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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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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BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment declares that any person in the United States should be equal under the law.[1] This has opened up the conversation of affirmative action, its goal being to ameliorate the effects of racism from the country's past. Affirmative action first became legal for hiring in jobs, as seen in John F. Kennedy's Executive Order 10925, which ensured that job applicants had equal opportunities by consciously taking into account race, gender, and other possible discriminatory factors.[2] The process has expanded from job hiring to the education system. Universities have used affirmative action as a way to accept a diverse student body. This controversial topic first came into court in 1971, with *Regents of the University of California v. Bakke*. The University of California was using a racial quota system as a way to apply affirmative action, which the court ultimately deemed unconstitutional under the Equal Protection Clause of the 14th Amendment. These similar systems were seen in *Parents Involved in Community Schools v. Seattle School Dist.* and *Gratz v. Bollinger* which limited the scope of how schools can use affirmative action. However, *Bakke* also upheld the use of race as a factor in admissions, as a way to encourage a diverse class enrollment. The case *Grutter v. Bollinger* clarified this decision by emphasizing that affirmative action pursues a compelling government interest in diversity. The decisions made in *Bakke* and *Grutter* would set a

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[1] U.S. Const. amend. XIV, § 1

[2] Exec. Order No. 10925, 3 C.F.R. 448 (1961)

precedent for upholding affirmative action in future cases, such as *Fisher v. University of Texas at Austin I* and *Fisher v. University of Texas at Austin II*. Recent judgments, however, threaten to overturn this precedent and put an end to race as a factor in college admissions. The Supreme Court has agreed to hear the case brought by Students for Fair Admissions against University of North Carolina, *Students for Fair Admissions, Inc. v. the University of North Carolina*. The petitioner, SFFA, was started by Edward Blum to outlaw the consideration of race in the college admission process. Along with the case against Harvard University, this decision will determine the future of affirmative action in higher education.

SUMMARY OF ARGUMENT

Historically, marginalized groups have been and still are discriminated against. The 14th Amendment was intended to remedy this injustice. The Equal Protection Clause shows that government classifications based on race can be supported by evidence of a compelling government interest.[3] Diversity in higher education is a compelling interest, which upholds affirmative action. In *Shelby County v. Holder*, Justice Ruth Bader Ginsburg said, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[4] When it comes to

[3] U.S. Const. amend. XIV, § 1

[4] *Shelby County v. Holder*, 570 U.S. 529 (2013)

racism, programs meant to help with discrimination should not be demolished, just because the effects of the problem aren't as prevalent. This can be applied to the case of affirmative action, as certain groups want to get rid of the system, even though the effects of racism and discrimination are still present today, especially in the education system. "Throwing out" affirmative action would result in exceedingly harmful outcomes. While it may seem that only minorities benefit from affirmative action, this system has ensured that everybody reaps the rewards of a diverse education. The Solicitor General of the United States, Elizabeth Prelogar, said, "every aspect of society would feel…the shockwaves if this Court were to retreat from *Grutter* now."[5] If *Grutter v. Bollinger* is overturned, everybody seeking a higher education will be negatively affected, regardless of race. To follow the true meaning of the 14th Amendment, this court should uphold *Grutter v. Bollinger.*

[5] *Students for Fair Admissions v. University of North Carolina* No. 21-707

ARGUMENT

I. Poor Conditions of those Previously Enslaved and the Establishment of the Freedmen's Bureau

The ratification of the 13th Amendment abolished the institution of slavery within the United States.[6] Under the institution of slavery, enslaved people were deprived of basic rights. The Freedmen's Bureau was meant to remedy the disadvantages that black people were left with due to years of enslavement. Senator William P. Fessenden, a supporter of the Bureau, pointed out that millions of former slaves were struggling to adjust to society after emancipation. He stated, "who[former slaves] had received no education, who had been laboring from generation to generation for their white owners and masters, able to own nothing, to accomplish nothing, are thrown, without protection, without aid, upon the charities of the world, in communities hostile to them."[7] The enslaved peoples' previous conditions made them unsuited to thrive in society after their freedom, which is why federal aid was necessary to alleviate these results.

