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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December 8, 2022

QUESTIONS PRESENTED

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

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SUMMARY OF ARGUMENT

When examining race conscious affirmative action, it is clear UNC's checkbox admissions policy to be a direct violation of the Fourteenth Amendment. The original intentions and language of the Fourteenth Amendment clearly prohibits racial discrimination of any form. This is further solidified by *Brown v. Bd. of Education*, 347 U.S. 483 (1954), which specifically outlaws racial discrimination and segregation by and in the schools.

The case law used by UNC to justify their discriminatory admissions (*Bakke* and *Grutter)* are weak, outlier cases without a textual constitutional basis. *Bakke* and *Grutter must be* overruled as they misinterpret the Fourteenth Amendment and meet all five criteria for overturning a case provided in *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 2022.

Even under the precedents of *Bakke* and *Grutter,* UNC fails to meet strict scrutiny. UNC's admissions process must be "narrowly tailored" to specifically provide "student body diversity." UNC has acknowledged and disregarded workable, non racially discriminatory options that would meet the compelling state interest of "student body diversity" without implementing a segregated admissions process.

ARGUMENT

The Fourteenth Amendment clearly prohibits any form of racial descrimination.

The United States Constitution was amended for the fourteenth time in order to ensure equal protection of all its citizens and protect the natural rights of "any person" within the state's jurisdiction. U.S. Const. amend XIV, § 1. When deciphering the intentions of any amendments one must closely consider the language with which it was written. The Fourteenth Amendment clearly states that all persons, or "any person," are guaranteed "equal protection of the laws," which inhibits racial discrimination. U.S. Const. amend XIV, § 1. John Bingham, the framer of the fourteenth amendment, stated that the Constitution was "based upon the equality of the human race. Its primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights." Cong. Globe, 34th Cong., 3rd Sess. 139 (1857). An affirmative action policy that uses race to influence admission's decision at UNC immediately violates the Fourteenth Amendment's guarantee of "equal protection" for "any person" along with the individual views of the amendment's framers.

A. The original purpose of the Fourteenth Amendment was to protect all races.

Although the Fourteenth Amendment was put into place to protect the rights of freedmen following the civil war, it was recognized by Rep. Blaine that the fourteenth ensured "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). Both the language of the amendment and the intentions of the framers protect not only the rights of the newly freed slaves but the rights of all Americans. As Justice Harlan recognized in his dissent of *Plessy v. Ferguson, 163 U.S. 537 (1896)* ., "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." His dissent was ultimately vindicated in *Brown v. Bd. of Education*, 347 U.S. 483 (1954), where this Court denied "'any authority … to use race as a factor in affording educational opportunities.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.* No. 1, 551 U.S. 701 (plurality) (2007). When UNC sets into place a system that judges an applicant's race as a qualification for higher education, one must look to the constitution and see the illegality of the practice. According to former President Andrew Johnson: "A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution. Nor can any 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." Veto of the Freedmen's Bureau Bill (February 19, 1866). As UNC uses an applicant's race as a determining factor in the admissions process, it has ignored the sacred right of equal treatment.

B. The Fourteenth Amendment eliminates the need for Affirmative Action

Although some have made the argument that races are commonly treated differently in the educational system, seen by the actions of *The Bureau of Refugees, Freedmen, and Abandoned Lands*, the actions were deliberately temporary, "the term of two years from and after the passage of this act." Act of March 3, 1865, ch. 90, § 1, 13 Stat. 507 and Act of July 16, 1866, ch. 200, § 12, 14 Stat. 173. The target population, newly freed black slaves, had little to no access to education prior to their emancipation and little experience with how to attain it. The freedmen's bureau was necessary at the time to ensure the best interests of the state were being pursued, including having an independent population through education. Act of March 3, 1865, ch. 90, § 1, 13 Stat. 507. UNC's stated interest for treating races differently is diversity according to UNC, an obvious separation from the precedent set by the creation of the *Freedmen's Bureau.* In addition to the different circumstances and goals of the *Freedmen's Bureau*, UNC's affirmative action policy has no expiry date, effectively confirming a choice to permanently treat applicants differently based on race. The creation of the *Freedmen's Bureau* also predated the Fourteenth Amendment and, as Representative Blaine pointed out, was no longer necessary after the protections from the Fourteenth Amendment were put into place. Cong. Globe, 44th Cong., 1st Sess. 229 (1875). The *Freedmen's Bureau* lost its need for existence once the rights of all Americans were protected equally and similarly UNC's affirmative action policy has no need to exist, as to protect the opportunities of black Americans, as the Fourteenth Amendment already achieves that goal by allowing diversity to occur justly and naturally.

