amendment championed race neutrality and opposed special privileges, as the Amendment intended to grant Black people the same rights that the other citizens were guaranteed.

Affirmative action prolongs the unconstitutional use of racial categories in college admissions indefinitely. Since the beginning of affirmative action during the Reconstruction Era, it was seen as a temporary method to assist the transition from slavery to citizenship. *Grutter* also set

a twenty-five-year expiration date, yet no significant decrease in the use of affirmative action has occurred in the twenty-one years since. The Court should strike down *Grutter*.

Finally, this case should be considered under strict scrutiny. This law fails to meet the standards of a compelling interest and is not narrowly tailored.

ARGUMENTS

I. The Fourteenth Amendment is Race-Neutral and Essentially Colorblind.

Race neutrality, or colorblindness, is the program that rejects distinctions or classifications based on race to prevent racial discrimination. In this context, The University of North Carolina's policies are race-conscious.

A. The historic purpose of the Fourteenth Amendment was to forbid racial classification and establish race neutrality.

The Fourteenth Amendment uses race-neutral language. The Fourteenth Amendment, by definition, is race-neutral as it states that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV, § 2.*

The limits of the Amendment are clear. The privileges and immunities mentioned in the Amendment are of the citizens and do not specify a minority. It only

affirms the equal protection of all United States citizens without racial distinction. Therefore, these privileges and immunities should be applied to all citizens of the United States, confirming its race neutrality. Nowhere in the text does it specify the race of the citizens in question and give those minorities additional privileges. The respondents try to argue that affirmative action is a means to counter the effects of racial discrimination, but even if their interests align, the means are still discriminatory. The Fourteenth Amendment upholds our argument.

The legislative debates preceding the Fourteenth Amendment exhibit Congress's opposition to affirmative action. During the Thirty-Eighth Congressional debate, Representative Hendricks argued that race-conscious programs represented an overreach of federal power. He stated,

> "That is a power which belongs exclusively to the States of the Confederacy and not at all to the General Government…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)*

Congress's opposition to affirmative action proves that the Framers did not write the Fourteenth Amendment in support of affirmative action.

Upholding the will of the Framers is vital as it protects rights in other situations as well. *Obergefell v. Hodges* legalized gay marriage on the grounds of the equal protection clause. "They [same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right." *Obergefell v. Hodges, 576 U.S. 644 (2015).* Similarly, students applying to the University of North Carolina request equal dignity.

B. The use of racial classification is inherently discriminatory.

Racial classification, as employed by the University of North Carolina, is inherently discriminatory. *Brown v. Board of Education (2003)* upheld this interpretation when the Court concluded that in the field of public education, "the doctrine of 'separate but equal' has no place" and that the Black students denied admission were "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown v Board of Education of Topeka, 347 U.S. 483 (1954).* The University of North Carolina's racial classification encourages separation in an educational environment that violates the Fourteenth Amendment. This is because racial classification is inherently discriminatory as it promotes the separation and distinction of races in an unnecessary situation.

Brown is an integral precedent that proved race should not be a factor in educational admissions.

II. Race-conscious admissions policies should not be allowed to be used indefinitely.

Affirmative action can be separated into two categories. The first, temporary affirmative action, is when the policies only happen for a set amount of time and are ended as soon as it achieves their interest. The second, indefinite affirmative action is when the policies do not expire and continue for as long as possible.

A. Historically, affirmative action policies have been temporary.

At the time of ratifying the Fourteenth Amendment, affirmative action policies were temporary, lasting only a few years. For example, the Freedmen's Bureau assisted newly freed slaves by providing them with food and other necessities. *Act of July 25, 1868, ch. 245, § 2, 15 Stat. 193.* This legislation was initially planned to expire after just one year but was eventually prolonged to three years. During these three years, the Bureau successfully assisted citizens through the transition, and after, the interest became no longer necessary. Black people had established their citizenship, and many had jobs and homes. The following is an excerpt from the Forty-Fourth Congress in 1875 in support of ending the Bureau:

> Rep. Blaine: "there is no longer 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).*

Representative Blaine argues that because the Fourteenth Amendment removed racial barriers, legislation from this point onwards should reflect that and avoid race-based privileges.
Similarly, Senator Cowan stated in 1886: "But are we to alter the whole frame and structure of the laws, are we to overturn the whole Constitution, in order to get at a remedy for these people?" *Cong. globe, 39th Cong., 1st Sess. 240 (1866).* Senator Cowan argued that the continuing Bureau was unconstitutional and unnecessary.