Under the Freedmen's Bureau Bill, freed persons were offered relief from the effects of slavery.[8] Congressman Thomas D. Eliot, a supporter of the bill creating the establishment, stated, "[This bill] will enable the Government to help into active, educated,

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[6] U.S. Const. amend. XIII

[7] Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985)

[8] Act of March 3, 1865, ch. 90, § 1, 13 Stat. 507

and useful life a nation of freedmen who otherwise would grope their way to usefulness through neglect and suffering to themselves, and with heavy and needless loss to us."[9] The Bureau contributed funding, property, and other resources to the establishment of more than a dozen colleges and universities for the benefit of black students. One of the most prestigious schools that were originally funded by the Bureau was Howard University, which was under a charter from the 39th Congress.[10] The university had the primary goal of educating freedmen but was open to people of all races and genders. The Freedmen's Bureau was only supposed to be active for one year, but it was clear that more time was needed to transition former slaves into society. This resulted in Congress passing The Act of July 16, which would renew the Bureau for another two years.[11] The Freedmen's Bureau was necessary for former slaves to adapt to society, as they were already largely disadvantaged. The Bureau simply allowed blacks to obtain the same privileges that whites had had for many years.

The 14th Amendment promised equal protection of natural rights. The 14th Amendment's primary goal, according to Congressman Thaddeus Stevens, was "the amelioration of the situation of the freedmen."[12] Congressman Mace Moulton nearly used

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[9] Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985)

[10] Act of June 21, 1866, ch. 130, § 2, 1866 Stat. 69, 14 Stat. 66

[11] Act of July 16, 1866, ch. 200, § 12, 14 Stat. 173

[12] Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985)

the exact same phrases to explain the goal of the Freedmen's Bureau bill a few months prior. *Id.* Another piece of legislation passed during this period was the Civil Rights Act of 1866. The act states, "That all persons born in the United States and not subject to any foreign power…are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude…shall have the same right, in every State and Territory in the United States…"[13] It could be argued that the Freedmen's Bureau violated this act, as some people would be unable to benefit from the government-sponsored organization. However, that is not the case. The Civil Rights Act did help ensure that everybody had the same rights, but the Freedmen's Bureau was necessary to give these rights to former slaves, so they could be equal to whites. Members of Congress who supported the Freedmen's Bureau also supported the 14th amendment and the Civil Rights Act of 1866, claiming that the pieces of legislation were interdependent with no inconsistency between them.

A. Lasting Effects of Slavery

Recently, minorities received opportunities, such as affirmative action, for self-support and self-advancement in the form of education, job training, business prospects, or employment. Just

[13] Civil Rights Act of 1866 Apr. 9, 1866, ch. 31, 14 Stat. 27

like in the Reconstruction era, education and job opportunities seem to be the areas where the majority of the focus is placed. This resemblance shows that current public leaders have a sense of when to use benign racial distinctions that is remarkably comparable to the ideas that were prevalent in Congress 120 years ago. During the 38th Congress, Representative Charles Sumner discussed the Freedman's Bureau and its intent to advance freedmen by ameliorating the vestiges of slavery. "Someone must take them by the hand; not to support them, but simply to help them to that work which will support them."[14] In other words, the Bureau was not giving former slaves advantages over whites but instead guiding them to support themselves. Just like in the Freedmen's bureau, today, education and job opportunities are the ways that the government can aid black people to support themselves. Today, higher education is one of the best ways one can propel forward in society, as it will help them get a good job and give them the ability to support themselves.

Because of black people's history of disadvantage, they are marginalized today in this education system, starting as early as preschool. Black schools have been underfunded since the beginning of segregated schools. Starting in the 1800s, multiple states would fund their schools by keeping the white taxes for the white schools while keeping the black taxes for the

