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 PETITIONERS

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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's founding circumstances and discussions show that its Equal Protection Clause was intended to create a colorblind constitution.[1] Where the Court has allowed racially discriminatory laws, they have been almost universally destructive. It is immaterial how important race is in a university's admissions process; its mere consideration must result in students being denied entry on the basis of their race. Title VI of the Civil Rights Act of 1964 is coterminal with the Fourteenth Amendment, and it clearly prohibits admissions practices that result in students being rejected from public institutions on the basis of their race.[2] On this basis, *Grutter* should be overturned.[3] *Grutter* does not legitimately apply strict scrutiny, the standard of review applied to racial classifications, and if its precedent is taken at face value, permits almost any imaginable race-conscious admissions program.[345] Moreover, *Grutter's* underlying assumption that race-conscious admissions policies will eventually become unnecessary has shown no signs of bearing out since the time of the decision.[3] Stare decisis should not be a barrier to overturning *Grutter*, since this case is of such constitutional and social importance.[3] Moreover, reliance interests surrounding *Grutter* are immaterial because this case is of immense social importance and because race-neutral admissions policies have been shown to be comparably effective

[1] U.S. Const. Amend. XIV

[2] 42 U.S.C. §2000d

[3] *Grutter V. Bollinger, 539 U.S. 306 (2003)*

[4] *Shaw V. Reno, 509 U.S. 630 (1993)*

[5] *Adarand Constructors, Inc. V. Peña, 515 U.S. 200 (1995)*

to race-conscious policies in establishing student-body diversity at both UNC and at other Universities.[6] Therefore, the Court should rule that race-conscious admissions policies are inconsistent with the Fourteenth Amendment and cannot survive strict scrutiny.[7]

[6] *Grutter V. Bollinger, 539 U.S. 306 (2003)*

[7] U.S. Const. Amend. XIV

ARGUMENT

I. The Fourteenth Amendment Created A Colorblind Constitution

The Fourteenth Amendment was conceived specifically to end dangerous racial classifications.[8] Immediately after the Thirteenth Amendment's ratification, southern states began to create overtly racially discriminatory laws.[9] Mississippi, for instance, passed a law which "prohibited blacks from renting land except in towns and cities."[10] This astounded Congress, which was determined to "[prevent] former confederates from reinstating the same type of regime that existed before the war [and protect] the liberty of former slaves."[11] To this end, the Fourteenth Amendment was conceived.[8] The purpose of the amendment, as put by Thaddeus Stevens, one of its most influential framers, was to "[allow] Congress to correct the unjust legislation of the states, so far that the law which operates upon one man shall operate equally upon all." "Whatever law punishes a white man for a crime," he continued, "shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal protection' to the

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[8] U.S. Const. Amend. XIV

[9] U.S. Const. Amend. XIII

[10] An Act to Confer Civil Rights on Freedmen, and for other Purposes (1865)

[11] Report of the Joint Committee on Reconstruction (1866). National Constitution Center. https://bit.ly/3VaIgkV

black man."[12]

It is clear that the Fourteenth Amendment was intended to create a colorblind constitution. Had the Court consistently acted upon this intention, cases with devastating effects on American society would have never been wrongly decided. *Plessy V.* Ferguson's deeply destructive "separate but equal" doctrine allowed the system of governmentally enforced segregation to leave long-lasting impacts which continue to shape our modern society. The error of using racial qualifications was recognized as early as *Plessy*, with Justice John Harlan dissenting, "[o]ur Constitution is colorblind and neither knows nor tolerates classes among citizens"[13]

Respondents point to federal legislation passed in the 1860s in order to support the claim that the Fourteenth Amendment was intended to permit some forms of positive discrimination designed to address historical inequity.[14] Their implication in this claim is that a Congress that proposed the Fourteenth Amendment to end all racial classifications would not have passed these laws.[13] However, "[d]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive

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[12] Speech Introducing the Fourteenth Amendment (1866). National Constitution Center. https://bit.ly/3YsOXlj

[13]Plessy V. Ferguson,
163 U.S. 537 (1896)