***Grutter* and *Bakke* should be overruled.**

To be true to the Fourteenth Amendment, we must ask the court to overturn both *Bakke* and G*rutter. Grutter v. Bollinger.,* 539 U.S. 306 (2003) and *Regents of Univ. of Cal. v. Bakke.,* 438 U.S. 265 (1978).

When law is wrong it must be overruled, and as we will explain, this is one such occasion. Adherence to precedent is not "'an inexorable command.'" *Kimble v. Marvel Entertainment, LLC*, 576 U. S. 446, 455. The logic behind *Grutter* is heavily based upon the *Bakke* decision. *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 2022, identifies five factors that should be considered in deciding when a precedent should be overruled. These five factors, discussed below, weigh strongly in favor of overruling *Bakke* and G*rutter.*

(1) The nature of the Court's error. Bakke is egregiously wrong and has lacked constitutional support from the day it was decided. The Fourteenth Amendment clearly states the illegality of race based discrimination of any form yet both *Bakke* and G*rutter* allow for racial discrimination in collage admissions. This is a flagrant violation of the Fourteenth Amendment and the primary reason we are calling for stare decisis to be overruled.

(2) The quality of the reasoning. Without any grounding in the constitutional text, history, or precedent, *Bakke* and G*rutter* imposed a detailed set of rules for college admissions across the nation. As shown previously, the Fourteenth Amendment does not allow for racial discrimination. This was vindicated in *Brown v. Board of Education*, 347 U.S. 483. Additionally there is a rejection of, "'any authority … to use race as a factor in

affording educational opportunities.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist*. No. 1, 551 U.S. 701, 747.

Bakke and G*rutter* stand alone among a sea of cases banning racial discrimination, examples being *Brown v. Board of Education 347 U.S. 483, Shelly v. Kramer 334 U.S. 1,* and *Loving v. Virginia 388 U.S. 1.* These cases and many more use the Fourteenth Amendment to protect against racial discrimination. *Brown* clearly asserts that there shall be no racial discrimination in schooling yet *Bakke* and *Grutter* both make racial discrimination acceptable when it comes to college admissions. *Brown* is widely considered "the single most important and greatest decision in this Court's history." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1412 and directly contradicts the precedent set by *Bakke* and *Grutter.* Because *Brown* exists, Bakke and *Grutter* cannot.

Lastly, *Bakke* asserts that diversity is a compelling state interest, yet makes no credible effort at proving the necessity of diversity through a checked box system. There are many ways to create a diverse classroom that do not involve racial discrimination yet *Bakke* chooses not to address them. "Student body diversity" does not make for a significant enough state interest enough to justify racial classifications, especially when race neutral options are present.

(3) Workability. The checked box system that results from *Bakke* and *Grutter* is unjustifiable under the pretense of workability. Flat out racial discrimination is unworkable and immoral in compliance with the Fourteenth Amendment. Both the original intent and language of the Fourteenth vehemently oppose racial discrimination and the checked box system allowed by *Grutter* opposes these intentions.