[14] Cong. Globe, 38th Cong., 1st Sess. 2799 (1865)

black schools.[15] With less tax money coming from black citizens toward these schools, many struggled to match the education taught at white schools. Segregated schools continued but came to a halt with the decision made in *Brown v. Board of Education*, which deemed the "separate but equal" precedent set in *Plessy v. Ferguson* unconstitutional based on the Equal Protection clause of the 14th amendment.[16] *Brown* held that race-based segregation denies students equal protection. It explained that the separation of students based on race is premised on racist assumptions about "the inferiority" of certain races, and "deprive[s] the children of the minority group of equal educational opportunities." *Id.* This forced schools to integrate. However, due to the practice of redlining, many schools remained segregated, as their districts were drawn based on geography. The effects of redlining are still visible today and have caused public schools to unintentionally remain segregated. Schools in predominantly black neighborhoods are often underfunded and lack the same resources as white-populated schools. States with extremely segregated schools include Texas, Michigan, New York, Illinois, Ohio, and New Jersey.[17] Additionally, among these states, districts with the highest percentages of white pupils often had the highest spending, while those with the lowest typically had the highest percentages of minority students. In

[15] Derek W. Black, Educational Gerrymandering: Money, Motives, and Constitutional Rights, 94 N.Y.U. L. Rev. 1385 (2019)

[16] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

[17] Derek W. Black, Educational Gerrymandering: Money, Motives, and Constitutional Rights, 94 N.Y.U. L. Rev. 1385 (2019)

North Carolina, public schools have enrolled more black students, and charter schools enroll more white students. From 2007 to 2012, the state legislature cut education funding by about $700 per student, but from 2013 to 2015, they doubled funding exclusively for charter schools.[18] This left black students at a disadvantage, as they were not getting an equal education.

Using the 14th Amendment in *Romer v. Evans*, the Supreme Court asserted that a Colorado state amendment that would ban any legislation protecting homosexuals was unconstitutional.[19] The decision stated, "A law declaring that in general, it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* Essentially, if one group is struggling to obtain government aid, while another group easily has access, it is a violation of equal protection. However, in government-funded education, it is more difficult for black students to utilize the same privileges and opportunities as white students. An example of this effect would be low participation and access to Advanced Placement classes for black students. At Greenwich High School, a survey showed that out of 99 black students, 14% have enrolled in one or more AP classes. By comparison, 62% of all Greenwich High School students have taken at least one AP class. Due to

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[18] Derek W. Black, Educational Gerrymandering: Money, Motives, and Constitutional Rights, 94 N.Y.U. L. Rev. 1385 (2019)

[19] *Romer v. Evans*, 517 U.S. 620 (1996)

districting, many of the black students at Greenwich High School went to an elementary school with a larger percentage of minorities than many of the other schools in the town. And as mentioned before, schools with a larger minority population tend to have less funding and opportunities than schools with predominantly white makeup. From a young age, minority students are not receiving the same education as white students living in a different part of the town. When being considered in the admission process, minority students will then be unfairly compared to students from their school that has had a completely different education than them. To give black students and other minorities a fair chance to have a higher education that will set them up for their future, affirmative action is necessary.

II. The Improvement in Education Quality and Society Due to Diversity

In a speech to celebrate Black History Month, President Ronald Reagan said, "Our nation rightly takes 'pride in the rich diversity that has been such a vital part of our country's greatness.'"[20] If diversity shown in society has been so important, this same principle should be reflected in universities, and affirmative action is the only way to fulfill this.

[20] Ronald Reagan, Message on the Observance of National Afro-American (Black) History Month (Jan. 26, 1982)

Cornell Law School explains the Equal Protection Clause as the following: "Equal protection forces a state to govern impartially—not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective."[21] According to this interpretation, distinctions between different people can be identified and used in the law, as long as it serves a legitimate government interest. This is determined by strict scrutiny, where the Supreme Court can decide the constitutionality of a law that concerns race. To be constitutional, the law must pass two standards: it is a compelling government interest and it is necessary to further that interest.

Under this standard, diversity as a factor of a university's admissions program is a compelling interest and therefore not "irrelevant," as stated by Justice Powell in the final decision in *Regents of University of California v. Bakke*, saying, "the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions."[22] Diversity was deemed as a compelling interest because a diverse student body promotes a higher quality of education for all.

