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 BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

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

PARTIES TO THE PROCEEDINGS

Petitioner in this matter, and plaintiff below, is Students for Fair Admissions.

Respondents in this matter, and defendants below, are the University of North Carolina; the University of North Carolina at Chapel Hill; the University of North Carolina Board of Governors; John C. Fennebresque; W. Louis Bissette, Jr.; Joan Templeton Perry; Roger Aiken; Hannah D. Gage; Ann B. Goodnight; H. Frank Grainger; Peter D. Hans; Thomas J. Harrelson; Henry W. Hinton; James L. Holmes, Jr.; Rodney E. Hood; W. Marty Kotis, III; G. Leroy Lail; Scott Lampe; Steven B. Long; Joan G. Macneill; Mary Ann Maxwell; W. Edwin McMahan; W.G. Champion Mitchell; Hari H. Math; Anna Spangler Nelson; Alex Parker; R. Doyle Parrish; Therence O. Pickett; David M. Powers; Robert S. Rippy; Harry Leo Smith, Jr.; J. Craig Souza; George A. Sywassink; Richard F. Taylor; Raiford Trask, III; Phillip D. Walker; Laura I. Wiley; Thomas W. Ross; Carol L. Folt; James W. Dean, Jr.; and Stephen M. Farmer. Respondents in this matter include, as intervenor-defendants below, Cecilia Polanco; Luis Acosta; Star Wingate-Bey; Laura Ornelas; Kevin Mills, on behalf of Q.M.; Angie Mills, on behalf of Q.M.; Christopher Jackson, on behalf of C.J.; Julia Nieves, on behalf of I.N.; Tamika Williams, on behalf of A.J.; Ramonia Jones, on behalf of R.J.; and Andrew Brennen.

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INTRODUCTION

The history of the United States is the history of a battle against racism, slavery, and discrimination in all its forms. Since the inception of this nation, much ground has been gained in this battle through the abolition of slavery, elimination of segregation, and, crucially, the mandate of "equal protection of the laws" in the Fourteenth Amendment. The battle to end racial discrimination must be won, and the horrid practices of racial classification, segregation, and preferential treatment must end. Although the law of equality is widely championed, it is tragically cast aside in college admissions as universities use the mere color of a student's skin to accept or reject their application. The last nail in the coffin of racism must be hammered shut, and racial affirmative action must be eliminated.

Racism and discrimination imposed by the state is completely abhorrent to the core principle of this nation that "all men are created equal." Decl. of Indep., 1 Stat. 1 (July 4, 1776). In 1868, a desire to end this terrible practice motivated the nation to enact the Fourteenth Amendment and expressly prohibit it in the greatest instrument of government: the Constitution. For good reason, this Court has allotted "no place" whatsoever for racial distinction in the field of public education. *Brown v. Bd. of Educ.,* 347 U.S. 483, 495 (1954). Regardless of the race or ethnicity of a student, every individual "must receive the same treatment at the hands of the state as students of other races." *McLaurin v. Okla. State Regents,* 339 U.S. 637, 642 (1950). Affirmative action denies students this

equal treatment in a manner inconsistent with this Court's strict scrutiny doctrines. Under the schemes of today's universities, students are treated not as individuals as promised, but as stereotypical members of racial blocs selected for preferences or handicaps. Such policies are no excuse for the suspension of equal protection or a gross misinterpretation of the Fourteenth Amendment.

Racial affirmative action at a state university violates and twists every guarantee and safeguard of equality of the Amendment. Under *Grutter v. Bollinger,* 539 U.S. 306 (2003), an indeterminate "critical mass" of minority students is such a "compelling interest" that it justifies surrender to racial discrimination. *Id.,* 343. This interpretation contradicts all historical evidence, the plain text of the amendment, and decades of precedent. "The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review." *Id.,* 395 (Kennedy, J., dissenting). "The affirmative-action system now in place . . . is based on concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; that is to say . . . it is racist." Scalia, *The Disease as Cure: 'In Order to Get Beyond Racism, We Must First Take Account of Race,'* 1979 Wash. Univ. Law Quarterly 147, 154 (1979). Such a vile system cannot survive the strict scrutiny guaranteed by the Constitution, and must be given no deference whatsoever.

In short, "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong,

and destructive of democratic society." Alexander Bickel, *The Morality of Consent*, 133 (1975). In keeping with this "lesson of the great decisions of the Supreme Court," *Grutter* should be overruled and racial affirmative action found unconstitutional under the Fourteenth Amendment. *Id.*, 133. This Court's traditional approach to *stare decisis* in constitutional cases cannot save *Grutter*, a decision with no basis in the Constitution, an unworkable framework, an array of negative consequences, and no reliance interests. Even if this Court retains *Grutter*, UNC's affirmative action policy ignores its commands. Justice Harlan's proclamation triumphed over *Plessy* and it must triumph over *Grutter*. As *Brown* recognized and *Grutter* ignored, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). So too must state academic admissions be "color-blind," for "[i]n respect of civil rights, all citizens are equal before the law." *Id.,* 559.

OPINIONS BELOW

The Middle District of North Carolina's post-trial findings of fact and conclusions of law are not yet reported but are reproduced at UNC.Pet.App.1-186.

