In the

Supreme Court of the United States

Students for Fair Admissions

Petitioners,

V.

University of North Carolina

Respondents,

PETITIONER'S BRIEF

Carina Adams-Szabo and Joy Greco

Greenwich High School

Greenwich Connecticut, 06830

Counsel for the Petitioner

(203) 979-3519

(203) 524-2886

carina.adams-szabo@greeenwichschools.org

joy.greco@greeenwichschools.org

QUESTION PRESENTED

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

Table of Contents

TABLE OF AUTHORITIES

"A Brief History of Affirmative Action." OEOD.

"Brown v. Board of Education (1954)." National Archives and Records Administration.

Cato.org. https://www.cato.org/blog.

"Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative ..."

"Civil Rights Act (1964)." National Archives and Records Administration.

Corteidh.or.cr. https://www.corteidh.or.cr/.

"Docket." Home - Supreme Court of the United States.

https://www.supremecourt.gov/docket/docket.aspx.

"Exhibitions." Home - Supreme Court of the United States.

https://www.supremecourt.gov/visiting/exhibition.aspx.

"Grutter v. Bollinger, 539 U.S. 306 (2003)." Justia Law.

"Live Updates: Supreme Court Hears Oral Arguments in Harvard, UNC Affirmative Action Cases: News: The Harvard Crimson." News | The Harvard Crimson.

"Lyndon B. Johnson." National Archives and Records Administration. National Archives and Records Administration.

O'Connor. "Grutter v. Bollinger." Legal Information Institute. Legal Information Institute, June 23, 2003.

"Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)." Justia Law.

"State Action Doctrine | Constitution Annotated - Congress."

WillColumnist, George. "Colleges Will Racially Discriminate No Matter How the Supreme Court Rules." Richmond Register, October 31, 2022.

Back, Christine J., and J. D. Hsin. "" Affirmative Action" and Equal Protection in Higher Education. CRS Report R45481, Version 3. Updated." Congressional Research Service (2019).

Harpalani, Vinay. "" Trumping" Affirmative Action." Vill. L. Rev. Online 66 (2021): 1.

Naibandian, John. "The US Supreme Court's" consensus" on affirmative action." In Diversity and affirmative action in public service, pp. 111-125. Routledge, 2018.

Vokes, Chelsie. "If SCOTUS Bans Affirmative Action, How Will We Achieve Diversity?." New England Journal of Higher Education (2022).

Young, Ryan Lewis. "The language and rhetoric of affirmative action: a structural topic model analysis of supreme court amicus briefs." PhD diss., The University of Iowa, 2019.

Zabel, Joseph. "Affirmative Action, Reaction, and Inaction: A Positive Political Theory Analysis of Affirmative Action in Higher Education." Conn. Pub. Int. LJ 19 (2019): 221.

I.CASE BACKGROUND

During the Reconstruction era (1863-1877), an organization called the Freedmen's Bureau provided relief for freedmen and refugees and assisted in educational efforts. Notably, Section 14 of the 1886 Act provided basic civic rights "without respect to race or color"[1]. "Freedmen " didn't involve a racial category nor did Congress pass these acts solely on race; instead to aid formerly oppressed people. The Freedmen's Bureau gave remedial benefits to the public without being race-conscious or using racial classifications.

The first instance of an American affirmative action policy was in 1961 when President John F. Kennedy instructed federal contractors to use "affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin."[2] This resulted in the creation of the Committee on Equal Employment Opportunity.

Then, in 1964 the Civil Rights Act was put into place. This landmark legislation prohibited employer discrimination. This built upon J.F.K.'s 1961 policy, expanding the policy from federal contractors to all contractors[3]. As well, this created the Equal Employment Opportunity Commission.

In 1967, President Lyndon B. Johnson amended the ongoing affirmative action policy E.O.11246 to include affirmative action for women. LBJ's presidency cemented the concept of affirmative action nationwide. Affirmative action was a part of many progressive programs that LBJ created, known collectively as "Johnson's Great Society"[4].

