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 PETITIONER

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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 use of race in admissions pursuant to a compelling interest of diversity is unconstitutional under the 14th Amendment, and *Grutter v. Bollinger, 539 US 306 (2003)* was therefore wrongly decided and should be overturned.

Grutter improperly applies strict scrutiny by removing the burden of proof from the university. While the court claims to apply strict scrutiny, they require neither a compelling interest nor a narrowly tailored scheme. The court allows the pursuit of the "educational benefits" of "a diverse student body," at odds with decades of precedent that allow only a remedial interest. *Grutter* also flouts all precedent in its supposed application of the narrowly tailored standard, allowing the university to use race where a race-neutral plan might work. The court also pays lip service to the idea of a 25-year time limit on racially discriminatory affirmative action but leaves it to the university to regulate their own program.

UNC's program fails strict scrutiny. Its supposed interest in campus diversity is vague and uncompelling, especially when contrasted with established compelling interests. UNC also fails to demonstrate that it has a true interest in diversity, given that it has an almost entirely upper-class enrollment. UNC's scheme is not narrowly tailored, because there exist multiple successful race-neutral schemes.

The dissolution of racially discriminatory affirmative action programs is the natural extension of the cultural trend away from racial classification. The doctrine of racial classification has evolved past *Plessy* and into *Brown*, a trend that should be followed in all cases

addressing racial classification.

ARGUMENT

I. *Grutter* does not properly apply strict scrutiny

In *Grutter*, O'Conner writes that the court applies "strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." However, she then goes on to say that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." Additionally, "the Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable," and the "conclusion that the Law School has a compelling interest in a diverse student body is informed by our view … that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."" *Grutter* also allows the use of 'critical mass,' which is simply a thinly veiled quota.

Prior to the *Regents of the University of California v. Bakke, 438 US 265 (1978)* ruling, affirmative action schemes of any form were only permitted if the compelling interest was in remedial action. Even the Freedman's Bureau's aid was focused on "the relief of freedmen and refugees," not all Black Americans. Starting with *Local 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986)* the court ruled that racial affirmative action "may be appropriate where an employer or a labor union has engaged in persistent or egregious

discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination," and made a similar decision in *United States v. Paradise*, *480 U.S. 149 (1987).* The court later held in *City of Richmond v. J. A. Croson Co. 488 U.S. 469 (1989)* that even remedial programs are not necessarily constitutional without evidence of governmental discrimination. The court included in the dicta that "[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility," and in *Wygant v. Jackson Bd. of Educ. 476 U.S. 267 (1986)* the court held that "societal discrimination alone is insufficient to justify a racial classification," repudiating "the role model theory … [that had] no logical stopping point," much like the critical mass theory. Even *Grutter* admits that "enrolling a "critical mass" of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional," but goes on to hold that the university "defines its critical mass concept by reference to the … benefits that diversity is designed to produce." However, the group of which the affirmative action scheme was designed to create a critical mass was delineated on purely racial lines. Additionally, any proponent of affirmative action to achieve a 'critical mass' of minority students would agree that a 1% enrollment is too small to be a critical mass, and a 60% enrollment exceeds critical mass. It then follows that there is some percentage or range of percentages that the university is aiming for, in the same manner that one might aim for a quota.

The *Grutter* court not only allows universities

to pursue racial classification even when race-neutral options are available, it abdicates the idea that the burden of proof of a compelling interest is on a university. The court even allows for the use of a race-based scheme because race-neutral admissions policies might harm the university's prestigious standing. There cannot possibly be a compelling state interest in the university maintaining its status while still admitting an elevated level of minority admission, given the fact that there isn't necessarily a compelling interest in the existence of a university at all. This approach of permissiveness masked as 'strict scrutiny' patently runs counter to decades of precedent.

An initial application of affirmative action in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) ruled that for an affirmative action scheme to be narrowly tailored, "five factors may be relevant: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or workforce; … and (v) the effect of the remedy upon innocent third parties." In *Grutter*, none of the factors is properly considered. The court ignores potentially effective race-neutral alternative remedies. The court fails to set a concrete time limit for the university's affirmative action scheme, saying only that "[t[he Court takes the Law School at its word that it … will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the

interest approved today," and leaving the university to decide whether its own meddling in racial classification has become unnecessary. The court sets no rules on the relationship between the artificially inflated minority enrollment and the state's minority population, leaving the door open for the university to create a minority enrollment that far exceeds the state's minority population if they so desired. The court did not properly consider the effect of the university's scheme on innocent applicants who are members of non-favored groups. The number of acceptances is finite, and a degree from a prestigious university often has a significant impact on a person's career. And yet, the court allowed the scheme, which necessarily results in fewer acceptances for innocent applicants who are members of non-favored groups.

II. UNC's affirmative action scheme fails strict scrutiny

A. UNC does not have a compelling interest in diversity

UNC's interest in diversity is, like social discrimination in *Wygant*, "is too amorphous a basis for imposing a racially classified remedy." Constitutionally compelling interests in racially classification are necessarily extreme. As it was so aptly put in Loving v. Virginia, 388 U.S. 1 (1967), racial classification is "odious to a free people." The origin of the strict scrutiny standard, *Korematsu v. United States*, *323 U.S. 214 (1944),* had the interest of protecting the United States "during a state of war

with Japan and as a protection against espionage and sabotage." Early examples of racial classification in education by the Freedman's Bureau were in response to the twin crises of formerly enslaved persons taking on a pseudo-refugee status and the need to rectify the horrors of slavery. In comparison, UNC's interest is both trivial and so difficult to define it justifies the continuation of their affirmative action program in perpetuity.