JURISDICTION

The Middle District of North Carolina's final judgment was entered on November 4, 2021. SFFA timely petitioned for certiorari before judgment on November 11, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1) and §2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

STATEMENT OF THE CASE

UNC, a highly competitive public university, makes use of a "holistic" admissions program in order to distinguish between roughly 60,000 applicants. Being a highly competitive institution, UNC accepts only a small percent of applicants. UNC considers the customary grades, test scores, and extracurriculars to distinguish between applicants, but uses a student's race and ethnicity throughout every layer of the admissions procedure and, as a crucial factor in the eventual decision. UNC.JA.407.

UNC and most universities receive their information on applicants' race from the Common Application, a standardized online college applications system. On the application, students are categorized by race as "American Indian or Alaska Native, Asian,

Black or African American, Native Hawaiian or Other Pacific Islander, or White" and by ethnicity as either "Hispanic/Latino" or not Hispanic. Tahraoui, *FAQ About the Race/Ethnicity Section of the Common Application,* Collegevine (2016). The very systems of racial classification are wholly unscientific and the provided categories often encompass "wildly disparate" groups which may have few commonalities. Bernstein, *The Modern American Law of Race,* 94 S. Cal. L. Rev. 171, 182 (2021).

Using data from the Common Application, UNC grants preferences for the admission "underrepresented" groups: African American, Native American, and Latino applicants. UNC.JA.408. Regardless of a student's discussion of race in their essays, mere "disclos[ure]" such an underrepresented ethnicity will procure significant preferences for a student. UNC.JA.632. According to UNC's own expert, "race and ethnicity explain 1.2 percent of the admissions decision" for in-state students and "5.1 percent of the admissions decision" for out-of-state students. UNC.JA.814; UNC.JA.815. UNC alleges this racial preference plays only "a very small role" in admissions, but it nevertheless results in the denial of entry to the university on the basis of race. *Id.* Even if race is not the predominant or most significant factor in UNC admissions, it is still a determinative factor for many students. UNC.JA.513.

Statistically, the disadvantage faced by white and Asian applicants in UNC admissions is severe. Admissions data from UNC demonstrates African American and Hispanic students have significant

admissions advantages across all levels of academic performance (as indicated from GPA and test scores). UNC.JA.451-454. In each academic decile, white and Asian students have significantly lower admission rates than their counterparts, particularly in the bottom deciles where the disparity reaches up to 40 percent. UNC.JA.453.

Although this Court has asked that Universities eliminate racial preferences as soon as possible, UNC has stubbornly rejected race-neutral alternatives which would provide similar levels of racial diversity. UNC.JA.550. The impact of race on UNC's admissions process is significant, resulting in the rejection of many highly qualified students. Despite its massive impact on admissions and its legal ramifications, UNC is determined to continue its plan of affirmative action.

SUMMARY OF ARGUMENT

The heart of the 14th Amendment's Equal Protection Clause is the undeniable and unambiguous prevention of state racial discrimination. History makes clear that the Framers of the Amendment wrote "equal" to mean identical treatment under law, deterring the provision of advantages for select racial groups. A thoughtful review of this Court's precedent produces the same reading: racial discrimination is repugnant to a free and democratic society. Since racial preferences at state schools function as racial discrimination in service of an ill-defined interest in "diversity," they are antithetical to the promise of the Equal Protection Clause.

Consistent with this Court's traditional approach to *stare decisis* in constitutional cases, *Grutter* and its regime can and must be overruled. *Grutter's* reasoning was grievously wrong insofar as it contradicts history, precedent, and tradition. The decision is unworkable as it relies on extreme cognitive dissonance. The strict scrutiny standard that *Grutter* endorsed fundamentally conflicts with the nearly impossible-to-define interest the opinion rubber-stamped: the educational benefits of diversity that form a "critical mass" of minority students. Aside from the jurisprudential damage, the decision has negatively impacted the real world, aiding in the entrenchment of continuous racial discrimination, especially against Asian Americans. Lastly, since the decision explicitly swears off any reliance, reliance interests pose no barrier to this Court's reconsideration of *Grutter*.

It is high time for this Court to get the Constitution right. *Grutter* must be overruled, and UNC's admissions policy must be found unconstitutional. Accordingly, this Court should vacate and reverse the judgment below.

ARGUMENT

I. The Fourteenth Amendment prohibits affirmative action in state universities.

In considering the application of the Fourteenth Amendment to affirmative action, it is necessary to first determine if the Amendment proscribes the practice and apply strict scrutiny if it does. In interpreting the Amendment, its words are "marks of . . . the speaker," and therefore their meaning cannot

be interpreted as "anything else but the ideas that he himself hath." John Locke, *An Essay Concerning Human Understanding* 133 (1801). Hence, it is imperative that the Fourteenth Amendment be interpreted according to the original meaning given by its Framers in Congress, adopted by the states, and understood by the general public. To this end, "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts,* 93 (2012). The permissibility of affirmative action is therefore to be determined from the text of the Amendment, its historical context, and its interpretive tradition. These factors all support the same conclusion: that "freedom from discrimination by the States . . . was among the basic objectives sought to be effectuated by the Framers of the Fourteenth Amendment." *Shelley v. Kraemer,* 334 U.S. 1, 20 (1948). For these reasons, affirmative action must be subject to the highest standards of strict scrutiny without the benefit of any modicum of deference or presumption of constitutionality.

