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

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[12/02/22]

QUESTIONS PRESENTED

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

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JURISDICTION

This case comes to the Court on Writ of Certiorari from the Fourth Circuit. This Court has jurisdiction under 28 U.S.C §1199.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, U.S. Const. amend. XIV, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of 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.

FACTS OF THE CASE

Both filed on the same day in November 2017, this case includes both *Students for Fair Admissions, Inc. v. President* and *Fellows of Harvard University, No. 20-1199*. Requesting to overrule *Grutter v Bollinger*, the Harvard case aims to hold that Title VI prohibits funding for institutions that consider race during admissions. Sparked by Students For Fair Admissions claiming that a white member was denied admission to the Freshmen class of 2014 due to affirmative action policies at UNC, this case asks the Court to apply the Fourteenth Amendment's guarantee of racial neutrality to public colleges as well as private colleges.

Students for Fair Admissions sued University of Northern Carolina for violating a student's Fourtheenth Amendment right to equal protection because of racial discrimination. Petitioners aim to eliminate the use of race as a factor in the admissions process.

SUMMARY OF ARGUMENT

This court's past precedent on affirmative action is compliant with the University of North Carolina's policy. UNC strives for a higher education for their students in which a diverse learning environment is absolutely necessary for its students.

Precedent from *California V Bakke*, 43 U.S. 265 (1978), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas Austin I*, 570 US 297 (2013) concludes, under certain circumstances, race is a permitted factor in admissions. The Court, essentially reiterating Bakke, holds in *Grutter* that the Constitution doesn't "prohibit the law school's narrowly tailored use of race in admissions decisions to further an approved compelling interest." *Grutter v. Bolligner*, 539 U.S. 306 (2003). UNC has succeeded in creating a race-conscious admission policy that is constitutional.

Although the framers of the Fourteenth Amendment held a righteous idea of complete removal of racial discrimination and its effects from society, they acknowledged this isn't yet possible. Context and legislation at the time of the Fourteenth amendment affirm that racial discrimination to assist minorities is constitutional, to move society to a less inequitable future.

Against decades of precedent, Petitioner's request to overturn *Grutter* and terminate its impact over student experience and opportunity across all racial groups would undermine case law and perpetuate racial segregation . Ruling for Respondent follows precedent while recognizing the Fourteenth amendment's nuanced implications.

ARGUMENT

I. This Court's precedent supports the Respondent.

Under the Court's precedent, the University of North Carolina does not violate a student's Fourteenth Amendment rights, and by extension, this particular type of race-conscious admission policy is permitted.

A. The University of North Carolina complied with the strict requirements of enacting affirmative action.

Since education became desegregated, the Court has continually narrowed and defined how institutes of education can evaluate race as a factor in admissions. In the first Supreme Court case addressing affirmative action in universities, the Court ruled that fixed quota systems for racial groups is unconstitutional, however considering race as one aspect of the holistic admissions process is constitutional. *See University of California V Bakke,* 43 U.S. 265 (1978). The University of North Carolina had no fixed quota system or categorical admission. Instead, they have stated clearly that their evaluation of race was never a deciding factor in the admittance process. With forty other factors taken into

consideration with race being only a "plus factor", UNC's affirmative action meets the standard of narrowly-tailored required.

B. Past Precedent allows for affirmative action

The ruling in *Regents of the University of California v Bakke* established that reserving a set number of spots for minorities is unconstitutional but taking race into account is not. *Grutter v Bollinger* upheld affirmative action under the determination that there is a compelling interest for students to be learning in diverse environments. *Parents involved in Community Schools v Seattle School District No. 1* established that affirmative action cannot be used to ensure diversity but it can be considered. As the precedent pertaining to affirmative action has evolved, it has become more narrowly defined.

The University of North Carolina complies with the precedent laid out in *Fisher v. University of Texas Austin*, which states that affirmative action is appropriately narrowly tailored if race is used as one of many factors to pursue diversity. *See Fisher v. University of Texas Austin I,* 233 S. Ct. 2411 (2013). The University of North Carolina admissions policy explicitly states that race may "never be used as the defining feature of a candidate's evaluation."