As *Mclaurin v. Oklahoma State Regents* stated, and was soon highlighted in *Brown v. Board of Education*, an important factor that "make[s] for

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[21] Equal protection, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/equal_protection#:~:text=The%20Fourteenth%20Amendment's%20Equal%20Protection,to%20a%20legitimate%20governmental%20objective

[22] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978)

greatness" in schools is the ability of a diverse student body "to engage in discussions and exchange views with other students."[23] *Grutter v. Bollinger* made a similar claim, explaining that educational environments are greatly enhanced when "students have the greatest possible variety of backgrounds."[24] *Fisher v. University of Texas I* and *Fisher v. University of Texas II* reaffirmed the benefits of diverse student bodies by explaining that exposure to diverse ideas leads to "enhanced classroom dialogue and the lessening of racial isolation and stereotypes," and greater "cross-racial understanding."[25]

More broadly, universities serve as a "training ground for a large number of our Nation's leaders" in all sectors of society.[26] In *Grutter v. Bollinger*, Justice Sandra Day O'Connor stated, "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* The "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* Through these interactions, students learn how to interact with one another and are better equipped to succeed in "an increasingly diverse workforce and society." *Id.*

President Joe Biden's Executive Order 13985 focuses on ensuring that federal agencies are

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[23] *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)

[24] *Grutter v. Bollinger*, 539 U.S. 306 (2003)

[25] *Fisher v. University of Texas*, 570 U.S. 297 (2013) and *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016)

[26] *Grutter v. Bollinger*, 539 U.S. 306 (2003)

advancing racial equity, which in turn, benefits the public:

"By advancing equity across the Federal Government, we can create opportunities for the improvement of communities that have been historically underserved, which benefits everyone. For example, an analysis shows that closing racial gaps in wages, housing credit, lending opportunities, and access to higher education would amount to an additional $5 trillion in the gross domestic product in the American economy over the next 5 years. The Federal Government's goal in advancing equity is to provide everyone with the opportunity to reach their full potential."[27]

While affirmative action and other race-conscious programs may seem like it only benefits minorities, it truly benefits everybody. As a result of affirmative action, more qualified people, who wouldn't have had the chance to do so without race-conscious admissions, will be able to enter the workforce, thus benefiting everybody. Because of the benefits for all, opportunities for those who are disadvantaged are a compelling state interest, which is why affirmative action programs should continue.

A. A Color-blind Constitution is Not Possible

The creators of the 14th Amendment understood that proactive, race-conscious actions would aid in

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[27] Exec. Order No. 13985, 3 C.F.R. 7009 (2021)

achieving the equality promised by the amendment, "break down discrimination between whites and blacks," and "ameliorat[e]. . . the state of persons of color."[28] Knowing this, the framers considered but dismissed any proposal that would have made the Constitution color-blind.

In *United States v. Jefferson County*, it was decided that "The Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." Essentially, if the Constitution were to be color-blind, it would be difficult to remedy the past effects of discrimination that are still prevalent in our society today. In addition, previous cases have proven a color-blind Constitution to be impractical. *In Parents Involved in Community Schools v. Seattle School District No. 1*, in his concurring opinion, Justice Kennedy stated, "In the real world, it is regrettable to say, it [a color-blind Constitution] cannot be a universal constitutional principle"[29]

If the application of the 14th amendment was color-blind, it would get rid of affirmative action, causing minority groups to struggle to obtain admissions at many colleges. In 1996, California passed Prop 209, which banned UC schools from using race, ethnicity, or sex as criteria in admissions.[30] Once this was passed, minority group

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[28] *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir.1966)

[29] *Parents Involved in Community Schools v. Seattle School Dist.* No. 1, 551 U.S. 701 (2007)

[30] Zachary Bleemer, The impact of Proposition 209 and access-oriented UC admissions policies on underrepresented UC

applicants' likelihood of UC admission and enrollment dropped. In 1998, declines were as high as 25 percent, which was seen at UC Berkeley. *Id.* After 1998, at all of the UCs, minority group applicants became 8% less likely to earn admission. *Id.* If minorities cannot obtain a higher education, they will have fewer opportunities for mobility in their lives. America can not become a post-racial society if minorities are continuing to live in worse conditions than whites, and proper education is a key to setting up a more successful future.

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applications, enrollment, and long-run student outcomes, UCLA (2021)

CONCLUSION

Given that the effects of slavery are still prevalent today and that it has been ruled multiple times that diversity is a compelling government interest, the Supreme Court should uphold *Grutter v. Bollinger*, to continue the use of race as a factor in admissions.

Respectfully submitted,

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