A. Affirmative action is anathema to the original meaning of the amendment.

The 14th Amendment is clear and decisive in its proscription of state racial discrimination, demanding the law be "color-blind" such that it "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. at 559 (1896) (Harlan, J., dissenting). The Framers of the Amendment did not mince words, proclaiming that never "shall any state . . . deprive any

person under its jurisdiction of the equal protection of the laws." At the time of its enactment, the meaning of this Amendment was well-understood. Representative John Bingham, its principal Framer, forcefully argued for the Amendment's passage to ensure "[t]he law in every State should be just; it should be no respecter of persons." Cong. Globe, 39th Cong., 1st Sess., 1291-1292. The Amendment, as understood by Bingham, his counterparts, and society at large, allows neither special cases nor allowances of discrimination. *Casus omissus pro omisso habendus est;* "a matter not covered is to be treated as not covered" and therefore if no exceptions to the rule of equal protection are stated, it is not the place of this Court to create one for universities. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts,* 93 (2012). As can be deduced from its text and historical context, the Amendment unequivocally prohibits all racial discrimination by the states, without exception or excuse. Under the Amendment, there can be no allowance of affirmative action in state universities.

Central to the meaning of the Fourteenth Amendment is the definition of "equal," as understood in 1868. Naturally, "[h]istorical dictionaries are the most reliable sources" for understanding such historical verbiage. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts,* 419 (2012). Comparing scholarly dictionaries written in the era around 1868, "equal protection" in the Fourteenth Amendment must describe treatment under the law "of the same extent, measure, or degree when compared"; "not inferior or superior" to the treatment of another. Joseph Worcester*, A Dictionary of the*

English Language, 571 (1860), James Stormonth, *A Dictionary of the English Language,* 326 (1882) *see also* Scalia & Garner, 421. By definition, equality goes both ways; it does not permit a policy to be legal when applied to one race and illegal when applied to another. If a state preference for white students is unconstitutional, as it clearly would be, then an identical preference for black students must also be unconstitutional. Thus, from a textual and linguistic analysis of the Amendment, its guarantee of "equal protection" references neutral and impartial treatment irrespective of race.

With the decree that "neither slavery nor involuntary servitude . . . shall exist within the United States," U.S. Const. amend. XIII, the greatest evil known to the country had been abolished yet the hardships of freedmen were by no means at an end. Except for the lucky few who had been granted land under the "40 Acres and a Mule" policy, newly freed slaves owned little land or other property and had few opportunities for work outside of sharecropping. Furthermore, Black Codes and Jim Crow laws oppressed freedmen, stripping them of civil and political rights alike, segregating them from white persons, and consigning them to second-class citizenship. Blacks were obligated to sign servant labor contracts restricting their freedoms, and punished arbitrarily for vagrancy. Their children were even involuntarily made apprentices to white masters. *See* Joe M. Richardson, *Florida Black Codes,* 47 Florida Hist'l Qtly 365 (1969). In effect, these Southern policies "established a condition but little better than that of slavery" through racial

discrimination and grievously unjust treatment of black freedmen. Samuel McCall, *Thaddeus Stevens*, 253-254 (1899). To put an end to this issue, the Federal Government began a program of postwar reconstruction, placing the South under military control and enacting considerable legislation to compel an end to the unjust treatment.

Established shortly after the Thirteenth Amendment, the Freedmen's Bureau provided immediate relief in the forms of "provisions, clothing, and fuel" along with protection of civil rights to address the crisis afflicting "destitute and suffering refugees and freedmen and their wives and children." 13 Stat. 507 (1865). While Justice Marshall's oft-cited justification for affirmative action's permissibility under the Fourteenth Amendment correctly observes "[t]he Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes," this argument still neglects both the text and purpose of the Act. *Regents of Univ. of Cal. v. Bakke,* U.S. 265*,* at 397 (1978). The benefits given by the Freedmen's Bureau were by no means exclusive to freedmen or blacks, but rather broadly given to "refugees and freedmen" based on emergent need at the time and not a racial classification. Indeed, Further, the Bureau's function was purely remedial, designed not to establish a system of racial preferences but instead to guard against discrimination itself and provide humanitarian aid to those in dire straits. Additional action was taken particularly with respect to education. Not only were the schools operated by the

Bureau maintained even after its shutdown, but Congress even established and funded Howard University to provide higher education to freedmen. Howard notably accepted all races and genders without any preferences in admissions, a heroic achievement against the dawning era of segregation. Undoubtedly, the work of the Bureau and University principally supported freedmen, but there were no racial distinctions at any point in their statutory authorization or operation. The Freedmen's Bureau, a crucial institution of charity and support in the pivotal period of reconstruction, maintained the moral high ground over discrimination and provided its aid to the needy, freedman and refugee alike, without respect to color.