(4) Effect on other areas of law. With the overturning of *Bakke* and *Grutter,* concerns may arise about diversity, not only regarding colleges but also federal contracting or the military. This is not a significant enough concern to justify the racial discrimination that is a checked box system. Like colleges, the government is easily capable of implementing different, race neutral, alternatives that would still satisfy the desired diversity.

(5) Reliance interests. There are many other ways to provide diversity without stooping to the level of racial discrimination that is supported by *Bakke* and *Grutter*. Overturning *Bakke* and *Grutter* would not end society as we know it. Diversity of college admissions may initially decrease with the elimination of the checked box system, however new, racially neutral alternatives would soon be implemented. Turning to the UC's for example, the University of California boasts that it just admitted its "most diverse class ever," despite the State's ban on racial preferences. *Watanabe, UC Admits Largest, Most Diverse Class Ever, But It Was Harder to Get Accepted, L.A. Times* (July 19, 2021), lat.ms/3Cn77JZ. If this proves insufficient in achieving "student body diversity," socioeconomic status could be considered in applicants admissions. If the most selective 193 institutions all used socioeconomic preferences instead of racial preferences, the combined African- American and Hispanic admissions, socioeconomic diversity, and mean SAT scores at these universities would all increase. See UNC.JA1266-67.

UNC cannot meet strict scrutiny

Even under this Court's existing precedent the Equal Protection Clause requires race-based admissions to satisfy strict scrutiny. The burden of proof falls upon UNC, who must show that its admissions program is "narrowly tailored" to achieve "the only interest that this Court has approved in this context": the educational benefits of "student body diversity." *Fisher v. University of Texas,* 570 U.S. 297 (2013),

UNC fails to satisfy strict scrutiny requirements. Its admissions discriminate against applicants based on their race, overemphasize the importance of race, and reject workable, race-neutral alternatives.

UNC claims "Student body diversity" is at the heart of their racial preference admissions system. In respect to students, diversity is far more than simple racial variety. It includes different socioeconomic upbringings, life experiences, cultures, and backgrounds. UNC acknowledges there factors but chooses to place the highest emphasis on the race of an applicant. The checked box system used by UNC admissions assumes that underrepresented minority candidates automatically satisfy the strict scrutiny requirements of student body diversity. This is yet another flagrant violation of the Fourteenth Amendment which forbids "the assumption that race or ethnicity determines how [individuals] act or think." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602

Fisher I, 570 U.S. at 312 dictates that race-based admissions must be "'necessary.'" and that race is not necessary when a "workable race-neutral alternativ[e]" is available. Id. To satisfy

"Workable" the solution simply most provide an alternative that achieves the educational benefits of diversity "'about as well and at tolerable administrative expense.'" Id. Whether or not race neutral alternatives will change the makeup of an institution, or whether the university finds these solutions painful or philosophically disagreeable is not the question at hand. Instead, the question is whether or not race neutral alternatives "'could promote the substantial interest about as well and at tolerable administrative expense.'" *Fisher I*, 570 U.S. at 312.

When provided with race-neutral opportunities, UNC chooses to ignore the existing precedent of *Fisher* and instead adhere to their racially discriminatory admissions. The SFFA lawsuit revealed that UNC's efforts to examine race neutral alternatives were sporadic and unserious at best. Their "efforts" surmounted to a "literature review" and committee that met only a handful of times before disbanding. UNC.JA428-30, 433- 34, 694-96, 1230-31. In a 2012 amicus brief in *Fisher I* UNC told this Court that if it adopted a race-neutral percentage plan the percentage of underrepresented minorities admitted to UNC would actually increase (from 15% to 16%). See UNCFisher-Br. 33-34, 2012 WL 3276512. Further, UNC has "workable race-neutral alternatives" capable of achieving the educational benefits of diversity "'about as well and at tolerable administrative expense.'" *Fisher I*, 570 U.S. at 312.

CONCLUSION

Without the support of the constitution, history, or relevant precedent, the court should reverse both Grutter and Bakke and uphold the Federal Circuit's judgment**.**

Respectfully Submitted,

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