[14] U.S. Const. Amend. XIV

of democratic society."[15] Therefore, in pursuing interests of addressing historical discrimination, a distinction should be made, as *City of Richmond v. J.A. Croson Co.* established, between measures designed to rectify "identified" discrimination and measures designed to address "social" or racial discrimination.[14] The laws Respondents quote address identified discrimination and do not make explicit racial classifications. Respondents argue that, by passing the Freedmen's Bureau Acts, "Congress demonstrated that the Equal Protection Clause was understood to allow certain race-conscious measures."[16] However, Respondents admit that the Freedmen's Bureau awarded benefits based on the "previous condition of servitude."[15] The freedmen are perhaps the most obvious victims of identified discrimination in American history, and thus the Freedmen's Bureau Acts cannot be considered to be truly race-conscious.[1718] This is further proved by the language of Congress passing the Freedmen's Bureau into law, stating that it was intended to help "for one year thereafter … refugees, freedmen, and abandoned lands."[16] The framers intended for this bureau to only last a year: to temporarily help the freedmen establish themselves economically, but not to grant them permanent privileges.[16] This is demonstrated by the fact that the Freedmen's Bureau was first set to expire after a year, but ultimately was extended a further two years, after which the agency was

[15] *City of Richmond V. J.A. Croson Co.*, 488 U.S. 469 (1989)

[16] Fitzgerald et al. BRIEF BY UNIVERSITY RESPONDENTS. https://bit.ly/3BHAsR8

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

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

dissolved.[17] Thus, the framers of the Fourteenth amendment distinguished between temporary measures designed to address identified groups who have suffered historical discrimination and broad, racial affirmative action measures with unspecific durations. Respondents today engage in the latter form of racial classifications, which are inconsistent with the Fourteenth Amendment's Equal Protection Clause.[19]

Moreover, even if these laws are accepted to be race-conscious, they would not necessarily reflect Congress's interpretation of the Fourteenth Amendment. The "Congress that enacted these statutes" did not provide "a constitutional interpretation to justify its decision." And the Equal Protection Clause was specifically designed not to apply to the Federal Government. It was meant to limit the power of state governments that, in the opinion of the 1866 Report of the Joint Committee on Reconstruction, had at the time "by flagrant rebellion and war, forfeited all civil and political rights and privileges under the federal Constitution."[20] Therefore, the Court should not derive its interpretation of the original intent of the Fourteenth Amendment's original intent from federal laws passed in the 1860s and turn its attention instead to the discussions that the framers of the Fourteenth Amendment had regarding its passage.[21] As discussed, evidence shows that they believed that by

[19] U.S. Const. Amend. XIV

[20] Report of the Joint Committee on Reconstruction (1866). National Constitution Center. https://bit.ly/3VaIgkV

[21] U.S. Const. Amend. XIV

ratifying section 1 of the Fourteenth Amendment they were banning all discriminatory racial classifications.[20] *Brown V. Board of Education*, in overturning *Plessy*, established the doctrine that "[r]acial discrimination in public education is unconstitutional."[2223] Now, the Court should follow in the footsteps of the historic Brown decision by abolishing the arbitrary distinction that has been created between admissions to public high schools and public universities by compelling UNC "to achieve a system of determining admission. . . on a nonracial basis."[21]

A. Title VI Is Coterminal With the Fourteenth Amendment, and it Clearly Prohibits Public Universities from Employing Overtly Race-Conscious Admissions Practices of All Types

Title VI is an extension of the Fourteenth Amendment.[24] The Fourteenth Amendment gave Congress the power to enforce it, and Title VI, which mirrors the Fourteenth Amendment closely in its language, has been held to be "coterminous with. . . the Fourteenth Amendment."[25] Respondents agree, stating that "[t]his Court has consistently held that Title VI and the Equal Protection Clause are coextensive."[26] Title VI of the Civil Rights Act

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[22] Brown V. Board of Education of Topeka, 347 U.S. 483 (1954)

[23] Plessy V. Ferguson, 163 U.S. 537 (1896)

[24] 42 U.S.C. §2000d

[25] Regents of the University of California V. Bakke, 438 U.S. 265 (1978)

