No. 20-843

In the
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioners,

v.

UNIVERSITY OF NORTH CAROLINA, ET AL.,
Respondents.

BRIEF FOR PETITIONERS

ARIA HOCH
Counsel of Record
Lake Oswego High School
2501 Country C Road, 97034
(971) 977-2116
hoch807373@loswego.k12.or.us

DAK STEINBACK
LAKE OSWEGO HIGH SCHOOL
2501 COUNTRY CLUB ROAD 97034
(503) 313-4474
stein78986@loswego.k12.or.us

Questions Presented

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

Table of Contents

Table of Authorities

Cases

Other Sources

Background

The University of North Carolina has created and used an admission system that considers race and ethnicity as part of its admission process . This is consistent with Grutter v. Bollinger, 539 U.S. 306 (2003), where the Supreme Court of the United States outlined the appropriate method of considering race as a factor in college admissions: universities may complete a highly individualized review of each applicant and meaningfully consider variables along with race that contribute to the compelling state interest of diversity. In November of 2014, Students For Fair Admissions filed a lawsuit against the University of North Carolina, alleging that its process of using race as a factor in admissions violated the Fourteenth amendment. At the same time, the group filed Students For Fair Admissions v. Harvard (2022). In October 2021, the North Carolina District Court ruled in favor of UNC. SFFA appealed the trial court decision but

then petitioned the Supreme Court of the United States to hear the case without conventional appellate review by the U.S. Court of Appeals for the Fourth Circuit. The Supreme Court agreed to hear both the UNC and Harvard cases together.

Summary of Argument

Sandra Day O'Connor's majority opinion in *Grutter* expected 25 years from the ruling that the use of racial preferences would not be necessary to promote diversity in schools. Today racial preferencing used as a way to promote diversity in college is no longer necessary. The societal conditions have changed substantially since that ruling and other ways of protecting diversity exist making racial discrimination in admissions not a compelling state interest.

The basis on which the fourteenth amendment was passed rendered the document color blind. It was originally established under the 14th that legally enforceable civil rights are the same for all without distinction on the basis of race. University Of North Carolina's race-based affirmative action admissions

system fails this standard. Affirmative action based on experience; ideas; backgrounds; socioeconomic status; and first-generation college status rather than race would fulfill the need for diversity sufficiently.

Argument

I. The 14th Amendment's Original Intent Was Not To Support Race-Based Discrimination

Though the meaning of the Equal Protections Clause of the Fourteenth Amendment has been hotly debated, Constitutional text, historical context, and research remains the only reliable way to decipher the original intent. The text states, "nor shall any State…deny to any person within its jurisdiction the equal protection of the laws." This clause is "framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude," *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) which is contrary to those who believe the 14th amendment was created solely to protect

African-Americans from discrimination and should be applied as such.

The amendment was made during the Reconstruction era in part to aid the Freedmen's Bureau and impede the Black codes which were being used by the Southern states to discriminate against black people. The clause worked to level the playing field and granted African-Americans full protections under the Constitution. However, the intent of the amendment was not to give certain advantages and privileges to one race and not another. Andrew Johnson saw the additional assistance being given to Freedmen as unconstitutional because it went beyond what the Framers of the 14th amendment intended, "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." President Andrew Johnson, "Veto of the Freedmen's Bureau Bill" (February 19, 1866). Similarly, In the Forty-fourth Congress in 1875, Representative James G. Blaine advocated for ending the Select Committee on Freedmen's Affairs. This committee had all matters concerning Freedmen referred to them and they determined what type of aid would be best for the situation presented. The committee then drafted legislation for the aid. Representative Blaine was against this saying "That 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). The same idea can be applied to the use of the 14th as justification for Affirmative Action and race-based

admissions, the original intent of the amendment was not to hold a certain race in higher esteem than another, nor to create a system of racial classifications.

A. Precedent Of The 14th Amendment

The use of race as a factor in admissions processes to promote diversity is inherently flawed as the Fourteenth Amendment forbids "the assumption that race or ethnicity determines how [individuals] act or think.'" *Metro Broad., Inc. v. FCC,* 497 U.S. 547 (1990) and colleges cannot use "race as a proxy" *Miller v. Johnson,* 515 U.S. 900 (1995) to curate diverse perspectives and views. It is important to consider this because the burden that lays on the shoulders of universities who use Affirmative Action and race-based admissions is proving that their program satisfies strict scrutiny, meaning it is

narrowly tailored, and has a compelling state interest. In *Bakke,* the Court established that, "achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances" however it is not the only factor. Being a member of a certain race does not automatically grant that person a unique perspective from someone that is white. The assumption that each race shares a singular perspective relies on antiquated stereotypes and does not take into account the various factors that comprise perspective.

Additionally, this intentional admittance of underrepresented minority students in colleges to "'prepare students for an increasingly diverse workforce and society'" in *Grutter,* demonstrates how the concept of diversity and the inclusion of minority

students is simply a tool for universities to teach white students about various cultural perspectives. This is not the way universities should be viewing diversity and race.

Brown v. Board of Education of Topeka, 347 U.S. 483, (1954) established that segregation automatically creates injury. The respondents might argue that the elimination of Affirmative Action would spontaneously create segregation in school systems, this is based on California's Proposition 209 (1996) that removed race-based Affirmative Action in its colleges and universities and saw an increase in the enrollment percentages of Asian-American and white students and a decrease in enrollment percentages of Black and Hispanic students initially. Recently though, the numbers have shifted and are not as skewed as some make them out to be.

