No. 20-843

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

1. Whether the Court should overrule *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016).
2. Whether the district court correctly applied this Court's precedents when it concluded that the University carried its burden to show that it has engaged in serious, good-faith consideration of workable race-neutral alternatives to its holistic, race-conscious admissions process.

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SUMMARY OF ARGUMENT

As Justice Harlan said in his *Plessy v. Ferguson* dissent, "Every true man has pride of race, and [...] privilege to express such pride." *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting). Justice Harlan traced this right from the Thirteenth Amendment, which "not only struck down the institution of slavery" but also "prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude," to the Fourteenth Amendment, "which added greatly to the dignity and glory of American citizenship." *Id*. at 555. In most areas of law, this Court has given life to these broad principles embedded in the citizenship, privileges and immunities, and equal protection clauses of the Fourteenth Amendment. See *Loving v. Virginia*, 388 U.S. 1, 9-11 (1967); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 489 (1954). But in both *Bakke* and *Grutter*, an ambiguous concept of diversity was allowed to overpower the need for racial equality. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003). As such, both cases should be overruled.

Alternatively, this court should find the University of North Carolina engages in race-based admissions and has not adequately considered race-neutral alternatives. *Fisher I* properly understood *Grutter* and *Bakke* to promote strict scrutiny, meaning "the University receives no deference." *Fisher v. University of Texas*, 570 U.S. 297, 311 (2013) (*Fisher I).* The court should reaffirm this understanding of its precedents.

ARGUMENT

I. The 14th Amendment requires race-blind admissions

A. The 14th Amendment requires racial classification to pass strict scrutiny

"Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." *City of Richmond v. J. A. Croson Company*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (citing A. Bickel, *The Morality of Consent* 133 (1975)). This is why "in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

Prohibition against classification by race, not mechanical prohibition of de jure inequality is the core of the Fourteenth Amendment. This comes directly from the citizenship clause: "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." Amdt. 14, §1, cl. 1. This clause must be read against the backdrop of *Dred Scott*, where Chief Justice Taney declared "free blacks were 'not intended to be included… under the word 'citizens' in the Constitution,' and therefore could 'claim none of the rights and privileges which that instrument provides.'" *United States v. Vaello Madero*, 596 U.S. __ (2022) (Thomas, J., concurring) (citing R. Williams, *Originalism and the*

Other Desegregation Decision, 99 Va. L. Rev. 493, 404 (2013)). The Fourteenth Amendment "connected citizenship with equality." *Id.* Moreover, it does so in a robust way, and "the most avid proponents of the post-War Amendments [Amendments 13,14, and 15] undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.'" *Brown*, 347 U.S. at 489.

The difference between a rule against inequality and a rule against caste is appreciable in two of the court's most famous cases. First, *Brown v. Board of Education* rejected the doctrine of "separate but equal" in the context of public education. It explained "to separate them [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Loving v. Virginia* similarly explained, in the context of interracial marriage, "this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving*, 388 U.S. at 11 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). It rejected Virginia's argument that "equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished." *Id.* at 10.

Classification implies a superior race, which "demeans us all." *Grutter*, 539 U.S. at 349 (Thomas, J., concurring in part and dissenting in part). That the harm

is present even when two groups may not receive materially different privileges is why racial classification always must "be subjected to the 'most rigid scrutiny.'" *Loving*, 388 U.S. at 11.

B. Historical practice does not conflict with this principle against classification

Scholars have pointed to various race-conscious laws passed in the immediate aftermath of the Fourteenth Amendment to argue the Amendment's original meaning permits affirmative action. These arguments are not new. The Court rejected similar arguments almost 50 years ago in *Loving*: "Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill [...] and the Civil Rights Act of 1866 [...] While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes, and not to the broader, organic purpose of a constitutional amendment." *Id.* at 9. For the court to reverse that judgment in the context of affirmative action would throw various past decisions into question because "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Bakke*, 438 U.S. at 289-90. But even taken at face value, the actions of Congress during reconstruction can be distinguished in two ways. First, they were by and large passed to "remedy state-enforced slavery." *Parents Involved in Community Schools v Seattle School Dist. No. 1*, 551 U.S. 701, 772 n. 19 (2007) (Thomas, J.,

concurring). Second, they were federal laws, which the Fourteenth Amendment explicitly treats differently than state laws.

One set of statutes often referred to are the two Freedman Bureau's Acts, and another law for paying African American soldiers. M. Rappaport, *Originalism and the Colorblind Constitution*, 72 Notre Dame L. Rev. 71 (2013) (citing C. Sunstein, *Radicals in Robes* 139-40 (2005)). But the original Freedman Bureau's subjects were limited to "refugees and freedmen from rebel states." University of Maryland History Department, *Law Creating the Freedmen's Bureau*, Chap 40 §1. Even though these refugees and freedmen were black, this law does not draw a racial classification. It classifies by the status of being a past slave. The "constitutionality of a classification based on previous condition of servitude would depend on whether it was being used as a subterfuge for racial purposes or to promote a legitimate public purpose." Rappaport at 81.