[26] Fitzgerald et al. BRIEF IN OPPOSITION BY UNIVERSITY RESPONDENTS. https://bit.ly/3C5MbsX

prohibits the exclusion of any person "on the ground of race, color, or national origin, from participation in. . . any program or activity receiving Federal financial assistance."[23] Under Title VI, it should not fundamentally matter whether the instrument of a university's discrimination is a quota system, as was that of the University of California overturned by *Bakke*, or a "holistic" process such as that employed by respondents.[24] Respondents contend that their point system that determines admissions employs "no quotas, fixed points, or separate admissions processes based on a particular candidate's race or ethnicity," and that their system never deducts points from an applicant on the basis of race.[27] However, in order to satisfy the strict scrutiny framework that has applied in all cases of race-conscious admissions policies, Respondents must prove that their admissions framework is narrowly tailored towards creating a diverse student body. Therefore, it must prove that it cannot establish a sufficiently diverse class without a race-conscious policy. In making this contention, Respondents admit that they intend to accept some students on the basis of their race, while simultaneously rejecting others (who would otherwise have been accepted) on the basis of their race. Each instance of this inevitable scenario is a violation of Title VI.[28]

Respondents' claim that race is never the sole reason for the rejection of an applicant is immaterial.

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[27] Fitzgerald et al. BRIEF IN OPPOSITION BY UNIVERSITY RESPONDENTS. https://bit.ly/3C5MbsX

[28] 42 U.S.C. §2000d

If race is the decisive factor in any admissions decisions, as UNC concedes that it is in at least 1.2% of its decisions, UNC is engaging in exactly the type of discrimination Title VI was passed to prohibit.[29] Senator Pastore, discussing his support for Title VI, said that the purpose of Title VI was to "guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind. Let me say it again: The title has a simple purpose to eliminate discrimination in Federally financed programs."[30]

Petitioners should not have to prove that UNC's discrimination is intentionally harmful. Intended effect is only material in the case of facially neutral policies. Under *Adarand v. Peña* and *City of Richmond*, it has been established that "any intentional use of race, whether for malicious or benign motives, is subject to [strict] scrutiny."[3132] UNC has spent considerable time arguing that race is a decisive factor in its decisions very infrequently, and neither should it be material, as it mistakenly was held to be in *Gratz V. Bollinger*, how many admissions decisions are impacted by UNC's policy.[33] Title VI prohibits "intentional racial discrimination" by agencies receiving federal funding, regardless of

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[29] Fitzgerald et al. BRIEF IN OPPOSITION BY UNIVERSITY RESPONDENTS. https://bit.ly/3C5MbsX

[30] Department of Justice. https://bit.ly/3V68Ewx

[31] Department of Justice. https://bit.ly/3V68Ewx

[32] *Adarand Constructors, Inc. V. Peña*, 515 U.S. 200 (1995)

[33] *Gratz V. Bollinger*, 539 U.S. 244 (2003)

impact,[34] and since the University of North Carolina's admissions policy explicitly considers race and results in the exclusion of students from the University, it represents intentional racial discrimination.

II. *Grutter V. Bollinger* Should Be Overturned

A. *Grutter* and *Gratz* create an Unworkable Framework Which Has Led to An Effective Vacuum of Judicial Oversight in College Admissions Policies

The court has long held that strict scrutiny applies to racial classifications. "[R]acial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[35] *Grutter* reiterated the importance that "all government racial classifications must be analyzed by a reviewing court under strict scrutiny."[36] The maxim "strict in theory, fatal in fact" has arisen to describe strict scrutiny, since it is ordinarily so difficult to satisfy. Paradoxically then, the effect of *Grutter* has been to allow free reign of universities to create race-based admissions systems of their choosing.[35] By holding that "student body diversity is a compelling state interest" and "[deferring] to the Law School's educational judgment that diversity is essential to its educational mission," *Grutter* effectively eliminates the compelling state interest criteria of strict scrutiny

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[34] *Alexander V. Sandoval*, 532 U.S. 275 (2001)

[35] *Personnel Administrator of Massachusetts V. Feeney*, 442 U.S. 256 (1979)