UNC claims to have a compelling interest in the educational benefits of a diverse campus, which they create by admitting a 'critical mass' of minority students. However, UNC fails to foster diversity in any way that is not racial. In terms of economic status, UNC has very little diversity. It is in the 94th percentile for enrollment by students with incomes in the top 1%, in the 95th percentile for students with incomes in the top 20%, and in the 11th percentile for students with incomes in the bottom 20%. In pursuing only racial diversity and neglecting socioeconomic diversity, UNC betrays the fact that it doesn't truly have a demonstrated interest in diversity, but an unconstitutional preoccupation with race.

B. UNC's scheme has viable race-neutral alternatives, and so fails to be narrowly tailored

Respondents claim that "no available race-neutral alternative would allow the University to achieve its compelling interest nearly as well as race conscious strategies." This is untrue, and many universities have been able to create similar levels of

minority enrollment with and without race-based affirmative action policies. The University of Texas maintained about the same ratio of minority population to enrollment during and after the state of Texas' affirmative action ban. Texas A&M likewise maintained about the same ratio of minority population to enrollment before and after the statewide affirmative action ban. The same is true for Hispanic enrollment at Florida State, minority enrollment at the University of Florida, Hispanic enrollment at Michigan State, minority enrollment at Washington State, and minority enrollment at the University of Washington. There are multiple ways to structure admissions which increase the number of minority admittees without unconstitutionally discriminating based on race. A Hoxby plan, which sets aside seats for students of a certain socioeconomic status, or a top 10% plan, would increase the number of minority admittees without touching race.

III. The turn away from race-based affirmative action is the natural extension of the same cultural trend that ended segregation.

The Supreme Court's post-14th Amendment history is littered with reversals of prior discriminatory rulings. In 1896, the court ruled in *Plessy v Ferguson 163 US 537 (1896)* that 'separate but equal' segregation was perfectly constitutional, holding "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other …. The most

common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power." This, of course, was absolutely false, with contemporary commenters and activists rallying behind the arguments of the Comité des Citoyens, that "the sun did not divide off a portion of its rays for one class and a portion for the other, a part of the whites and a part for the blacks; but shone equally for everybody." The Appeal even published "that [the Jim Crow law] is unconstitutional and in conflict with the fundamental principles of free government there is no more doubt than that the sun shines." Following the Plessy ruling, Professor William H H Hart, a Black lawyer, gave a speech saying, as transcribed in the Appeal, "there is no sense in depending for redress upon the fourteenth amendment to the Constitution. The Supreme Court of the United States doesn't like it, and the white people of this country do not." However, he also correctly predicted that "some day the amendment will come into its heritage and grow, for it is the magna carta of modern times." Unfortunately, the fourteenth amendment took half a century to begin to come into its heritage with the decision in *Brown v. Board of Education of Topeka (1), 347 US 483 (1954)* and the path to that decision was long. *Gong Lum v. Rice* once again upheld the constitutionality of segregating schools. However, in *Sweatt v Painter*, *339 US 629 (1950),* the court ordered the University of Texas Law School to admit an otherwise qualified Black applicant, Heman Sweatt, because the segregated school would not offer him an education equal to that available at the

University of Texas Law School. *McLaurin v Oklahoma State Regents, 339 U.S. 637 (1950)* was a similar case in which George McLaurin attended a school alongside white students but was required to be completely separate from his classmates. The court held that those requirements "deprive[d] him of his personal and present right to the equal protection of the laws, and the Fourteenth Amendment precludes such differences in treatment by the State based upon race." Although these rulings stopped short of overturning *Plessy*, they were a departure from the previous blanket acceptance of all segregation, and foreshadowed *Plessy's* fall.

In *Brown* it was held that "In approaching this problem [of segregation], we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

The evolution of affirmative action is very like the evolution of anti-voting discrimination legislation like section 4 of the Voting Rights Act of 1965. Upon the signing of the Voting Rights Act, President Johnson said "This act flows from a clear and simple wrong. Its only purpose is to right that wrong. Millions of Americans are denied the right to vote because of their color. This law will ensure them the right to vote." It sprung out of a legitimate, ongoing injustice, as did early freedmen's schools, which singled out Black Americans for education in a way that could be

compared to today's affirmative action schemes, as well as early affirmative action in hiring. In *South Carolina v. Katzenbach*, *383 U.S. 301 (1966),* the court recognized that the Voting Rights Act constituted "an uncommon exercise of congressional power…. but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate." The exceptional circumstances of widespread de jure segregation and voter suppression rendered section 4 of the Voting Rights Act constitutional at the time of its passage and the *Katzenbach* ruling. However, as ruled in *Shelby County v. Holder*, *570 U.S. 529 (2013),* "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions," and they have become an unconstitutional overreach. Similarly, the first uses of affirmative action in government hiring, triggered by Executive Order 10925, were meant to create nondiscriminatory workplaces in the face of rampant discrimination. Later uses of racial classification in hiring and firing, such as in *Wygant,* were ruled to be unconstitutional. The academic admissions sector must catch up. While early examples of affirmative action in admissions were considered constitutional, we live in a very different time, a time in which de jure segregation has been eliminated, and the effects of slavery have lessened greatly.

CONCLUSION

Based on both the weight of precedent and historical trends, The use of race in admissions pursuant to a compelling interest of diversity is unconstitutional under the 14th Amendment, and *Grutter v. Bollinger, 539 US 306 (2003)* was therefore wrongly decided and should be overturned.

Respectfully submitted,

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