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

The Fourteenth Amendment explicitly states that raced based decision making is unconstitutional. Written in the midst of the reconstruction era, the 14th Amendment aims to provide a level of equality to "All persons born or naturalized in the United States", not to favor certain citizens over others. From a textualist standpoint, affirmative action is prohibited under this amendment as denying or accepting students based on racial criteria subsequently denies certain citizens from these aforementioned rights. The intent of the framers during presidential reconstruction was to provide a race-neutral amendment that applies to everyone in a colourblind society, protecting those as "persons", and not as racial groups. Affirmative action violates this law, and *Grutter v. Bollinger* 539 U.S. 306 (2003) should be overturned.

Former Supreme Court precedent supporting affirmative action is contradicting and fails to clearly prove, with complete certainty, that race conscious admissions does not, and will not violate the 14th Amendment.. Both major cases, Regents of University of California v. Bakke and Grutter v. Bollinger established a weak precedent that should be overturned in order to maintain the integrity of the 14th Amendment. The court should instead turn to reasoning found within the landmark case of Brown v. Board of Education, reaffirming that colleges must treat each applicant "as an American,

and not as a member of a particular … race." "All Americans, whatever their race or color, stand equal and alike before the law." Brown v. Board of Education, 347 U.S. 483 (1954)

We urge the court to overturn *Grutter v. Bollinger* in order to uphold the ideals of the 14th amendment.

SUMMARY OF CASE

In 1997 Barbara Grutter, a white student with a 3.8 GPA and a 161 LSAT score applied and was rejected from The University of Michigan Law School though her credentials exceeded those of other applicants. Michigan operated on an affirmative action based admission policy, favouring applicants that were underrepresented racial minorities.

Grutter required no proof that "a 'critical mass' of underrepresented minorities" was actually "necessary" to the educational experience of the university, and while their race-based admission policy proved to provide a racially diverse campus, there was no accounting for diversity within perspective, background, or experience as a result from a focus on race. *Grutter v. Bollinger* 539 U.S. 306 (2003). Under the court's reasoning, schools have to provide evidence that the difference in race-neutral admissions policies and affirmative action provide a wide enough difference in diversity that there remains a compelling governmental interest.

ARGUMENT

I. *Grutter* should be overturned

A. *Grutter* violates former precedent

When examining this question, it is important that we first turn to precedent regarding suspect classifications and government discrimination. Established in Footnote Four of *Carolene Products v US*, suspect classifications, including race, national origin, and religion are protected under the the standard of strict scrutiny. Laid on the defendant, the burden of proof must satisfy both compelling state interest and narrowly tailored in order to be upheld.

When applied to the admissions process, this burden is hard to satisfy. While diversity is commonly upheld as a compelling state interest, precedent has shown time and time again that these admission processes fail to meet the narrowly tailored requirement, an intricate part of the standard. In *Gratz v Bollinger*, The University of Michigan's Office of Undergraduate Admissions operated under a point based admission system, allowing minority applicants to gain one fifth of the required points. In a 6-3 decision, the court established that the procedure was not narrowly tailored and therefore violated the 14th amendment and the strict scrutiny standard. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.

1996), though denied review by the Supreme Court, reached the 5th circuit in Texas. Hopwood, along with 3 more white students, were denied admission though their academic statistics were higher than that of minority applicants. The University, following a race-based admissions process, was overruled, with the 5th circuit objectively stating schools could not use race as a factor in determining applications as it failed to meet the strict scrutiny standard. In the 1978 case involving the *Regnents of the University of California vs Allan Bakke*, affirmative action was challenged due to the accusation of Bakke's rejection from The University of California's medical school to be a violation of the Equal Protection Clause and the Civil Rights Act of 1964 due to the use of discrimination in this admissions process. The school, working on a quota system, denied Bakke although his academic statistics proved worthy of admission. The test of strict scrutiny was applied, but not fully fulfilled. The burden of being narrowly tailored was rejected by the courts after acknowledging that there were better ways to enhance diversity than operating on a quota system, giving race too large a role in the admission process. Bakke, though ultimately decided in a plurality decision, that, "The Equal Protection Clause permits race to be one factor, among many, in an admissions program," *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) created controversy

amongst the court. Four justices joined the opinion that "The Equal Protection Clause prohibits the university's specific race-based admissions program, and Bakke shall be admitted." This plurality opinion from such a pivotal case leads to a very weak precedent when applied to other affirmative action cases.

The 1997 case of *Grutter v Bollinger* challenged the use of race as a factor in admissions under the Fourteenth Amendment. Grutter, after being rejected from the University of Michigan Law School, argued that her denial from the law school was unconstitutional due to Michigan's race-based admission consideration. Michigan used race as a 'soft variable' in the application and admission process, giving "racial bonus points" to minority applicants. Bollinger was able to argue and convince the courts that 'critical mass' or mass representation was narrowly tailored while meeting compelling state interest of a diversified class. Although this case allowed affirmative action to be upheld as constitutional, the court was split on opinion, leaving four of the justices unconvinced that the policy was narrowly tailored. Even in the majority opinion Sandra Day O'Connor included a statement saying, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in student body diversity] approved today."