The Supreme Court first ruled on affirmative action in University of North Carolina v. Bakke (1978), which established affirmative action programs as constitutional. At the time, UC Davis reserved

---

[1]"State Action Doctrine | Constitution Annotated - Congress." Accessed December 17, 2022. https://constitution.congress.gov/browse/essay/amdt14-2/ALDE_00000810/.
[2]"A Brief History of Affirmative Action," OEOD, accessed December 16, 2022, https://www.oeod.uci.edu/policies/aa_history.php.
[3]"Civil Rights Act (1964)," National Archives and Records Administration (National Archives and Records Administration), accessed December 16, 2022, https://www.archives.gov/milestone-documents/civil-rights-act.
[4]"Lyndon B. Johnson." National Archives and Records Administration. National Archives and Records Administration. Accessed December 16, 2022. https://obamawhitehouse.archives.gov/1600/presidents/lyndonbjohnson#:~:text=The%20Great%20Society%20program%20became,removal%20of%20obstacles%20to%20the.

16% of spots for minority applicants. Petitioner Allan Bakke was denied admission by the university's medical school despite scoring better than minority students who were admitted that year. Chief Justice Warren E. Burger asserted that diversity *quotas* are unconstitutional, but affirmative action is constitutional when a school is interested in encouraging diversity. 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied (Justia, 438 U. S. 266)[5].

In the 2003 cases of Grutter v. Bollinger and Gratz v. Bollinger, the Supreme Court held that the University of Michigan's undergraduate and law school's narrowly tailored use of race in admissions decisions is not prohibited. Grutter alleged that the school's affirmative action policy was racially discriminatory and in violation of the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981[6].

Patrick Strawbridge, on behalf of the Petitioner, introduced Students for Fair Admissions v. the University of North Carolina with the argument that racial classifications are wrong and that Grutter v. Bollinger should be overturned. Mr. Strawbridge cites several examples in which race is not accepted as a factor, such as awarding custody of minors or striking a juror from the jury pool. He cites that race has made the difference in 700 applications each admission cycle and therefore denies the opportunity "to compete on a fair playing field" and contradicts equal treatment of the Fourteenth Amendment[7].

[5]"Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)," Justia Law, accessed December 16, 2022, https://supreme.justia.com/cases/federal/us/438/265/.
[6]"Grutter v. Bollinger, 539 U.S. 306 (2003)." Justia Law. Accessed December 16, 2022. https://supreme.justia.com/cases/federal/us/539/306/.
[7]"Live Updates: Supreme Court Hears Oral Arguments in Harvard, UNC Affirmative Action Cases: News: The Harvard Crimson." News | The Harvard Crimson. Accessed December 16, 2022. https://www.thecrimson.com/article/2022/10/31/scotus-sffa-oral-arguments/.

I.STATEMENT OF THE PROBLEM

Students for Fair Admissions v. University of North Carolina (SFFA v. UNC) is a significant landmark case that depicts the use of Race Affirmative Action in the institution's admission process. The goal of Affirmative action is to end the long history of racism that disadvantaged African Americans. On the other hand, the 14th Amendment provides that States must not make any laws or enforce any law that limits the immunities or privileges of Americans. Therefore the case for SFFA v. UNC will be the basis of whether Affirmative Action is a violation of the 14th Amendment.

1. Regents of the University of California v. Bakke (1978): Universities can consider race as a factor

In Regents of the University of California v. Bakke, the supreme court found the grant program constitutional, and the Supreme Court established quotas at the University of California. At the time, Davis from the University of California, reserved 16 out of 100 for qualified minority students. Alan Bakke, who is white, was denied admission by the university's medical school, even though he had higher test scores than the minority students who entered that year. He sued the university. In the Bakke case, the court ruled that quotas, along with the use of incentive measures to eliminate the effects of racial discrimination, are unconstitutional. However, in a small majority, the court held that the school had a "compelling interest" in the educational interests of a diverse student population, and that racial classification was not the main thing to be considered. In the words of Justice Louis Powell, "Racial or ethnic background may be considered a 'plus' in a particular applicant's record."[8]

[8] Back, Christine J., and J. D. Hsin. "" Affirmative Action" and Equal Protection in Higher Education. CRS Report R45481, Version 3. Updated." Congressional Research Service (2019).