Petitioner's request to overturn *Grutter v Bollinger* in order to banish race from admissions entirely disempowers over forty years of well-established precedent. Past precedent states that colleges are allowed to take race into consideration.

II. Universities have a compelling interest in a higher education that allows for affirmative action

A) Diversity is a compelling interest

Affirmative action is constitutional under the expectation that universities will uphold that such practice is "to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Grutter v. Bolligner*, 539 U.S. 306 (2003). This means that diversity has been determined to be a compelling interest. The Universities are the most qualified to dictate what is beneficial in a learning environment, and what creates "a higher education", as they are responsible for the education of each new generation. The more diverse an environment is, the more perspective and opposing experiences are brought to the table- this creates a deeper understanding of the world for students, most of which have only been exposed to the one or few areas they grew up in. This idea is seen in a study by Drexel University, *The Importance of Diversity and Cultural Awareness in the Classroom*. Past precedent has established that the goal to create this higher education is a compelling interest a University has, and can obtain through affirmative action.

B) Race-neutral alternatives are ineffective

The Petitioners argue that because the University of North Carolina refused all race-neutral alternatives, the institution fails strict scrutiny. Their reasoning states that this rejection reveals that their compelling interest is fabricated, arguing that it is not about creating a higher education but of ensuring diversity in their schools. This is false. These suggested race-neutral

alternatives have been shown to decrease freshman year GPAs as well as SAT scores, therefore decreasing the education a student is receiving.. Both of these consequences do not meet the goal of creating a "higher education", which was what the court decided the compelling interest of affirmative action is. Considering race, through affirmative action, has neither of these consequences and functions quite well in striving towards the University's goal. This has been clear to the Supreme court, who then have approved affirmative action in case law listed above.

Diversity is necessary in collegiate institutions- not even the Petitioners deny this. However, as seen in *Bakke*, when affirmative action is taken away, diversity drastically decreases in the classroom. This also opposes the University's compelling interest to create a higher learning environment. See *Proposition 290,* when the state of California banned affirmative action, and diversity in classrooms consequently decreased.

III. Petitioner's argument fails to recognize detrimental impacts of their requests.

A) Petitioner fails to address the impact of Affirmative Action on all college students and the higher-education environment.

The aforementioned benefits of affirmative action seen in University of North Carolina's compelling interest in diversity are undeniably important in a progressive multicultural society.

Although Petitioner argues that affirmative action disadvantages those in unfavored minority groups, its purpose is to create a "level playing field" by

"neutralizing the effect of years of systemic racial discrimination and oppression." Furthermore, less than ten years ago, in 2013, the University of North Carolina's Freshmen class enrolled less than one hundred black male students. Affirmative action systematically creates fairness by removing the disadvantages of minority students, qualifying such practice to be consistent with the Fourteenth Amendment. With University of North Carolina being one of many schools in the United States with a background of racial discrimination, and only admitting 95 black men out of freshmen class 5,000, affirmative action aids in influencing a more unprejudiced admissions process that should not be hindered.

B) A race-neutral or "color-blind" admissions process would place an unfair burden on minority students.

Petitioner's request to remove race in a holistic admission process would force prospective students of color to narrow what can be shared in an application. For many students of color, race, ethnic, and cultural heritage are a substantial part of their identity. Consequently, with one's racial identity so heavily intertwined with their experiences and perspectives, minority students would be limited. With affirmative action in place, all students are free to speak of their experiences with race- including white and asian students, whose race has also played a large role in their life.. Being unable to disclose race in an application would constrict students of color from sharing large parts of themselves. This goes against the Fourteenth Amendment.

IV. Race-based affirmative Action is constitutional under the Fourteenth Amendment.

A) The original intent of Congress when crafting the Fourteenth Amendment is consistent with race-based affirmative action.

When viewing the language of the Fourteenth Amendment today, we see its ideal of eliminating race as a consideration for benefits in our society—an example being admittance into collegiate institutions. However, the Congress that created the Freedman's Bureau is the same Congress that is responsible for gifting America with the Equal Protection Clause as a remedy for centuries of slavery and a reaffirmation of the nation's greatest paragons that race is not an advantage. They looked to race-based systems to aid America in its strive towards total equality. Congress passed legislation that established institutions to educate former slaves in their transformation into society. See *Act of June 21, 1866* for more.