Another set of statutes–one said to appropriate money for "the relief of destitute colored women and children," *see* Act of July 28, 1866, ch. 296, 14 Stat. 310, one providing money to destitute "colored" persons in the District of Columbia, *see* Resolution of Mar. 16, 1867, No 4, 15 Stat 20, and special procedures for awarding prize money to "colored" soldiers and sailors, *see* Act of Mar. 3, 1873, ch 227, 17 Stat 510, 528–were "explicitly race-conscious laws." Rappaport at 82 (citing Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427 (1997)). But there are caveats. First, the funds for colored women and children were actually funds for the National Association for the Relief of Destitute Colored Women

and Children, a private association concerned about the "plight of former slaves" that Congress had chartered in 1863. *Id.* at 103 (citing Act of July 28, 1866, ch. 296, 14 Stat. 310, 317; Act of Feb. 14, 1863, ch. 33, 12 Stat. 650). The standard for funding an organization would be "discriminatory intent," and "there is no evidence that the federal government had a discriminatory intent." *Id.* Second, the 1867 law for D.C. residents was preceded by a similar law the year before. That act, criticized because "it discriminated based on race because there were also white persons who were destitute" was modified "to allow the funds to be provided to all destitute persons irrespective of color." *Id.* at 104 (citing Cong. Globe, 39th Cong., 1st Sess. 1507-08 (1866). Though the 1867 act limited funding to colored persons, the full history suggests Congress did have worries about race-conscious measures. Finally, the fifth statute did draw a "clear distinction based on race," but it plausibly satisfied "a moderate version of strict scrutiny." *Id* at 110. It seems Congress reasonably believed black serviceman who paid agents to "secure bounties, pensions, and other payments" were "much more likely to overpay their agents than whites" and imposing price controls, for which "it is not clear that Congress had a better filter than race," was the best solution to the problem.

Perhaps the most important caveat to all these laws, however, is that they were passed by Congress. The Fourteenth Amendment states "No *state* shall [...] deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, §1. And while there are good reasons to apply this same requirement to the federal government, *see Bolling v. Sharpe*, 347 U.S. 497 (1954) and *United States v. Vaello Madero*, 596 U.S. __

(2022) (Thomas, J., concurring), it seems "the Congress that proposed the Amendment thought that an equality principle should be applied to the states but not to the federal government." Rappaport at 90. For them, the "federal government had shown itself to be a much better protector of the rights of minorities than had the states," and the Union Army was "part of the solution to the attacks on the rights of blacks." *Id.* If the Congress thought the states were held to a different standard, then the acts of the Congress do not give insight into what they thought the appropriate standard for states was.

C. Diversity cannot be a compelling interest

While both *Grutter* and *Bakke* agree with various parts of the analysis above, *see Grutter*, 539 U.S. at 326 ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'); *Bakke*, 438 U.S. at 291 (citing *Hirabayashi*, 320 U.S. at 100) ("'[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect [...] It is to say that courts must subject them to the most rigid scrutiny.'"), their assertions that diversity is a compelling interest that can justify racial classifications are wrong and should be overruled.

Behind the 14th amendment is "judicial hostility to partial or special laws [that] had deep roots in Anglo-American legal and political thought." Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 255 (1997). From John Locke's Second Treatise that argued for "'one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at

Plough'" to Jeffersonian Republicans who "attacked the Federalists for granting special privileges to business interests, to Jacksonian "opposition to legislative grants of monopolies," equal rights were part of the Republican tradition. *Id.* at 255-57. While Saunders herself views this history as allowing racially discriminatory laws with "an adequate public purpose," a few revisions suggest a stricter scrutiny. Rappaport at 74. Most importantly, the Civil Rights Act of 1866, passed by Congress at the same time as the Fourteenth Amendment, "did not simply prohibit laws that discriminated on the basis of race that did not have an adequate public purpose justification. Rather, it prohibited all such discrimination." *Id.* at 130 (citing Civil Rights Act of 1866, ch. 31, 14 Stat. 27). It seems "that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence" can be compelling interests. *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).

But diversity as a compelling interest is not just wrong, it is "egregiously wrong," *see Dobbs v. Jackson Women's Health Organization*, 597 U.S. __ (2022), because racial diversity for its own sake is "simply the forbidden interest in racial balancing." *Grutter*, 539 U.S. at 355 (Thomas, J., concurring in part and dissenting in part). And "outright racial balancing" "is patently unconstitutional." *Grutter*, 539 U.S. at 330. *Grutter* attempts to distinguish the concept of "enroll[ing] a 'critical mass' of minority students" from racial balancing "by reference to the educational benefits that diversity is designed to produce." But that is weak reasoning; if there are underlying benefits behind diversity, those should be the compelling interest. Using

diversity as a screen is a "we know it when we see it approach" not "capable of judicial application." *Grutter*, 539 U.S. at 357 (Thomas, J., concurring in part and dissenting in part).