III. SUPREME COURT PRECEDENT

2.Gratz v. Bollinger and Grutter v. Bollinger (2003): The modern precedent

These two cases, especially his Grutter v. Bollinger-set the blueprint for race-conscious admissions widely adopted at colleges, both lawsuits led to white men being denied admission to the University of Michigan. In Gratz v. Bollinger, Gratz sued Jennifer and Patrick Hamacher over the university's points-based admissions system. At the time, the University of Michigan was admitting applicants who scored above 100 on a 150-point scale. Members of underrepresented minorities were awarded 20 points each, allowing “nearly all” eligible applicants from these minority groups to be admitted. The point system was unconstitutional because race was not considered individually.[9][10]

But in Grutter’s case, Gratz’s sister Barbara Grutter filed a lawsuit over her rejection from college law school, the court upheld the basic notions behind her actions affirmatively. Admission officers can take applicants' race into account, as long as they do so in a "strictly calibrated" and individualized manner, a five-to-four majority found. In the Grutter case specifically, the court also said race-conscious programs shouldn't be made permanent. Conservative Justice Sandra Day O'Connor wrote on behalf of the majority that she hoped "in 25 years there will be no need to use racial preferences to further the interests recognized today."[11]

3.Fisher v. University of Texas (2013 and 2016): A failed attempt to overturn Bakke and Grutter

After being denied admission to the University of Texas in 2008, a white woman named Abigail Fisher sued the university for their race-sensitive admissions policy. At the time of her lawsuit, the University of Texas automatically admitted the top 10% of Texas applicants who graduated from high school, regardless of race. For the remaining slots in each incoming class (about one-fourth of the enrollment), the university considered a variety of factors, including race. Fisher only questioned this

---

[9]Harpalani, Vinay. "" Trumping" Affirmative Action." Vill. L. Rev. Online 66 (2021): 1.
[10] Naibandian, John. "The US Supreme Court's" consensus" on affirmative action." In Diversity and affirmative action in public service, pp. 111-125. Routledge, 2018.
[11] Vokes, Chelsie. "If SCOTUS Bans Affirmative Action, How Will We Achieve Diversity?." New England Journal of Higher Education (2022).

discretionary part of Texas's admissions policy. When the case was first heard in 2013, the Supreme Court remanded it to the lower courts. Then, in 2016, a judge ruled in favor of the university, finding that its admissions program was indeed constitutional. Judge Anthony Kennedy ultimately voted to uphold Texas' admissions policy, but in a 2013 decision, he wrote, “before a university turns to racial -driven admissions, there should be an available, workable, racially neutral simple options which must have proven to be not enough."[12]

4. Students for Fair Admissions v. President and Fellows of Harvard College and Students for Fair Admissions v. University of North Carolina (likely 2023)

These two cases heard on Monday are separate but similar. Together, they seek to overturn Grutter’s ruling and share a central question: Does any consideration of race in the college admissions process constitute a violation of the Equal Protection Clause? The cases are similar in that the plaintiffs say the schools discriminated against white and Asian American applicants during the admissions process by giving extra preference to Black, Hispanic and Native American applicants. The Harvard College case goes further, claiming discrimination against Asian American applicants, which Harvard denies.
Both cases were brought by a conservative group called Students for Fair Admissions, whose head, Edward Blum, also bankrolled the Fisher case. Both Harvard and the University of North Carolina say they consider race as one of many factors, alongside considerations such as extracurricular activities, socioeconomic background and military veteran status, and do so within the constitutional guidelines set by Grutter. The school also states that attempts to diversify its students' bodies in a racially neutral way have not been successful.

Fisher's ruling in 2016 came as a surprise to many. In the present, with six of the nine Supreme Court Justices appointed by Republicans, the Court is even more conservative than it was before. The decision to overthrow Grutter once and for all could have dramatic implications for the world of college

[12] Young, Ryan Lewis. "The language and rhetoric of affirmative action: a structural topic model analysis of supreme court amicus briefs." PhD diss., The University of Iowa, 2019.

admissions. According to a brief submitted by Harvard University, more than 40% of U.S. colleges consider race at some point in the admissions process. The court's newest judge, Ketanji Brown Jackson, has retired from the Harvard case but remains in the UNC case.[13]

IV. ARGUMENT: AFFIRMATIVE ACTION IS UNCONSTITUTIONAL UNDER THE 14TH AMENDMENT AND TITLE VI

The Supreme Court seems equipped to rule that the race-aware admission applications at Harvard and the University of North Carolina had been unlawful, which could overrule many years of precedents. Such a choice could jeopardize the affirmative movement at schools and universities across the nation, specifically elite institutions, lowering the illustration of Black and Latino college students and bolstering the range of white and Asian ones.