The idea that slavery created an irreparable debt to African Americans shaped the drafting of the Fourteenth Amendment. Senator Charles Sumner stated that "The curse of slavery is still upon them… The intervention of the national Government is necessary", as a means for arguing that the federal government must assist victims of racism until the effects of slavery are no longer visible in our society. See *An Act to establish a Bureau for the Relief of Freedmen and Refugees* for more. This idea is consistent with other historical monuments for affirmative action outside of Universities. *United Steelworkers of America,*

AFL-CIO-CLC v. Weber pertains to the workplace, and the Court ordered that programs seeking to eliminate archaic patterns of racial segregation and hierarchy while not prohibiting white employees from advancing in the company, are consistent with the intent of the 14th Amendment.

This idea of governmental assistance presented by Congress during the drafting of the Fourteenth Amendment has led us to race-based affirmative action today. This idea is seen in other areas of our history as well. See *Executive Order 10925* for more. America's tumultuous history of slavery ensured that race has been and as of right now, needs to continue to be an element of consideration in the holistic review of college admittance programs .

V. *Grutter v Bollinger* does not meet the requirements to be overturned

F) Previous ruling must have had an "error", meaning the court previously wrongly interpreted the case or had some sort of misjudgement.

This is untrue when viewing *Grutter v Bollinger*. *Dobbs v Jackson Women's Health Organization* overturned previous cases regarding abortion on the argument that *Roe v Wade* and *Planned Parenthood v Casey* caused a gap in the democratic process for individuals who wanted advance in state interest for fetal life.

However, with legislation such as *Proposition 290*, there is still room for those opposing affirmative action to influence state representatives and legislation to advance their interest in race-blind admissions, employment, and other processes.

G) ***Dobbs v Jackson Women's Health Organization* establishes that the quality of reasoning must be poor.**

a) *Dobbs v Jackson Women's Health Organization* argued that the quality of reasoning for *Roe v Wade* is faulty due to the lack of grounding in constitutional text, history, or precedent. *Grutter v Bollinger* follows the precedent and line of reasoning in *Bakke*, stating that an applicant's race may be used as a factor in admissions, and *Gratz's* decision to prohibit mechanized systems of affirmative action. *Grutter v Bollinger* does not have poor reasoning, as it follows decades of precedent and is grounded in constitutional history, the equal protection clause and precedent.

H) **The case should exhibit Workability—the ability to understand and apply the precedent of the case consistently and predictably**
    a) *Grutter v Bollinger* reiterates that in suspect classification, there needs to be both a compelling interest and narrowly tailored policy. It has already been establishes that diversity in higher education serves as a compelling state interest, and a narrowly tailored policy consists of a policy in which no other alternative could serve it's intended purpose, and cannot be a mechanized system. With these two standards always at hand when discussing discrimination based on race, *Grutter's* precedent is consistent and predictable when applied to other universities.
I) **The Effect on other areas of law that a case has should not be disproportional**
    a) *Dobbs* argues that *Roe v Wade* and *Planned Parenthood v Casey* have led to the distortion of many important but unrelated legal doctrines

b) However, *Grutter* addresses areas in which there are admissions at stake. other cases like *Ricci v DeStefano* outline areas in which race in similar situations doesn't affect opportunity or probability

J) Reliance interests

a) *Dobbs v Jacksons Women's Health Organization* ruled that in order for a case to be overturned, it needs to uphend substantial reliance interests. When discussing areas of law that race-based affirmative action might affect, the topic of gender identity and sexual orientation are brought up. However, race-based affirmative action will have no effect on these areas because the two topics fall into different classes with different constitutional protections. Race meets the strict scrutiny standard, but sexual orientation and gender identity do not, therefore they are intermediate classes. *Grutter v Bollinger* does not uphend any substantial reliance interests, and does not meet the requirements for overruling in part because of that.

CONCLUSION

Based on common law and case law, the Fourteenth Amendment allows race-conscious policy in the university admission processes. The University of North Carolina maintained lawful behavior. Therefore, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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