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 BY RESPONDENTS

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QUESTION PRESENTED

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

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SUMMARY OF ARGUMENT

The original telos of the Fourteenth Amendment was to create a vision for a racially equal society, both in political rights and economic conditions.

Grutter v. Bollinger rules that race conscious affirmative action as performed by the University of North Carolina satisfies the requirements of a compelling state interest and being narrowly tailored. This satisfaction of legal and Constitutional requirements is evidenced further in previous Supreme Court Cases *The Regents of the University of California v. Bakke* and *Fisher v. The University of Texas at Austin*. Race conscious affirmative action creates racially diverse college campuses, contributing to the academic and social well being of students belonging to both historically underrepresented and overrepresented racial groups. The University of North Carolina's race conscious admissions policies, moreover, abide by preceding case decisions by using a holistic decision process rather than a racial quota system.

Race conscious affirmative action is not only consistent with historical telos and precedent, but is critical for the realization of the vision that the Fourteenth Amendment sets for the United States.

STATEMENT OF FACTS

A. In November of 2014, the Petitioner, Students for Fair Admissions, sued the University of North Carolina on the basis that their race-conscious admissions process violated the Equal Protection Clause of the U.S. Constitution's 14th Amendment. Students for Fair Admissions is a nonprofit membership group whose mission is to remove racial considerations from college admissions decisions. Their claim is that Race-conscious affirmative action, which is practiced by numerous college admissions offices including the University of North Carolina, discriminates against Asian Americans and Caucasians on the basis of their race. The defendant, the University of North Carolina, claims that their admission process is holistic and abides by the precedent set forth by *Grutter v. Bollinger*. Their defense is that racial diversity on college campuses is a compelling state interest and their admissions process is narrowly tailored as required under the Strict Scrutiny standard.

B. This case was decided in October 2021 in the U.S. District Court for the Middle District of North Carolina in favor of the University of North Carolina. The Students for Fair Admissions appealed to the Supreme Court, who agreed to hear the case in January of 2022.

STATEMENT OF ARGUMENT

I. The University of North Carolina's policy on Race-conscious affirmative action is consistent with the original telos (i.e. intentions) of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

A. Reconstruction Congress did not intend for the Fourteenth Amendment to mandate race neutrality.

The framers of the Fourteenth Amendment, and thus the Equal Protection Clause, did not intend to mandate complete race neutrality from government bodies. In fact, alongside the passing of the Fourteenth Amendment, Congress passed a number of laws intended to uplift Black Americans to an equal status as their white counterparts. "The thirty-ninth Congress approved race-conscious programs designed to enable blacks to improve their situation and, although the programs were remedial in purpose, no attempt was made to screen individual black participants to assure that they were actual victims or to measure the degree of past disadvantage." (Schnapper). Congress passed the Freedmen's Bureau Acts of 1865 and 1866, which provided food, shelter, clothing, medical services, and land to newly freed African Americans. However, in the implementation of this program, there was no attempt to differentiate between freedmen and other African Americans. These are examples of explicitly race-conscious legislation that would

indicate that the framers of the Fourteenth Amendment did not have race neutrality in mind. In 1971, in *Swann v. Charlotte Mecklenburg Board of Education*, the Supreme Court upheld the race conscious busing of students to promote integration in public schools. While some may argue that these laws were passed exclusively based on the recipients' statuses as former enslaved people, many of the laws did not differentiate between formerly enslaved people and other Black Americans. The expressed intent of the Reconstruction Congress was to amend the systemic harms of slavery, not to require race neutrality. "See, e.g., Cong. Globe, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton) explaining that Race-conscious measures adopted during Reconstruction were intended to "break down discrimination between whites and blacks" and "ameliorat[e] . . . the condition of the colored people"." This is because at the time of the passing of the Fourteenth Amendment, it was understood that slavery was synonymous with being Black.