However, we concede that there were also many proponents of the Freedmen's Bureau at the time, such as Representative Charles Sumner during the Thirty-Eighth Congressional debate. *Cong. globe, 38th Cong., 1st Sess. 2799 (1865).* But, it has been one hundred and fifty years since the Emancipation Proclamation, and current society is incomparable to then. Through these years, there have been significant changes in racial equality. Racial bias still exists, but it is not enough to warrant government intervention.

B. Prolonging this policy indefinitely would be unconstitutional.

While we understand and condemn the racial discrimination and bias that still exist, the problem is no longer urgent enough to require governmental action. In fact, governmental intervention could result in unintentional consequences such as with the Asian American students in *Students for Fair Admissions v. University of North Carolina (Oct. 31, 2022).* The respondents argue that after twenty-five years of affirmative action, colleges and universities should be able to gain a sufficient number of racial minorities. But despite the many years since affirmative action was enacted, there has not been a significant decrease in the use of racial classifications in the admissions process. Also, racial disparity based on education has been decreasing and the problem should be solved with time. In response to this trajectory, states such as California have "Prohibited…public universities, colleges, and schools…from discriminating against or giving preferential treatment to any individual…on the basis of race, sex, color, ethnicity, or national origin." (California Proposition 209) While we understand and condemn the racial discrimination and bias that still exist, the problem is no longer urgent enough not to require governmental action. Governmental intervention could result in unintentional consequences, such as with the Asian American

students in *Students for Fair Admissions v. University of North Carolina (Oct. 31, 2022). Grutter v. Bollinger (2003)* has been a stare decisis for proponents of affirmative action, but it should be overruled. The Court has an obligation to strike down bad precedents. When the Supreme Court decided in favor of the University of Michigan, Justice O'Connor stated in the majority opinion that the "race-conscious admissions policies must be limited in time…racial classifications, however compelling their goals, are potentially dangerous." *Grutter v. Bollinger, 539 U.S. 306 (2003)*. It establishes that we cannot allow race-conscious admissions to be indefinite since the purpose of the Amendment was to someday do away with the dangers of classification. Justice O'Connor continues, "We expect that twenty-five years from now, the use of racial preferences will no longer be necessary to further the interest." It has been twenty-one years since the ruling, yet the use of affirmative action in admissions has increased. This proves that affirmative action has not achieved its interest. Though the twenty-five years are not up, no substantial change could occur that could change the trajectory in just four years. The Court should overturn *Grutter v Bollinger (2003).*

III. This case should be considered under strict scrutiny as the policy fails to meet the required standards.

Strict scrutiny is a standard for reviewing constitutionality and requires the policy in question to be "precisely tailored to serve a compelling governmental interest."

A. The University of North Carolina's admissions policy should be considered under strict scrutiny.

Based on numerous other affirmative action precedents, "Racial classification must be analyzed by a reviewing court under strict scrutiny". The Supreme Court has repeatedly affirmed that strict scrutiny should be the standard for affirmative action cases. If the policies are not "precisely tailored to serve a compelling governmental interest," race-conscious policies should be denied. *Fisher v. University of Texas (2016)* further established that strict scrutiny is a sufficient reason to negate race-based admissions.

B. The United States government no longer has a compelling interest in continuing affirmative action as racial discrimination no longer warrants government intervention.

The University of North Carolina does not demonstrate a compelling enough interest to pass strict scrutiny. As the *Regents of the University of California v. Bakke (1978)* proves, a university's mere interest in diversity can not sustain race-based admissions. As used by the Regents of the University

of California, a quota system violated the Fourteenth Amendment clause because it is not only race-conscious, but race becomes the factual basis for admissions. Therefore, the University of North Carolina has the burden to prove that its diversity is vital enough to serve a compelling government interest. Though diversity is beneficial, it is not compelling in this day and age.

C. The policy is not "narrowly tailored" as it does not meaningfully pursue race-neutral alternatives.

Finally, the policy is not 'narrowly tailored' and therefore fails strict scrutiny. In *Fisher v. University of Texas (2013)*, the Court held that strict scrutiny "imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that…race-neutral alternatives do not suffice." The University of North Carolina is not considering race-neutral alternatives. One race-neutral alternative is a classification based on socioeconomic status. It would achieve even better effects as it would encourage an economically diverse university class and simultaneously give students who have not had the privileges of a wealthy background to receive opportunities.

CONCLUSION

As Chief Justice Roberts said, "The way to stop discrimination…is to stop discriminating on the basis

of race." We ask today's Court to rule to end racial discrimination; remember *Brown v. Board of Education*, and overturn *Grutter v. Bollinger*. The University of North Carolina wrongly disguises its violation of the Fourteenth Amendment as diversity and harms students adversely. The Framers of the Fourteenth Amendment believed in the equality of all people and the right for students to attend the school they deserve. The University of North Carolina's violation is undeniable and unconstitutional.

Respectfully submitted,

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