During the process of reconstruction, severe discrimination continued even as the Union Army and Freedmen's Bureau attempted to stop it. For this purpose, various statutes and amendments were enacted by Congress to enfranchise all Americans with civil and political rights. First among these, the Civil Rights Act of 1866 began by addressing the excuse through which slavery itself was found permissible: the matter of citizenship. In denying slaves and those of African descent any protection under the law, Chief Justice Taney infamously determined that "they are not included, and were not intended to be included, under the word 'citizens'" and "can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States." *Dred Scott v. Sandford,* 60 U.S. at 425 (1856). Since the *Dred Scott* decision had unjustly excluded blacks from citizenship and the associated

privileges and immunities thereof, Congress provided in the Civil Rights Act that "all persons born in the United States . . . of every race and color, without regard to previous situation of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States to . . . full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other." 14 Stat. 27 (1866). The language of the Fourteenth Amendment, likewise enacted by the 39th Congress, parallels the Act in establishing *jus soli* citizenship and demanding equal protection. While clearly the Framers of both the Act and Amendment "were . . . trying to ensure that people who had been discriminated against . . . were actually brought equal to everyone else in the society", their methodology was colorblind and completely race-neutral. 58 (2022). Tr. of Oral Arg. in *Merrill v. Milligan* and *Merrill v. Caster,* O. T. 2022, Nos. 21-1086 and 21-1087, p. 58. As is articulated in its text, the Civil Rights Act brought blacks to equality by guaranteeing them the same legal rights as whites without granting special preferences or benefits on the basis of race. The Fourteenth Amendment, functioning in significant part as a constitutional enshrinement of this principle, does the same.

The historical context of the Fourteenth Amendment, crucial to its correct interpretation, in no way suggests racial affirmative action might be permissible. "What the nation, through Congress, has sought to accomplish in reference to that race is what had already been done in every State of the Union for

the white race -- to secure and protect rights belonging to them as freemen and citizens, nothing more." *Civil Rights Cases,* 109 U.S. at 61 (1883) (Harlan, J., dissenting). The sole function of the Equal Protection Clause is to prevent the states from treating citizens differently because of their race; it certainly does not permit the practice to rectify long-past discrimination. While indeed "the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes," neither does it allow these measures to be discriminatory in of themselves. *Bakke,* 438 U.S. at 396 (Marshall, J., concurring in part and dissenting in part). Considering the immediate legislative action taken during Reconstruction, "[r]ace-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were . . . not inconsistent with the colorblind Constitution." *Parents Involved in Cmnty. Schs. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 772 n.19 (2007) (Thomas, J., concurring). Then, there was a compelling interest in addressing the immediate remedial needs caused by slavery. Over a century later, this interest no longer exists. And regardless of any subjective intent Congress may have had to give continual preferences and benefits, "[t]he searches is for the objectively manifested meaning, not for [Congress'] unexpressed state of mind." Robert E. Keeton, *Keeton on Judging in the American Legal System* 207 (1999). There is no indication of such a meaning expressed in these acts of Congress. In Equal Protection Clause, the only "objectively manifested meaning" is a blanket prohibition of racial discrimination irrespective of the form or cause thereof. The Amendment was drafted around one

principle: that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). For this reason, it cannot permit such a distinction for any reason.

B. This Court's precedents are inconsistent with *Grutter's* approach.

The Equal Protection Clause has been interpreted as a ban on racial discrimination since it was first adjudicated in the *Slaughterhouse Cases,* 83 U.S. 36 (16 Wall.) (1872). As Justice Miller explained, "[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." *Id.,* at 81. Although a "strong case would be necessary for its application to any other [race]," this necessarily occurs when "gross injustice and hardship" is imposed by the state such as racial preferences in university admissions. *Id.,* at 81. It cannot be said that "no one else but the negro can share in this protection;" rather, as the Court held, that "these articles are to have their fair and just weight in any question of construction." *Id.,* at 72. Shortly thereafter, in *Strauder v. West Virginia,* 103 U.S. at 303 (1880), this Court inquired regarding the Fourteenth Amendment, "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States . . .?" *Id.,* at 307. While *Strauder* involved a former slave being convicted by a jury that, according to West Virginia law, was made up of only white

individuals, racial discrimination is pernicious in all forms, whether it be in a court room or an admissions office. The *Slaughterhouse Cases* and *Strauder* rightly consider discrimination against black freedmen to be the principal target of the Fourteenth Amendment, but are clear that the constitutional guarantee of equality is not exclusive to one race. Under the precedent set by *Slaughterhouse* five years after its passage and fortified by *Strauder,* the Amendment serves the clear function of ensuring no person must suffer racial discrimination at the hands of a state.

Shortly thereafter, in *Strauder v. West Virginia,* 103 U.S. 303 (1880), this Court inquired regarding the Fourteenth Amendment, "[w]hat is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States . . .?" *Id.,* at 307. Both cases rightly consider discrimination against black freedmen to be the principal target of the Fourteenth Amendment, but are clear that equality is not exclusive. Under the precedent set by *Slaughterhouse* five years after its passage and fortified by *Strauder* shortly thereafter, the Fourteenth Amendment serves the clear function of ensuring no person must suffer racial discrimination at the hands of a state.