To assert that the Constitution and the Equal Protection Clause is race-blind is to ignore critical historical facts. Rather, the Constitution not only permits classification by race, but also the granting of specific privileges to specific racial groups that have been historically discriminated against. In the court's interpretation of the Fourteenth Amendment, any classification by race requires the court to utilize strict scrutiny, meaning the law must be narrowly tailored and have compelling state interest. If the law meets both prongs, it is consistent with the Fourteenth Amendment. This is exhibited through the Constitution's specific privileges to Indigenous tribes, who are allowed sovereignty over their native land

outside of the powers of the United States government. As aforementioned, diversity on campus is a compelling state interest that is achieved through an affirmative action policy that is adequately narrowly tailored and therefore does not violate the 14th Amendment. Overturning precedents that permit race-conscious decision making such as *Grutter* and *Fisher* would be perpetuating a narrative that is historically inconsistent with the original telos of the Equal Protection Clause.

When the Constitution was originally written and in the years prior to the Equal Protection Clause, Race-conscious discrimination against Black people was explicit. For example, the three fifths compromise in Article 1, Section 2, clause 3 of the original Constitution counted African slaves as only three fifths of a whole person for population purposes. Other examples include the allowance of the enslavement of African peoples (Article 1, Section 9, clause 1 prohibits the limitation of the importation of "persons" by the federal government), the lack of citizenship and suffrage given to African Americans (*Dred Scott v. Sandford*, 1857), and the legality of segregation (*Plessy v. Ferguson,* 1896). The current policies set forth by the University of North Carolina and other states are to rectify the negative repercussions of those policies. To only now mandate race neutrality would be a misinterpretation of the original telos of the Fourteenth amendment and an injustice to those who have been negatively impacted by prior race-conscious discriminatory laws.

II. Race-conscious affirmative action prevents segregation, thus it honors the ruling that segregation should be avoided in order to hinder social racial hierarchies, as established in the case of Brown v. Board of Education of Topeka.

A. Segregated educational facilities are inherently unconstitutional because they instill a racial hierarchy in which one race is seen as innately superior to the other, thus violating the Equal Protection Clause of the Fourteenth Amendment.

During the 1940s, psychologists Mamie and Kenneth Clark devised and carried out a series of experiments known vernacularly as "The Doll Tests," in order to study the psychological effects of segregation on African-American children. The test procedure was fairly simple: the test subjects, African-American children, were presented with four dolls, identical in all aspects except for race. The children were then asked which dolls were "good" or "bad," "beautiful" or "ugly," etc, and as a result most children seemed to highly favor the white dolls as having superior traits, while expressing that the black dolls had inferior traits. The Clarks concluded that "prejudice, discrimination, and segregation" instilled African-American children with a sense of inferiority which harmed their self-esteem.

The conclusion that African-American children were instilled with a sense of racial inferiority because of segregated, "separate but equal" educational facilities

meant that segregation in the educational system created a racial hierarchy in which one race was seen as inherently superior to the other. This argument was used in Brown v. Board of Education of Topeka to conclude that segregated educational facilities were inherently unconstitutional for the racial inequality they generated violated the Equal Protection Clause of the Fourteenth Amendment.

B. Race-conscious affirmative action prevents racial segregation and bolsters racial diversity.

Hypotheticals are not needed to conclude that race-conscious affirmative action prevents segregation and bolsters racial diversity. The laboratories of democracy have witnessed what happens when affirmative action is eliminated. in 1996, the state of California approved Proposition 209, which prohibited the consideration of race, sex, or ethnicity in the admissions process of public education. Alongside with California, the states of Texas, Louisiana, and Mississippi also upheld bans on race-conscious affirmative action after the 1996 Hopwood v. Texas decision.

Proposition 209 had an immediate impact on the state's elite universities in California. Black and Hispanic enrollment at Berkeley and Los Angeles' flagship campuses has dropped precipitously. Legal challenges to the policy were unsuccessful. According to a study published by the University of California, Prop 209 caused a decline in systemwide URG (underrepresented groups) enrollment by at least 12 percent (Bleemer).

The decline of students of color caused by Prop 209 and the 1996 Hopwood v. Texas decision can also be traced in medical schools. A study published in 2016, revealed that affirmative action bans have led to about a 17% decline (from 18.5% to 15.3%) in the first-time matriculation of medical school students who are underrepresented students of color (Garces and Mickey-Pabello).

