No. 20-843

In the

Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS,
Petitioners,

v.

UNIVERSITY OF NORTH CAROLINA AND STUDENTS,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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[12/16/22]

QUESTION PRESENTED

Whether race conscious affirmative action is consistent with the Fourteenth Amendment to the United States Constitution.

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SUMMARY OF ARGUMENT

The Fourteenth Amendment prohibits racial classification, and the University of North Carolina's (UNC) race-based affirmative action violates the amendment.

The Framers worded the Amendment to be race-neutral, this principle is enforced by the Equal Protection Clause and the Immunities and Protection Clause forbids states from violating such principle, it was then embodied by The Freedmen's Bureau, a post-Civil War organization aimed to assist victims of the war.

The 1954 case, *Brown v. Board of Education* upheld the Fourteenth Amendment by ending race-based segregation. It adheres to the principles inlaid in the Civil Rights Act of 1875 and the circumstances in which it was enacted. 347 U.S. 483 *(1954)*.

Race-conscious affirmative action is neither narrowly tailored nor the least restrictive means to achieve the compelling interest and is, therefore, impermissible. To achieve the compelling interest, Grutter relies on the achievement of critical mass which is defined by loose terms and circular logic with seemingly no end to the plan.

Therefore, this Court should reverse and rule in favor of the petitioner.

ARGUMENT

I. The Fourteenth Amendment historically prohibits racial classification.

Race-neutral language permeates the Fourteenth Amendment; viewed within the context in which it was created, it becomes clear that the Framers were, in every way, intentional with such wording. To neglect this doctrine enshrined in the Constitution is to overlook the Framers' intent.

The two primary clauses depict the intended race-neutrality of the amendment: The Equal Protection Clause and the Privileges and Immunities Clause. Further, the Freedmen's Bureau—a post-war redress agency deemed constitutional by Congress—was race-neutral.

A. The Civil Rights Act of 1866 established the race neutrality of the Equal Protection Clause.

In order to overturn precedent on historical grounds, parties must satisfy the "burden" to show evidence that settles "the historical question with enough force" to displace precedent, and parties must point to "something more than ambiguous historical evidence." *Gamble v. United States*, 139 S.Ct. 1960, 1974 (2019).

The evidence that the Constitution prohibits consideration of race is unambiguous. The Equal Protection Clause grants citizenship to "all persons born or naturalized in the US," forbidding states to deny anyone "life, liberty, or property, without due process of law" or to deny anyone "equal protection of

the laws." U.S. Const. amend. XIV, § 1. The passage of its precursor, the Civil Rights Act of 1866 further points to the original intent of the Framers.

While it is widely understood that the Fourteenth Amendment was written solely in the context of remedying the effects of slavery, one crucial development often goes unnoticed: hostility towards Union men in the south—a key consideration of the Framers.

For the Committee of Fifteen—whose members also wrote the Fourteenth Amendment—protection of freed slaves, while was their main aim, was not their sole concern. Members also expressed concern over the persecution of white Unionists in the South. One member warned that "if former Confederates were disenfranchised, it would be a 'death blow to the Union men and the men of color in the South. They will have no protection, their rights will not be recognized.'" Ben J. B. Kendrick, The Journal Of The Joint Committee Of Fifteen On Reconstruction 410 (1914). Subsequent debates also raised that concern; John Martin Broomall of Pennsylvania was one Congressman who raised such concerns, asking, "are the evils complained of limited to the black man? …[W]hite men… are now being punished under color of State laws for refusing to commit treason against the United States." Cong. Globe, 39th Cong., 1st Sess. 1263 (1866).

After the drafting of the second version of the act after much debate, suggestions that Section One *only* protected black people were actively rejected. When asked if the amendment was "aimed simply and purely toward the protection of "American citizens of

African descent, Senator Bingham clarified during the congressional debate that, "it is proposed as well to protect the thousands… of loyal white citizens of the United States… and protect them also against banishment." *Id. 1065.*

Public understanding of the amendment mirrored that of the Framers; the Boston Daily Advertiser reported that "[t]he great object of the first section… was to compel the States to observe these guarantees, and to throw the same shield over the black man as over the white." *Reconstruction, os. Daily Advertiser, May 24, 1866.*

Seen in this light, it is reasonable to conclude that the Framers intentionally drafted an amendment in universal terms that would address the plight of *both* the Union Men and African Americans. Based on such dialogue that emphasizes that the rights enshrined in the Amendment extend beyond the black race, this court's remark in McDonald's, that "the 39th Congress was intent upon establishing in the federal law a *broader principle* than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves," was correct. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 296 (1976). (emphasis added)

B. The Privileges and Immunities Clause reinforces the doctrine of "no discrimination."

The Privileges and Immunities Clause is more explicit in prohibiting states from enacting unconstitutional law; it states that "no state shall

make or *enforce* any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. (emphasis added)

The term "abridge" can be interpreted to be synonymous to "discriminate." Steven G. Calabresi, Julia T. Rickert, *Originalism and Sex Discrimination,* 90 Texas Law Review 1 (2011). John Harrison, Reconstructing the Privileges or Immunities Clause, 101 The Yale Law Journal 1420-1422 (1992). The petitioner agrees with this analysis based on the context in which this clause was enacted.

The Fourteenth Amendment was, in part, a direct reaction to the Black Codes. Raoul Berger. *Selected Writings on the Constitution 185 (1987)* Lyman Trumbull of Illinois, who introduced the bill to the Senate—which initially stated that "there shall be *no discrimination* in civil rights or immunities among the inhabitants…on account of race, color, or previous condition of slavery;"—said in January of 1866 that the Black Codes "still impose upon [Negroes] . . . the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations." GLOBE 474-75, 476.