According to the University of California's enrollment percentages from 2011-2021, African American enrollment went from 3.69% to 4.44%, Hispatic/Latinx enrollment went from 23.08% to 26.24%, Asian American enrollment dropped from 39.04% to 35.04%, and white enrollment dropped from 25.52% to 19.63%. These results can conclude that the initial ban on Affirmative Action did result in an immediate decrease in underrepresented minority students but overtime evened out and in some cases resulted in an increase in their student population. *Brown* tells us that we should loath racial classifications in schools. The ruling was meant to "...achieve a system of determining admission to the public schools on a nonracial basis."

II. The Conditions On Which *Grutter v. Bollinger* Was Ruled Are No Longer Valid And Should Be Overturned

In this Court's Opinion in *Grutter,* it is important to note that Justice O'Connor stated, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Although 25 years have not passed, the societal changes predicted to have occurred in that time are fulfilled enough to require that race-based preferencing be phased out. 2022 is a different time than 2003 with national feelings on race and how we approach discussions and inclusion changing drastically. Past years have shown major social movements revolving around race such as Black Lives Matter and Stop Asian Hate.

College enrollment rates of 18 to 24 year-olds rose 6%, from 31% to 37% for black students, 14%, from 22% to 36% for Hispanic students, and 8%, from 16% to 24% for American Indian/Alaska Native students during the time period between 2000 and 2018, *See* Bill Hussar, The Condition of Education, 2, (2020). Although the percentages of minorities being enrolled in colleges seems to demonstrate increased diversity, it is coming at the cost of burdening Asian-American students.

In the *New York Times* article "Applying to College, and Trying to Appear 'Less Asian" Amy Qin, *Applying to College, and Trying to Appear 'Less Asian,'* NY Times, Dec. 2, 2022, https://www.nytimes.com/2022/12/02/us/asian-american-college-applications.html, Asian-American

students expose how Affirmative Action and the race-based admissions process has pressured them to deliberately attempt to hide important aspects of their personalities–like playing violin or piano–to conceal what may reveal them as "too" Asian to admissions offices.

A. Race-Based Admission Systems Are Not The Only Method Of Creating Diversity In Universities

There are other methods of fostering a diverse student body at colleges and universities that are race neutral. Choosing instead to focus on socioeconomic background and/or academic performance would satisfy a diverse campus criteria. Texas's *Top Ten Percent Plan*, Tex. HB. 588, § 51.803 (1997) allowed for automatic admission into all state

colleges and universities to the students in the top 10% of their graduating class. The other applicants would be evaluated on hardships or obstacles overcome by students instead of looking at race. These obstacles and hardships could be whether the applicant would be the first generation of his or her family to attend or graduate from college; whether the applicant is bilingual; the financial status of the applicant's school district; the quality of the applicant's school; and the applicant's responsibilities while attending school, including whether he or she has been employed and whether he or she has helped to raise children or other similar considerations. All of these qualities contribute to creating a diverse student body with a multitude of different perspectives. Those who were eligible for the program had an increased likelihood of enrollment into Texas

public universities including the two flagship schools, the University of Texas at Austin and Texas A&M by almost 60 percent, Issac Mcfarlane, *The Texas Ten Percent Plan's Impact On College Enrollment,* Education Next, Apr. 22, 2014 https://www.educationnext.org/texas-ten-percent-plans-impact-college-enrollment/#:~:text=Fifty%2Deight%20percent%20of%20students,flagship%20(see%20Figure%202). Policies like these allow for more diverse colleges with students of all backgrounds while race-based admissions have the possibility to be dominated by one class.

B. Race-Based Admission Systems Open The Door For The Possibility Of Racism From Admission Officers

UNC considers applicants' race at every step of the review process. In this review process internal staff and admission officers focus closely on a applicatant's race. Online chats between these admissions officers raise concerns of racism

- "I just opened a brown girl who's an 810 [SAT]."
- "If its brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]."
- "Still yes, give these brown babies a shot at

  these merit $$."
- "[W]ith these [URM] kids, I'm trying to at least give them the chance to compete

> even if the [extracurriculars] and essays are just average."
>
> - "I don't think I can admit or defer this brown girl."
> - "perfect 2400 SAT All 5 on AP one B in 11th"
> - "Brown?!"
> - "Heck no. Asian."
> - "Of course. Still impressive."
> - "I just read a blk girl who is an MC and Park nominee."

Pl's Ex. 84 (D.C.Dkt.163-16); see also Pl's Ex. 74 (D.C.Dkt.166-6) ("Stellar academics for a Native Amer/African Amer kid."); Pl's Ex. 75 (D.C.Dkt.163-27) Referring to minorities with stereotypes and acronyms violates our societal desire for a colorblind society because admissions officers at prestigious

universities like the University of North Carolina, who are responsible for the potential educations of thousands of students, are using race in a mechanized and calculated way. The district court agreed with UNC that the chatroom messages were consistent with the type of holistic process UNC describes. This aforementioned admissions process aims to "fully" understand the entire "context within which the student has lived and done his or her work." J.A.701. One long-time member of the admissions office explained at trial that applicants are "not just the test score, not just the GPA, not just an essay. They're a whole person." J.A.701. Clearly when looking at the chatroom messages between admissions officers, the applicants are not holistically analyzed for admission but instead their test scores are examined only in the context of their racial

affiliation. Not only was the court wrong in dismissing the chat room messages, it brought to light a core issue with Affirmative Action and how it forces admission officers to admit or reject students based upon their race in order to satisfy the standard of diverse classrooms that their university advocates for.

CONCLUSION

The Supreme Court should rule that race-based admission systems are not consistent with the Fourteenth Amendment and overturn *Grutter*.

Respectfully submitted,

ARIA HOCH
Counsel of Record
Lake Oswego High School
2501 Country Club Road
Lake Oswego, OR, 97034

DAK STEINBAK
Lake Oswego High School
2501 Country Club Road
Lake Oswego, OR, 97034
[12/16/22]