C. Conclusion.

Thus, if (a.) Brown v. Board of Education of Topeka establishes that segregated educational facilities are inherently unconstitutional due to their inevitable triggering of a racial hierarchy in which one race is seen as superior to the other, and if (b.) Race-conscious affirmative action prevents racial segregation and bolsters racial diversity, then race-conscious affirmative action honors the ruling that segregation should be avoided in order to hinder social racial hierarchies, as established in the case of Brown v. Board of Education of Topeka.

III. Race-conscious affirmative action is consistent with the Fourteenth Amendment of the U.S. Constitution because it supports the narrowly tailored and compelling state interest standards required under the standard of Strict Scrutiny.

A. A racially diverse student body propagates great educational benefits that satisfy compelling state interest.

When higher education institutions are virtually monopolized by a majority race, many minority group students experience isolation and discomfort on campuses, due to a lack of sense of "ownership" of the campus spaces and traditions. This means that minority students have worse chances at establishing social networks through higher education. This can lead to biases from teachers and peers, a lack of intrinsic motivation for schoolwork, and feelings of hopelessness.

A 2019 study by the National Center for Educational Statistics found that "52% of Black students and 53% of Native American students drop out of 4-year colleges… compared to only 42% of white students dropping out". These students then experience a dramatic loss in their future income and salaries due to a lack of a bachelor's degree which inhibits their employment opportunities. Therefore, in order to enhance the educational experience of minority students by preventing them from feeling isolated, it would be within the state's interest to cultivate a racially diverse student body.

A commitment to college classroom diversity would ameliorate the current income inequalities that exist along racial lines. "In the United States, the average

Black and Hispanic or Latino households earn about half as much as the average White household and own only about 15 to 20 percent as much net wealth." By preventing students of color from dropping out of higher education, the state would increase access to higher-paying employment opportunities and increase equality across racial groups.

In addition to being beneficial to minority students, racially diverse student bodies aid significantly in the educational experience of majority students. A study published in 2009 by the Russell Sage Foundation shows a positive impact in racial attitudes for college students who are part of a racially diverse student body. The study, "The Diversity Challenge: Social Identity and Intergroup Relations on the College Campus." is authored by James Sidanius, former professor of psychology at Harvard University, and examines the experiences of 2,000 students at the University of California. Through surveying students on their racial attitudes before entering college and then again after spending a year on campus, it was discovered that students who were assigned a roommate of a different race or ethnicity showed a significant gain in their attitudes about people of different races compared to students who were assigned a roommate from the same racial or ethnic group. This finding of improved racial attitudes was found regardless of racial attitudes expressed by the student as measured by the preliminary questionnaire. This furthers the state's interest by decreasing the amount of racial biases that exist among Americans, which will improve equality.

On page 11 of the Petitioners' Merits Reply Brief, it is argued that allowing

for Race-conscious affirmative action to increase diversity in universities in order to cultivate a student body that mirrors the racially diverse population of the U.S. is not a "legitimate interest that can sustain race-based admissions." During the oral argument for *Students for Fair Admissions v. University of North Carolina*, however, Justice Elena Kagan challenged this argument, claiming that higher education institutions are much like "pipelines" to leadership positions in American society. She argued that American pluralism is only upheld when those filling American leadership roles are reflective of who Americans are as a people, in all their racial variety, and that "If universities are not racially diverse, then all of those institutions [areas of leadership] are not going to be racially diverse either." This coincides with the 5-4 opinion delivered by Justice Sandra Day O'Connor on the *Grutter v. Bollinger* Supreme Court Case, in which states that "because universities and law schools in particular represent the training ground for a large number of our nation's leaders, this path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity." Since (a.) higher education serves as a specimen of "pipeline" to leadership positions in American society, and (b.) those who fill leadership positions should reflect the multiracial population of the U.S., then it is a compelling state interest for higher education to cultivate racially diverse student bodies.

B. Race-conscious affirmative action is consistent with the Fourteenth Amendment of the U.S. Constitution *if* the policy is narrowly tailored.

Grutter v. Bollinger establishes that if race is not the main or only factor in college admissions, then the state interest is met narrowly tailored, and thus it is consistent with the Fourteenth Amendment of the U.S. Constitution. As stated in its 5-4 opinion delivered by Justice Sandra Day O'Connor, "The Law School considers race only as a plus in a particular applicant's file and gives serious consideration to all the ways besides race that an applicant might contribute to a diverse educational environment."