Moreover, both *Bakke* and *Grutter* make the second mistake of deferring to universities: "Justice Powell reasoned that by claiming 'the right to select those students who will contribute the most to the robust exchange of ideas,' a university "seeks to achieve a goal that is of paramount importance in the fulfillment of its mission. [...] Our conclusion that the Law School has a compelling interest in a diverse student body is at the heart of the Law School's proper institutional missions, and that 'good faith' on the part of the university is 'presumed' absent 'a showing to the contrary.'" *Grutter*, 539 U.S. at 329 (citing *Bakke* 438 U.S. at 313-319). But "a marginal improvement in legal education cannot justify racial discrimination." *Grutter*, 539 U.S. at 361 (Thomas, J., concurring in part and dissenting in part). And strict scrutiny cannot be a deferential standard no matter the context.

D. Reliance interests are especially weak

Finally, it is important to consider the *stare decisis* factors as "overruling a precedent is a serious matter." *Dobbs*, 597 U.S. However, though *Grutter* is a precedent of this court, "*stare decisis* is 'not an inexorable command.'" *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). The previous section demonstrated a few factors that weigh in favor of overruling *Grutter*: "the nature of their error, the quality of their reasoning, and the 'workability' of

the rules they imposed on the country." *Id.* But *Grutter* is perhaps an opinion that welcomes its own undoing, and as such, this court should be extremely reluctant to uphold it on *stare decisis* grounds.

A university relying on race-conscious admissions was forewarned "all race-conscious admissions programs [must] have a termination point." *Grutter*, 539 U.S. at 342. Indeed, *Grutter* seems to assume that all universities will constantly scrutinize their admissions program to see if an alternative to race-conscious admissions is "practicable." *Id.* at 343. In this context, the famous line, "We expect 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," *Id.*, is a warning to any university hoping to rely on *Grutter*.

Moreover, the 4 paragraphs preceding that proclamation can be read as a deep uneasiness on the part of the justices in the majority with racial preferences. It starts with a deep humility: "We are mindful, however, that '[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.'" *Id.* at 341 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Petitioner's view is that *Grutter's* "durational requirement" that "can be met by sunset provisions in race-conscious admissions policies and periodic reviews" was a compromise to recognize the deep roots racial equality has in our country's history and Constitution. *Id.* at 342. To stubbornly apply *Grutter* even if this court finds it wrong would betray *Grutter's* recognition that "[e]nshrining a permanent

justification for racial preferences would offend this fundamental equal protection principle." *Id*.

II. Under *Grutter*, the University did not properly consider race-neutral alternatives

If the court declines to overrule *Grutter* and *Bakke*, it can still reverse by concluding that UNC has not "adequately considered the available alternatives," *see Grutter*, 539 U.S. at 309, to race-conscious admissions in achieving the compelling interest of diversity.

First, although *Grutter* emphasizes that the requirement for UNC is not "exhaustion of every conceivable race-neutral alternative," *Id.*, the standard should still be quite high. First *Grutter* itself emphasizes that strict scrutiny is the correct standard for evaluating race-conscious measures and that "such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Id.* at 326. And in the subsequent Fisher case, 7 justices emphasized that *Grutter*'s discussion of deference only applies in "establish[ing] that its [the University's] goal of diversity is consistent with strict scrutiny." *Fisher I*, 570 U.S. at 311. In determining if "the means chosen by the University to attain diversity are narrowly tailored to that goal [...] the University receives no deference. *Id.*

Thus, under *Grutter*, the court should give deference to a statement submitted by Provost for the University of North Carolina, James Dean, insofar as it defines diversity as a compelling interest for UNC: "Living and learning within an environment of diverse classmates [...] encourage the vibrant exchange of ideas,

perspectives, and visions, especially when all feel included and encouraged to share their points of view." It should not defer to UNC's belief that its method is narrowly tailored for achieving diversity nor that it has adequately considered race-neutral alternatives.

UNC has not adequately considered race-neutral alternatives. First, UNC could race preferences with socioeconomic preferences. The "Modified Hoxby Simulation" proposed by UNC's expert along these lines would maintain racial diversity while also increasing socioeconomic diversity, likely furthering UNC's professed goal of learning within a diverse environment. UNC.JA 576-79, 1157. SFFA also presented three alternatives that would eliminate preferences like legacy status that predominantly help wealthy whites. These also maintained racial diversity, increased socioeconomic diversity, while academic excellence of admittees remained constant. *Id.* at 1147, 1149, 1151. Finally, percentage plans similar to those used by the University of Texas system achieved similar results. *Id.* at 1153, 1155.

CONCLUSION

This Court should reverse the decision below.

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