A quarter of a century later and it is clear this precedent needs to be re-evaluated to fit the intentions justices decided this case with, as well as for it's blatant violation of the Equal Protection Clause.

B. *Grutter* violates the Fourteenth Amendment

Grutter violates the Fourteenth amendment because affirmative action is race-based decision making. Written amongst other Reconstruction Amendments, and ratified by 28 out of the 37 states in 1868, the Fourteenth Amendment explicitly states, "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." By close examination of the text, we see the framers of the '14th emphasis on "any person", referring to all residents within the United States, not specific ones. The Framers intentionally chose to leave out racial language from this amendment because it was not their intent to protect one specific minority. While accompanied by a series of legislation to protect newly freed slaves from the oppressive Black Codes, this Amendment does not specifically protect black people from deprivation

of life liberty and property, it protects “all persons”. Textually, the Fourteenth amendment upholds former Justice Harlan's great dissent in *Plessy V. Furgeson*, affirming that "Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” *Plessy v Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting) Under this colourblind concept, and its weak and self destructive precedent, Bollinger should be overturned for violating the equal protection clause.

This interpretation is not an unfamiliar one, in arguably the most important Supreme Court case, *Brown v Board of Education*, the Court established that the Constitution denies “‘any authority … to use race as a factor in affording educational opportunities.’” Parents Involved, 551 U.S. at 747 (plurality). While so clearly stated and emphasized by the court, Michigan and UNC’s application process is a direct violation of this monumental case precedent.

II. UNC **violates the Fourteenth Amendment and fails Strict Scrutiny**

We affirm that UNC’s affirmative action based admission program violates both the Fourteenth Amendment and fails the strict scrutiny test.

Racial diversity is not the only way to create diversity in the classroom, and universities should be concerned about offering a diverse range of perspectives, not just a racially diverse campus. Diversity cannot be reduced to only race, gender, or religion, but is instead individually built upon by the range of experiences and perspectives students can bring to the classroom. This is impossible to determine through only race, as affirmative action does. Assuming one's experience based upon their race is a form of racial stereotyping. The Fourteenth Amendment prohibits "the assumption that race or ethnicity determines how [people] act or think." *Metro Broad., Inc. v. FC.*

Implementing race-neutral alternatives to the admissions process that uplifts underrepresented students in classrooms while not focusing solely on race is easy for schools to achieve. Eliminating legacy advantage, increasing financial aid offerings, and working with disadvantaged schools are ways for universities to amplify a more socio-economically diverse campus without focusing purely on race.

Under Prop 209, California prohibited "discriminat[ing] against or grant[ing] preferential treatment on the basis of race, sex, color, ethnicity, or national origin in… public education." The removal of affirmative action in this state, passed by a large percentage of Asian, Black, and Latino voters, did not

instigate tragedy on California institutions since its introduction in 1996. The schools remain able to maintain diversity by turning to a holistic approach to their applications, not a racial one.

UNC is one of the oldest public colleges in the United States, and offers competitive acceptance rates. Being a public school, UNC is required to admit 82% of their student body from in-state applicants. UNC favors underrepresented racial minorities which they define as African Americans, Hispanics, and Native Americans. UNC.Pet.App.15 & n.7. This definition completely discards Asian American applicants, and focuses only on three distinct racial groups. UNC also admitted to considering an applicant's race at "every stage" of the admissions process. UNC.Pet. App.51; UNC.JA407. In a horrifying discovery of admissions officers online chats, it is clear that the consideration of race is playing too big a factor in the review process. "[W]ith these URM ... kids, I'm trying to at least give them the chance to compete even if the.. essays are just average." UNC.JA1244-51.

Under the majority opinion written in *Grutter*, the court commented that
"it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable" *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Although UNC has other race-neutral alternatives to the admissions process, they refuse to use them. In order to pass strict scrutiny "UNC must show that no race-neutral alternative can achieve the educational benefits of diversity "'about as well.'" *Fisher I*, 570 U.S. at 312. Under *Grutter,* the same criteria must be satisfied, and UNC must show that their race-neutral policy does not yield the same diversity they require for their "substantial government interest".

We agree that diversity in the classroom should be of interest to universities, but narrowing this down solely to racial diversity is not proficient enough. Universities should be focused on hollistic diversity and difference in experience, not just race. It is sharing these different experiences, perspectives, and backgrounds that make us a diverse society, not just the colour of our skin.

We urge the court to revisit the outdated and incorrect interpretation of *Grutter* and to eliminate affirmative action in UNC's policy under the Fourteenth Amendment.

Respectfully submitted,

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