[36] *Grutter V. Bollinger*, 539 U.S. 306 (2003)

in the case of race-conscious college admissions.[35] It also created an overly lenient standard for evaluating the narrow tailoring of race-conscious admissions policies. *Grutter's* opinion simply stated that "[t]he Court is satisfied that the Law School adequately considered the available alternatives," without making any reference to specific alternatives considered by the Law School.[37] In fact, the Law School's brief in the case contained no specific statistical analysis of any alternatives. Alternatives were considered only qualitatively, and included "abandon academic selectivity" and a plan which would have offered admissions to students within a certain GPA percentile of their university classes, regardless of the university they attended.[36]

Unsurprisingly, under *Grutter's* extreme standard of deference to universities' evaluations of alternatives, it has proven very difficult to strike down race-conscious admissions policies under *Grutter*.[38] In *Fisher II,* for instance, the majority of the court, citing *Grutter*, accepted the University of Texas' argument that it had a compelling interest in "securing the benefits of racial diversity" by a "critical mass" of minority enrollment, without requiring it to define these benefits, or even what might constitute a "critical mass."[39] Even putting aside Petitioners' contention that race-conscious policies in general are inconsistent with Title VI, *Grutter's* framework is

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[37] Mahoney et al. Brief for Respondents, Grutter V. Bollinger. https://bit.ly/3FZmiNs

[38] *Grutter V. Bollinger*, 539 U.S. 306 (2003)

[39] Alito, Samuel. Dissenting Opinion in *Fisher V. University of Texas at Austin* (2016). https://bit.ly/3FIgzKW

self-contradictory.[37] Under *Grutter's* precedent that "[o]nce. . . a university gives 'a reasoned, principled explanation' [for considering race in admissions], deference must be given to the University's conclusion. . ." it is difficult to imagine a scenario in which a University that wanted to apply a race-conscious admissions system would be prohibited from doing so.[40] Unsurprisingly then, not a single university's race-conscious admissions program has been overturned since *Grutter*.[39] Thus, it is clear that in practice, *Grutter* does not legitimately uphold the framework of strict scrutiny that it claims to reaffirm.[39]

B. Grutter Is Based on False Assumptions

Justice O'Connor's opinion in *Grutter* placed a time limit on the duration of affirmative action, declaring that "race-conscious admissions must be limited in time" and that "[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[39] This was based on another overly simplistic assumption: that all ethnic groups would quickly revert to performing equally by objective metrics in the college admissions process, absent invidious legal discrimination. The last two decades have shown the error of this assumption. The achievement gap between black and white students in 12th grade math, for instance, remained exactly constant from 2005 to 2019, according to the National Assessment

[40] Grutter V. Bollinger, 539 U.S. 306 (2003)

of Education Progress.[41] This should significantly undermine the Grutter decision.

Petitioners agree with Respondents that this achievement gap stems largely from "the discrimination between whites and blacks."[42] However, addressing this past discrimination through race-conscious affirmative action policies (as the Respondents suggest) has been held by the court to be unconstitutional, as outlined in *Bakke*, and is moreover unnecessary to achieving the educational benefits of diversity.[43]

III. Reliance Interests and Stare Decisis are Immaterial in Cases of Such Social Importance

Respondents claim that they are significantly reliant on *Grutter V. Bollinger*'s precedent to establish racial diversity.[44] They contend that the court holding race-based affirmative action to be unconstitutional will "upend universities' careful planning and frustrate their ability to pursue their academic mission" (Respondent's brief, pg 55 of pdf). Moreover, they claim that there is no "pressing need to upend forty years of established precedent."[45] However, the court has shifted away from considering stare decisis and reliance interests in matters of such constitutional importance. In Justice Alito's recent

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[41] Racial and Ethnic Achievement Gap. https://bit.ly/3BISn9W

[42] Fitzgerald et al. BRIEF BY UNIVERSITY RESPONDENTS. https://bit.ly/3BHAsR8

[43] *Regents of the University of California V. Bakke*, 438 U.S. 265 (1978)

[44] *Grutter V. Bollinger*, 539 U.S. 306 (2003)