Questioning from participants of the courtroom docket's six-justice conservative majority became sharp and skeptical. If the courtroom docket does away with affirmative movement via way of means, in modern terms, participants of that majority may now no longer hesitate to take formidable steps on divisive issues. The college will be further evidence of the court's shift to the right following President Donald J. Trump's appointment of three judges. Its own judicial legitimacy could be in question.

Supreme Court Justice John G. Roberts Jr. is a self-proclaimed keeper of the court's independence and authority, voicing conflicting impetus in the case. He has long criticized racism.[14] His question about racially neutral means of achieving diversity suggested that he might embark on a characteristically gradual path. In general, the Supreme Court's conservative questions contained two themes, that diversity in education can be achieved without direct consideration of race, and that the time must come for universities to stop making such distinctions.

In the seminal 1978 Supreme Court case, Regents of the University of California v. Bakke, 4 justices held that racial quotas and set-asides, applied as a part of an affirmative motion application on the

[13] Zabel, Joseph. "Affirmative Action, Reaction, and Inaction: A Positive Political Theory Analysis of Affirmative Action in Higher Education." Conn. Pub. Int. LJ 19 (2019): 221.
[14]Corteidh.or.cr. Accessed December 16, 2022. https://www.corteidh.or.cr/.

UC Medical School at Davis, violated the non-discrimination provisions of the Civil Rights Act.[15] This also violated the claim, in Brown v Board Education of Topeka, "achiev[ing] a system of determining admission to the public schools on a nonracial basis,".[16] Four different justices concluded that race can once in a while be implemented as one issue amongst others to counteract discrimination. Justice Lewis Powell concurred with each view. As a result, the Court ordered that Alan Bakke be admitted to the UC Medical School, however, those race-based admissions criteria are likely permissible in following cases. In inspecting the validity of affirmative motion packages, the Court might follow a two-component strict scrutiny test:

First, this system should be designed to obtain a compelling government interest.

Second, this system needed to be narrowly tailor-made – i.e., it must no longer be viable through race‐impartial means. The Petitioners in Students for Fair Admissions have proposed a theoretically viable socioeconomic alternative.[17]

In 2003, the Court confirmed the affirmative motion application of the University of Michigan Law School, which used race as an admissions issue to attain an "essential mass" of minority students. That policy, argued the Law School, served a "compelling hobby in attaining range amongst its pupil body." In a five–four opinion with the aid of using Justice O'Connor, the Court agreed. Justice O'Connor mentioned that "all elements that could make contributions to variety are meaningfully taken into consideration along race" as a part of an "individualized inquiry into the viable variety contributions of all applicants."[18] After Grutter, admissions packages designed to sell racial diversity might be deemed to fulfill the basic part of the Court's strict scrutiny test – i.e., diversity is a compelling kingdom hobby. Still,

---

[15]"Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative ..." Accessed December 17, 2022. https://journals.sagepub.com/doi/10.1177/0895904815616484.
[16]"Docket." Home - Supreme Court of the United States. Accessed December 16, 2022. https://www.supremecourt.gov/DocketPDF/20/20-1199/222821/20220509143547971_20-1199%20and%2021-707%20Amicus%20Meese%20Supp.%20Pet.pdf
[17]"Brown v. Board of Education (1954)." National Archives and Records Administration. National Archives and Records Administration. Accessed December 16, 2022. https://www.archives.gov/milestone-documents/brown-v-board-of-education.
[18]O' Connor. "Grutter v. Bollinger." Legal Information Institute. Legal Information Institute, June 23, 2003. https://www.law.cornell.edu/supct/html/02-241.ZO.html.

the packages should fulfill the second part of the test – i.e., the packages should be narrowly tailor-made. In Grutter, the University of Michigan Law School handed that test.