The judicial record of Fourteenth Amendment interpretation is far from perfect. For decades, the law of the land was *Plessy v. Ferguson,* 163 U.S. 537 (1896), and its notorious promulgation of the "separate but equal" doctrine. This abhorrent precedent was rightfully overturned in "the single most important

and greatest decision in this Court's history, *Brown v. Board of Education*." *See also Cumming v. Richmond County Bd. of Educ.,* 175 U.S. 528 (1899) (permitting de jure racial segregation in public schools, overturned in *Brown*), *Berea College v. Kentucky,* 211 U.S. 45 (1908) (permitting states to enforce racial segregation in private schools, overturned in *Brown*), and *Gong Lum v. Rice,* 275 U.S. 78 (1927) (permitting the exclusion of students from public schools on the basis of race). *Ramos v. Louisiana,* 140 S.Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring in part). "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." *Parents Involved in Cmnty. Schs. v. Seattle Sch. Dist. No. 1,* 551 U.S. at 747 (2007). This doctrine of segregation and discrimination "deprived [students] of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown,* 347 U.S. 483, 495. Hence, this Court demanded states implement a "system of determining admission to the public schools on a nonracial basis." *Brown II,* 349 U.S. 294, 300-301 (1955). Regrettably, under today's affirmative action programs, students are once again told where they can and cannot go to school because of the color of their skin. Under the law of *Brown,* this cannot stand.

Brown was unambiguous and forceful in its proscription of discrimination, affirming the core principle of the Equal Protection Clause that "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown v. Board of Education*, O. T. 1952, No. 8, p. 7. Of course, "*Brown v.*

Board of Education was not written for blacks alone" and therefore such uses of race are unconstitutional regardless of the affected groups. *Guey Heung Lee v. Johnson,* 404 U.S. at 1216 (1971), *see also Hernandez v. Texas,* 347 U.S. 475 (1954) (extending equal protection to all racial and ethnic groups). This Court has rightfully applied this same standard of race-neutrality across other disciplines and circumstances. *See Adarand v. Peña,* 515 U.S. 200 (1995) (demanding strict scrutiny be applied to all race classifications) and *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989) (finding racial preferences in municipal contracting unconstitutional). Affirmative action jurisprudence is an outlier to this standard of equality. In *Grutter,* the law of *Brown* and the Fourteenth Amendment was subverted to permit racial affirmative action through an "unprecedented display of deference under our strict scrutiny analysis." *Grutter,* 539 U.S. at 387 (Rehnquist, C.J., dissenting). Thus, the law of *Grutter* and *Gratz* came to prohibit stringent quotas but allow for broad "consideration to all the ways an applicant might contribute to a diverse educational environment." Under such a vague direction, universities can still give hefty racial preferences and even use illegal quotas "through winks, nods, and disguises." *Gratz v. Bollinger,* 539 U.S. at 305 (2003) (Ginsburg, J., dissenting). *Grutter* is an outlier in the history of this court, which does not conform or adhere to the great precedent of *Brown*. The tradition and precedent of this court rather makes clear that racial discrimination is inherently suspect and presumptively illegal in all contexts.

C. Affirmative action operates as racial discrimination.

Racial affirmative action is fundamentally discriminatory. In the cutthroat world of college admissions, the finite number of places at any given school requires that to admit one applicant is to necessarily reject at least one other. In this high-stakes battle where every inch matters, anything can tip the scales and, thus, every consideration must be considered as if it will single handedly determine a student's prospects. Thus, every factor considered by admissions officers is potentially "determinative" of the final decision even if it is not the "predominant" or most significant consideration underlying it. UNC.JA513. When race is considered in college admissions through affirmative action programs, regardless of the method or system in which it is used, there will be instances where a student's race eventually determines whether they are accepted or rejected. Thus, such "holistic" consideration of race as permitted under *Grutter* is "undeniably a classification based on race and ethnic background." *Bakke,* 438 U.S. 265, 289 (1978).

Despite the urging of universities that racial preferences will never "negatively" affect a student's chances of admission, to consider race in admission is to exclude students on the basis of race. UNC.JA638. In a zero-sum game such as college admissions, it is logically impossible and "defies the law of mathematics" for any positive not to "negatively" affect one who does not possess the positive. *Fisher II*, 579 U.S. at 410 n.4 (2016) (Alito, J., dissenting). By

Grutter's own standard, "[n]arrow tailoring … requires that a race-conscious admissions program not unduly harm members of any racial group." 539 U.S. at 341 (2003). Affirmative action, in effecting denial of admission on the basis of race, definitively and severely harms members of any group to whom a preference is not given. Even though a student rejected from one university due to affirmative action may have opportunity for education elsewhere, when comparing schools there is rarely "substantial equality in the educational opportunities offered." *Sweatt v. Painter,* 339 U.S. 629, 633 (1950). "It is difficult to believe that one who had a free choice between [universities] would consider the question close" when given the prospect of attending the most selective schools. *Id,* 634. While this free choice is obviously not realistic, the admissions process owes students, at a minimum, fair and even-handed consideration of their application regardless of race.