[45] Fitzgerald et al. BRIEF BY UNIVERSITY RESPONDENTS. https://bit.ly/3BHAsR8

opinion in *Dobbs V. Jackson*, citing *Pearson V. Callahan*, he argued that stare decisis "is at its weakest when we interpret the Constitution."[46] Moreover, reliance interests should not be considered in this case. In the case of *Brown V. Board of Education*, it is clear that the Topeka Board of Education had an enormous reliance interest in maintaining its segregated school system.[47] In the aftermath of *Brown*, the creation of bussing programs became necessary infamously so as to ensure that schools were not de facto segregated by geography.[46] However, this does not in any way undermine the landmark *Brown* decision.[46] The holding of this case will impact the future admitted classes of many of the country's best universities. In constitutional cases of such importance, reliance interests should be irrelevant in the face of the potential social consequences of the decision.

Even if reliance interests were applicable in situations such as this case, universities' reliance on the *Grutter* precedent to establish diversity in their student body is unclear at best.[48] It is clear that UNC, specifically, has workable alternative admissions models that would create similarly diverse classes. The district court ruled one race-neutral plan submitted by petitioners, which would have increased socioeconomic diversity and the number of underrepresented minority students in UNC's

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[46] Alito, Samuel. Dissenting Opinion in *Dobbs V. Jackson Women's Health Organization*. https://bit.ly/3G086UI

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

[48] Grutter V. Bollinger,
539 U.S. 306 (2003)

accepted class, to be unworkable because it would have caused a minimal 31 point decrease in UNC's average SAT score.[49] The minor negative impacts of this plan should be considered to fall under the "tolerable expense" that UNC has outlined as being needed for it to consider race-neutral alternatives (Respondent brief page 28).

These race-neutral alternatives, which substitute socioeconomic considerations for racial ones, serve as possible alternatives to help UNC achieve diversity without necessitating the use of racial classifications that Title VI prohibits.[50] Therefore, even accepting the invalid premise that reliance interests are material in this case, UNC, like most all other universities, is not legitimately reliant on the Grutter precedent to establish legitimate diversity, especially when diversity is defined more broadly than ethnicity.

The benefits of race-neutral alternatives are not solely theoretical. There is historic evidence to suggest that these alternative admissions practices need not detract from racial diversity if implemented correctly. The University of California system, which has used race-neutral admissions since a 1996 ballot measure banned the consideration of race in public university admissions, serves as a case study in race-neutral admissions. Amici President and Chancellors of the University of California contend that their race-neutral criteria "Have Been

[49] STUDENTS FOR FAIR ADMISSIONS, INC., V. UNIVERSITY OF NORTH CAROLINA, et al., TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW. https://bit.ly/3j9IRGy

[50] 42 U.S.C. §2000d

Inadequate to Achieve the Educational Benefits of Diversity" [51] To support this, they cite the fact that minority enrollment dropped sharply shortly following the passing of Proposition 209. However, modern evidence shows that the University of California System's pursuit of race-neutral admissions criteria, including socioeconomic status and geographic region [52], has in fact been successful. Today, UC campuses are more diverse than ever. The enrollment of Black and Hispanic students in the UC system had increased from 19.3% in 1995, when it considered race directly, to 43% in 2021.[51] Moreover, the University of California system is impressively socioeconomically diverse. 27% of UCLA students and 26% of UC Berkeley students receive Pell Grants, granted to students requiring financial aid to attend college, in comparison to 21% at the comparable University of North Carolina at Chapel Hill and higher than any comparatively selective universities.[53]

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[51] Robinson et al. BRIEF FOR THE PRESIDENT AND CHANCELLORS OF THE UNIVERSITY OF CALIFORNIA AS AMICI CURIAE SUPPORTING RESPONDENTS. https://bit.ly/3YoVldv

[52] CALIFORNIA FRESHMAN ADMISSIONS BY CAMPUS AND RACE/ETHNICITY FALL 2020, 2021, AND 2022. UNIVERSITY OF CALIFORNIA. HTTPS://BIT.LY/3V4OMD2

[53] Economic Diversity National Universities. US News. https://bit.ly/3PDhHnp

CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment, as incorporated by Title VI of the Civil Rights Act, prohibits racial classifications in college admissions. For this reason, the court should reverse.

Respectfully submitted,

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