IV. The UNC's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits originating from a diverse student body does not infringe the Fourteenth Amendment of the U.S. Constitution.

A. Compelling State Interest.

It is crucial to understand that the UNC has embraced diversity as a core part of its educational mission. As the nation's first public university, UNC is dedicated to providing an educational experience that reflects the inherently diverse values of America's future, aiming to host "a diverse student body to become creators, explorers, innovators and leaders." UNC particularly cares about promoting racial diversity within its campus– and so, propagating a racially diverse student body is a very significant state interest to the University.

B. Narrowly Tailored Compelling State Interest.

It is also necessary to understand that the UNC considers race flexibly as one factor among many in its admissions process– the University conducts a thorough, holistic, and individualized review of each candidate. According to a member of the admissions office, applicants are "not just the test score, not just the GPA, not just an essay. They're a whole person." In addition to this, the expert evidence suggests that around only 1.2 percent of the applicant pool as a whole is affected by the race-conscious admissions program at UNC. Since race is not the main or only reason an individual might get admitted into the school, then the state

interest is narrowly tailored.

The issue at hand is whether or not Race-conscious affirmative action is consistent with the Fourteenth Amendment of the United States Constitution, since considering race through college admissions can be seen as discriminatory. Under the Equal Protection clause of the Fourteenth Amendment, Race-conscious affirmative action is presumptively unconstitutional unless the state proves narrowly tailored compelling interest. Since UNC has a narrowly tailored (race is not the main or only factor in college admissions,) compelling state interest (a racially diverse student body,) the UNC's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits originating from a diverse student body does not infringe the Fourteenth Amendment of the U.S. Constitution.

V. The University of North Carolina's policy of Race-conscious affirmative action follows preceding cases regarding affirmative action.

There are a number of Supreme Court cases over multiple decades that uphold Race-conscious affirmative action in admissions. In 1978, in *Regents of the University of California v. Bakke* 438 U.S. 265 (1978), the Court upheld that Race-conscious admissions decisions did not violate the Equal Protection Clause so long as they did not instate racial quotas, as quotas do not meet the necessary criteria for race based classification of being narrowly tailored. In Justice Powell's Majority Opinion, it's stated that "In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."

Since the University of North Carolina does not utilize racial quotas as an admissions factor, their admissions policy does not violate the ruling in *Bakke*. Rather, since the University utilizes a holistic approach that considers race as a factor, it has been determined by precedent that the policy does not violate the Equal Protection Clause.

Similarly, in 2003, the Supreme Court ruled in *Grutter v. Bollinger* 539 U.S. 306 (2003) that Race-conscious admissions decisions were permissible for two reasons. Firstly, that the Constitution "does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in

obtaining the educational benefits that flow from a diverse student body." Secondly, "in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."

This preceding opinion, when applied to the question at hand, proves that the University of North Carolina's admissions policy does not violate the Equal Protection Clause, even when applying strict scrutiny. The holistic approach has been previously determined as narrowly tailored and serving a compelling interest in diversity on college campuses, as aforementioned.

Most recently, in *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016)the court ruled in favor of the University's affirmative action policy. Justice Kennedy's majority opinion rules that "although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a "factor of a factor of a factor" in the holistic-review calculus. Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities." Moreover, it is stated that "the contention that the University discriminates against Asian-Americans is "entirely unsupported by evidence in the record or empirical data." Similarly, there is no evidence that the University of North Carolina discriminates against Asian-Americans. Rather, the University of North Carolina cites multiple Supreme Court precedents including *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v.*

Univ. of Tex., 570 U.S. 297 (2013) ("*Fisher I*"); and *Fisher II*, 136 S. Ct. at 2198).

The plaintiff's argument in this case relies on the fact that Asian-Americans are discriminated against in the admissions process. However, as ruled before in *Fisher*, there is no evidence that discrimination has occurred. It is also determined that race can only act as a positive feature and not as a negative feature. The University's goal is to further diversity on campus, which is inclusive of all races, including Caucasians and Asians.

CONCLUSION

For the foregoing reasons, this Court should uphold.

Respectfully submitted,

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