State racial discrimination always poses "serious problems of justice," particularly in public education. *Bakke*, 438 U.S. at 298. The "plus" given to underrepresented minorities under such affirmative action policies plainly grants students of certain races a better chance at admission than students of other races. UNC.JA634. As Justice Powell correctly observed, when all "are not accorded the same protection, then it is not equal." *Bakke,* 438 U.S. at 290. The inequality guaranteed by racial affirmative action blatantly violates the precept that never "shall any state…deprive any person under its jurisdiction of the equal protection of the laws." U.S. Const. amend. XIV. Unless the historical record indicates otherwise,

unequal treatment in all its forms clearly falls within this proscription. For a state institution to give admission preferences on the basis of race "appears on its face to be within a specific prohibition of the Constitution" and thus may not be given the "presumption of constitutionality." *U.S. v. Carolene Products Co.,* 304 U.S., at 152 n. 4 (1938). Therefore, "governmental action based on a race group classification must be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed." *Adarand*, 515 U.S. 200, 202. With respect to affirmative action, there can be no question that it has.

II. *Grutter v. Bollinger* must be overruled.

Although racial affirmative action violates the Fourteenth Amendment under an analysis of its original meaning, *stare decisis* must be given due consideration because of the precedential weight of *Grutter*. However, *stare decisis* is "not an inexorable command" and therefore it must be set aside to overrule precedent under proper circumstances. *Pearson v. Callahan,* 555 U.S. 223, 233 (2009). This Court has provided a framework for the proper application of *stare decisis* in several recent cases: *Citizens United v. FEC,* 558 U.S. 310 (2010)*, Franchise Tax Bd. of Calif. v. Hyatt,* 139 S.Ct. 1485 (2019), and *Dobbs v. Jackson Women's Health Org.,* 597 U.S. ___ (2022). In determining whether to overturn a prior decision, this Court has recognized "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the

absence of concrete reliance" as relevant factors. *Id.,* slip. op., at 43. These factors ought to be applied to this case, and they will indicate that *Grutter* was grievously wrong, unworkable, extraordinarily disruptive to the law, and without reliance. As is the case here, *stare decisis* is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment," and thus it cannot be prioritized over correct interpretation. *Agostini v. Felton*, 521 U. S. 203, 235 (1997). "[S]tare decisis is not an end in itself," and it cannot salvage *Grutter* when all indications advise its reversal. *Citizens United,* 558 U.S. at 378 (Roberts, C.J., concurring).

A. The diversity interest *Grutter* recognizes is not compelling.

As demonstrated in Part I, *Grutter* is wholly inconsistent with post-14th Amendment history and this Court's precedents that interpret the same amendment. In *Grutter*, this Court approved of the supposed educational benefit that having a "critical mass" of minority students on campus produces. *Grutter* justified this interest by claiming that "diversity" prepares students for the "increasingly diverse communities and workplaces that await them," promotes "cross-racial understanding," establishes "legitimacy in the eyes of the citizenry" by making clear that top colleges and universities are "visibly open" to all races, and helps prevent minority students from "feel[ing] isolated." *Grutter*, 539 U.S. at 332.

Not only do these interests suggest a scheme of proportional representation, which this Court rejected in *Parents Involved* (enjoining a public school district's use of race to assign students to schools), but they operate as "lesson[s] of life" not unique to the higher education context. *Grutter,* 539 U.S. at 347 (Scalia, J., dissenting). If the Court can justify racial discrimination in this circumstance, there is no reason why these same interests cannot allow for racial discrimination in contracting, K-12 education, or any other context. In *Parents Involved* and *Adarand*, this Court rejected this discrimination, recognizing the plague on American society it fuels. Retention of *Grutter* requires retention of fundamental inconsistencies across this Court's Equal Protection Clause case law in other contexts. This Court should overturn *Grutter* to prevent the watering down of strict scrutiny that could upset other areas of law.

Furthermore, the very racial classifications that UNC uses in service of achieving diversity are arbitrary and a poor justification for the suspension of equal protection. For example, UNC groups East Asians, Koreans, South Asians, Pakistanis, and other groups as identical, stereotypical "Asians." "The term 'Asian'...is extremely broad and masks important variations by country of origin, religion, language, diet, and other factors." Bhopal, *Migration, Ethnicity, Race, and Health in Multicultural Societies* at 18 (2d ed. 2014). Much the same can be said about the 'white' racial classification that deems individuals with Norwegian ancestry identical to individuals with Iranian ancestry. Justice Alito correctly recognized that "[i]t [is] ludicrous to suggest that all of these

students have similar backgrounds and similar ideas and experiences to share." *Fisher II*, 79 U.S. at 414. The classifications UNC uses do not serve the interest of diversity itself, and only inflame racism. Put simply, an interest in diversity cannot be compelling if it is defined by racial classifications that are overbroad, arbitrary, and excessively stereotypical. Such "segregation in public education is not reasonably related to any proper governmental objective," and it must therefore fail strict scrutiny. *Bolling v. Sharpe,* 347 U.S. 497, 500 (1954).