Today, the Supreme Court is being requested to overturn Grutter. The case is Students for Fair Admissions v. Harvard, consolidated with a comparable case related to the University of North Carolina. The plaintiffs argue that the affirmative motion packages at Harvard and UNC have discriminated against Asian applicants. Because UNC is a public university, it is obligated to use the Equal Protection Clause of the 14th Amendment, and since Harvard gets extensive federal funding, it is obligated to use Title VI of the Civil Rights Act, which additionally prohibits racial discrimination. In City of Richmond v. J.A. Croson Co., Justice Kennedy affirms this, stating, "The moral imperative of racial neutrality is the driving force of the Equal Protection Clause."[19] If the Court decides that Asians were unduly harmed, it may claim that diversity isn't a compelling interest as a consequence of reversing Grutter; or the Court may determine that Harvard's and UNC's packages have been now no longer narrowly tailor-made due to the fact the colleges should have met their diversity dreams via the use of race‐impartial admissions policies. Our view of the Grutter case is, the Court implicitly condoned 4 injustices: Punishment of people to boost organization interests; discrimination that frequently benefited non‐sufferers and injured folks that had performed no wrong; options for a few minorities who continued despite life's hardships; and prejudicial remedy of different minorities and a few whites who have been much less lucky than the individuals who have been favored.

The Equal Protection Clause of the 14th Amendment was clearly intended to combat racism. So, when Judge John Marshall Harlan, in his famous opposition to Plessey v. Ferguson, argued that the term "colorblind constitution" precludes racial consciousness, he clearly overextended it. But, as he went on to explain if our colorblind constitution was meant to eliminate racial classification, he was in line with

[19]"Docket." Home - Supreme Court of the United States. Accessed December 16, 2022. https://www.supremecourt.gov/DocketPDF/20/20-1199/222736/20220509090924571_20-1199%20Amicus%20BOM.pdf

Chief Justice John Roberts' recent judgment that: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” (Parents Involved v. Seattle, 2007)[20]

Roberts Court found that the Equal Protection Clause and Title VI allow race-conscious remedies to address actual or potential individual discrimination. Courts are likely to rule that, racial classification to achieve diversity is unconstitutional. Diversity no longer justifies the racial classification of individuals simply because they belong to a privileged group. It is not seen as the overriding governmental interest that justifies giving benefits to those individuals.

Over the years, opponents of affirmative action have expressed some reservations about the supposed benefits of diversity.

First, if diversity is a top government priority, why not measure diversity in ways other than race? Why not also apply religion, nationality, socioeconomic status, geography, and (perhaps most importantly) perspective? According to a recent poll, the Harvard class of 2025 is 72.4% liberal and 8.6% conservative.[21] Third, how would Pedro Goldberg measure (His mother is Hispanic; his father is Jewish) on the scale of diversity? Will Harvard let him in or shut him out? Fourth, discriminated Black people weren't the only ones who experienced it. How do you choose which groups to prioritize? Fifth, if diversity takes precedence over academic standards, will universities be forced to either lower academic standards or reject unqualified affirmative action applicants? Have diversity goals increased minority enrollment, or have they simply diverted some minority students to elite colleges, diverting them from other colleges they could otherwise have attended? Finally, “diversity” has never been contextually defined. What exactly are its educational benefits? How will you know when your goals have been met? In her 2003 Grutter Opinion, Judge O'Connor speculated that 25 years might be enough to determine this.

---

[20]Cato.org. Accessed December 16, 2022. https://www.cato.org/blog/way-stop-discrimination-basis-race-stop-discriminating-basis-race

[21]WillColumnist, George. “Colleges Will Racially Discriminate No Matter How the Supreme Court Rules.” Richmond Register, October 31, 2022. https://www.richmondregister.com/opinion/colleges-will-racially-discriminate-no-matter-how-the-supreme-court-rules/article_0ce8f912-5948-11ed-a111-e7a8eb698ebb.html.

Eight states - Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington now ban public universities from considering the applicants' race.[22]

V. CONCLUSION

Race-conscious affirmative action is unconstitutional under the U.S. 14th Amendment.

[22]"Exhibitions." Home - Supreme Court of the United States. Accessed December 16, 2022. https://www.supremecourt.gov/visiting/exhibition.aspx.