B. Grutter's standards for reviewing affirmative action are unworkable.

Under *Grutter,* universities are able to do this with deference unparalleled in a strict scrutiny context. *Fischer II* confirmed that under *Grutter,* "[o]nce…a university gives 'a reasoned, principled explanation' for its decision [to pursue the educational benefits of diversity], deference must be given 'to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.'" *Fisher II,* 579 U.S. 365*,* 376, quoting *Fisher I,* 470 U.S. 297*,* 310-311 (2013) (internal quotation marks and citation omitted). This system constitutionalizes a paradox: the alleged discriminator, the university, gets to define for itself how much racial discrimination they feel necessary to achieve their own vague educational goals and how they intend to discriminate. This malleable standard certainly betrays the Constitution's promise of equal protection under law.

Deference to a university's justification for racial affirmative action is contradictory to the test of strict scrutiny itself. When after careful analysis, a government policy appears to contradict the Equal Protection Clause as affirmative action does, there must be a "narrower scope" for any deference in this case and it must be the burden of the state to prove their policy may pass muster. *Carolene Products,* 304 U.S. at 152 n.4. *Grutter* effectively shifted this burden by allowing universities to define "compelling interest" for themselves and pass narrow tailoring standards by declaring their policy "holistic." *Grutter* went beyond the "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits," exceeding these limits for the sake of greater acquiescence to the whims of admissions officers and deans. *Grutter,* 539 U.S. at 328.

Grutter did not settle the constitutional issue of affirmative action, and has merely caused more ambiguity and confusion in the discipline of equal protection. The "*Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation," and gives no clear procedure or standards for lower courts to follow. *Grutter,* 539 U.S. at 348 (Scalia, J., dissenting). How are judges to know whether a policy is sufficiently "holistic" or "individualized" to survive strict scrutiny versus being a simple "quota?" This system places immense burdens on the judiciary and on litigants, and provides no consistent answers. Such methodology is hardly a "workable" judicial standard.

Schools such as UNC are unable to definitively state what will have to happen for a "critical mass" of minority students to be reached on campus. The *Grutter* opinion does not articulate objective parameters for achieving a "critical mass," perhaps because courts are not well equipped to examine the terms of social science experiments. Instead, since universities rely on a slew of unspecific and subjective criteria, it is nearly impossible for lower courts to meaningfully review these types of policies without venturing into an array of studies and simulations about race-neutral alternatives. This results in a factually intensive inquiry which lower courts must engage in for eternity—hardly a "workable" system.

C. *Grutter* has spawned significant negative real world consequences.

Grutter, by deviating from this Court's principle of racial neutrality, has promoted more explicit racial classifications in education. *Since Grutter*, racially exclusionary classes, spaces, and graduations have propagated throughout college campuses all across this country. Resting on the same diversity rationale as *Grutter*, DEI ("Diversity, Equity, and Inclusion") policies have promoted anti-racism, a concept that suggests "[t]he only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination." Kendi, *How to Be an Antiracist* 13 (New York, One World, 2019). By using race as part of their admissions regimes, universities send a message that race matters. Students are taught to carry this

message with them, in their hearts and minds, to campus and post-graduation.

Grutter has perpetuated racial stereotypes. This Court recognized in *Palmore*, and affirmed in *Miller*, that "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." *Palmore v. Sidoti,* 466 U.S. at 432 (1984), *see also Miller v. Johnson,* 515 U.S. at 912 (1995). This has been born true not only in the record, which amply demonstrates UNC admissions officers communicating to put an applicant's race at the forefront of their discussion, but in our nation's university admissions system at large. The Princeton Review guide serves as a powerful illustration of this, stating that Asian American university applicants ought to "get involved in activities other than math club, chess club, and computer club." *Cracking College Admissions* at 174 (2nd ed. 2004). A university admissions system that has spawned an industry of counseling which instructs students to hide their true interests and passions, if consistent with racial stereotypes, is not a system worth preserving. For an Asian American applying to a prestigious university like UNC, pursuing an interest in pursuing a career as a doctor or an engineer is chastised for no reason other than the student's race.

Affirmative action serves as a "stigma" against underrepresented minorities on college campuses and in greater society. As Justice Thomas aptly described in *Grutter*, affirmative action programs result in minorities being "tarred as undeserving," regardless of

whether those stigmatized are actually the 'beneficiaries' of racial discrimination." *Grutter,* 539 U.S. at 373 (Thomas, J., dissenting). However well intentioned, affirmative action policies, sold to the Court in *Grutter* as temporary measures necessary in furtherance of equality, have their inverse effect: they serve to denigrate minority accomplishments in the public perception.

D. There are no reliance interests against overruling *Grutter*.

The importance of reliance interests cannot "outweigh the interest we all share in the preservation of our constitutionally promised liberties" *Ramos v. Louisiana,* 590 U.S. ___ (slip. op. at 25) (2020). Nowhere is this more important than in cases dealing with racial classifications. "This Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia,* 388 U.S. 1 at 11 (1967), quoting *Hirabayashi v. U.S.,* 320 U.S. at 100 (1943). Accordingly, this Court has not hesitated to overturn precedents that permit racial classifications. *See Brown v. Bd. of Educ.,* 347 U.S. 483 (overruling *Plessy v. Ferguson*, *Cumming v. Richmond County Bd. of Educ., Berea College v. Kentucky, Gong Lum v. Rice*); *Batson v. Kentucky,* 476 U.S. 79 (1986) (overruling *Swain v. Alabama*); *Trump v. Hawaii,* 138 S.Ct. 2392 (2018) (overruling *Korematsu v. United States*). When erroneous precedent approves of racial classifications that both lack support in this Court's case law and works to erode "the fundamental

principle of equal protection as a personal right," "the principle must prevail" over its "misapplications." *Adarand,* 200 U.S. at 235.

The *Grutter* majority cautioned that a termination point for affirmative action policies is necessary to "assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Grutter,* 539 U.S. at 342. Accordingly, the Court, "see[ing] no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point," expected that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" *Id.,* at 342-343. No legitimate reliance interests can rest with a decision that contains its "own self-destruct mechanism" *Id.,* at 394 (Kennedy, J., dissenting).

Even if this Court is unwilling to view *Grutter*'s 25-year window as binding, *Grutter* recognized that the test of the success of university affirmative action policies would be "their efficacy in eliminating the need for any racial or ethnic preferences at all." *Grutter,* 539 U.S. at 343. Universities have been on notice since the time of *Grutter* that their admissions policies must continuously diminish the salience of racial consideration and come to an end. That there is still more work to be done in furthering racial equality in this country is not a sign that universities need more time, but instead a glaring indication that *Grutter* failed at its central mission.

Preserving *Grutter*'s race-conscious regime in the face of this failure would fundamentally alter the promise of the opinion. By authorizing UNC to continue on this divisive path, while it has not fulfilled its commitment to diminishing the role race plays in admissions, would fundamentally alter the character of *Grutter*. *Stare decisis* does not compel such a result. As this Court reiterated just last term, "*stare decisis* is 'a doctrine of preservation, not transformation.'" *Dobbs,* 597 U.S. ___ (slip. Op., at 73) (2022), quoting *Citizens United,* 558 U.S. at 384 (2010) (Roberts, C.J., concurring). It is of the utmost importance that the principle of equality be preserved, not transformed into the imposition of racial distinction and discrimination.

III. UNC's practice fails *Grutter's* narrow tailoring requirement.

In *Grutter*, the University of Michigan utilized a holistic admissions system that included a consideration of race, just as UNC does here. To pass strict scrutiny's second prong, *Grutter* states that universities must narrowly tailor their admissions policies to their interest in a "critical mass." Even though the *Grutter* opinion established a deferential standard for universities, stating that "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative…[or] require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups," UNC still fails this test. 539 U.S. at 339.

Before the district court, SFFA presented three race-neutral alternatives that would produce a diverse class: Simulations, 3, 8, and 13. UNC.JA.1069. These models are as detailed as realistically possible. Since they are grounded in data from 162,000 real UNC applicants who received the school's holistic ratings, they are far from just a "conceivable" alternative, but a practical one. UNC.JA.556-57.

UNC does not prove that these alternatives would harm their ability "to provide educational opportunities to members of all racial groups," instead objecting to these alternatives on the basis that they do not maintain the school's "actual levels" of racial diversity. UNC.JA.883-84. The notion that a race-neutral alternative is unworkable because it does not result in the same levels of racial diversity as a status quo race conscious plan cannot be correct. If it were to be, it would reinforce a racial quota, which *Bakke* squarely forbids.

UNC has adamantly refused to use a race-neutral alternative to facilitate diversity despite SFFA's reasonable recommendation of many such alternatives. If the use of arbitrary racial classifications to further a dubious state interest with plenty of colorblind alternatives is indeed narrow tailoring, then "narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Hill v. Colorado*, 530 U.S. at 749 (2000) (Scalia, J., dissenting). If that is narrow tailoring, everything is.

* * *

"The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *City of Richmond v. J.A. Croson Co.,* 488 U. S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in judgment). To adhere to the Constitutional imperative of racial neutrality, this Court must overrule *Grutter* and hold that race-based admissions programs are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. *Stare decisis* imposes no barrier to this step, and no affirmative action program carries the compelling interest and narrow tailoring needed to pass strict scrutiny The time has come for this Court to rid our law and society of the divisive poison that is treating people not as individuals, but rather with regard to their race.

"It is a sordid business, this divvying us up by race." *LULAC v. Perry,* 548 U.S. at 511 (2006). For good reason the Fourteenth Amendment's Framers prohibited states from undertaking this business. State Universities must comply with their demands and cease the use of racial affirmative action immediately. "In the eyes of government, we are just one race here. It is American." *Adarand,* 200 U.S. at 239 (Scalia, J., concurring in part and concurring in judgment). Therefore, our Constitution "neither knows nor tolerates classes among citizens." *Plessy,* 163 U.S. at 559 (Harlan, J., dissenting). "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," not to continue the repugnant practice of discrimination as affirmative action does. *Parents Involved,* 551 U.S. at 748. This is

the mandate of the Fourteenth Amendment, the law of *Brown,* and the demand of equality. If this nation is to fulfill the promise of our colorblind constitution, we must stop discriminating on the basis of race.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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