The notion that "abridges" equates to "discrimination" further proves true in comparison to the Fifteenth Amendment—ratified in 1868—which declares that "[t]he right of citizens of the United States to vote shall not be denied or *abridged* by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Mirroring the language in the Civil Rights Acts, the Fifteenth amendment forbade the

government from discriminating against citizens' rights to vote based on race—which, in reality, did not extend beyond white and black people as other races were largely prohibited by *citizenship* restrictions.

In interpreting what "privileges and immunities" encompassed, the majority opinion in *Corfield v. Coryell* held that the clause protected only certain "fundamental" rights. 6 Cas. 546, 552 (US circuit court 1823). Many Republicans, including Michigan Senator Jacob M. Howard, argued that it mainly excluded political privileges—primarily, the right to vote. CONG. GLOBE, 40th Cong., 3d Sess. 1003 (1869). Either reading does not exclude the "fundamental" rights like those listed in the 1866 Act.

Bound by this clause, the state cannot enforce race-based affirmative action, which clearly prohibits states from "abridg[ing]" or discriminating the "privileges or immunities" of non-beneficiary applicants. *Id*.

C. The Freedmen's Bureau upheld the doctrine of race neutrality.

The Freedmen's Bureau—subject to much debate even during the time of its enactment—is largely cited as the epitome of a race-based policy that gave certain privileges to African Americans. Upon closer examination, however, the Freedmen's Bureau was, at its core, not simply an Act to uplift former slaves but, more importantly, a race-neutral policy of which the primary purpose was to provide a remedy to *all* victims of war—the "freedmen *and* refugees", Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507, 507. (emphasis added)—encompassing all races. To

achieve this universal remedy, the Freedmen's Bureau relied on race neutrality.

Section 4 specifically authorized setting apart lands, "for the use of loyal refugees and freedmen." *Id*. The emphasis on "loyal" refugees again reflects the authors' concerns about the persecution of Union Men in the South. In fact, legislative history points to evidence that "refugees" were added in part because of concerns that the proposed legislation was seen by some as race-based. Paul Moreno, Racial Classifications and Reconstruction Legislation, 61 J. S. HIST. 276-277 (1995)

The Civil Rights Act of 1866, which was passed shortly before the Act of July 16, 1866, which extended the life of the Bureau, specifically prohibits distinction based on "previous conditions of servitude." *Id.* However, it is important to distinguish that the 1866 Act used slavery as a proxy for race while the Freedmen's Bureau did not. Since the 1866 Act was enacted largely as a response to the Black Codes, many of which used the term "freedmen" as a way to discriminate against African Americans, such as Mississippi's Black Codes which used the distinction "any freedman, free negro, or mulatto." Laws of the State of Mississippi (1865) In order to ensure that states did not use the classification "freedmen" as a proxy for race, the Act explicitly referred to previous slaves.

However, the Freedmen's Bureau had no reason to use the term as a proxy for race. Not only is the term not formally a racial category, but during the Civil War, 89% of the African American population were slaves. Joseph C. G. Kenndy, U.S. Dep. to the Interior, Population of the United States in 1860:

Compiled from the Original Returns of the Eighth Census 7 (1862). It is unreasonable for the Freedmen's Bureau—specifically intended to provide benefits to certain people—to use "previous conditions of servitude" as a category encompassing the entire African American population. Indeed, unlike proponents of modern affirmative action policies, the enactors of the Freedmen's Bureau understood that a person's race does not inform their experiences.

Petitioners acknowledge that there were race-conscious acts passed by Congress outside of the Freedmen's Bureau. However, the mere fact that statutes that provided race-based benefits were enacted does not prove anything about the original purpose of the Fourteenth Amendment. For, if race-based benefits inform the meaning, then the discriminatory laws against black people passed during the same period should be to the same extent. Michael B. Rappaport, *Originalism and the colorblind constitution*, 89 SSRN Electronic Journal 95 (2013). However, the Court does not conclude that laws that discriminate against African Americans help understand the meaning of the Fourteenth Amendment, for they are blatantly unconstitutional. Additionally, the amendment does not even apply to Congress; it was strictly directed toward states. *Id*. So, legislation passed during the Reconstruction Era is not dispositive as to the meaning of the Fourteenth Amendment; the best evidence available is the language of the Constitution itself and the institutions that it permitted, which prohibits racial classification.

II. Brown v. Board of Education upheld the principle of race neutrality.

In the landmark decision, Brown declared that "[s]egregation of children in public schools solely on the *basis of race* deprives children of the minority group of equal educational opportunities." (emphasis added) *Brown v. Board of Educ., 347 U.S. 483 (1954).* Evidently, Brown requires admission policies to be colorblind, dooming race-conscious programs.

This reading of Brown is consistent with the principles inlaid in the Civil Rights Act of 1875 and the circumstances in which it was enacted. According to *Reconstruction, America's unfinished revolution, 1863-1877,* segregation was a dominant political issue of the early 1870s—leading to the enactment of the Civil Rights Act of 1875, which guaranteed the "full and *equal* enjoyment," "regardless of color," to various accommodations, including public schools. Eric Foner (1988). This Act aimed to combat segregation and "protect all citizens in their civil and legal rights," by implementing an evidently race-neutral policy. *Id.* This reading of Brown allows that it mirrored such principles enshrined in the Act of 1875.

The Court had recognized decades before *Brown* that racial segregation, at its core, is racial "discrimination." *Railroad Company v. Brown*, 84 U.S. 445 (1873). Based on the principles in and the context of which the 1875 Act was passed, this Court can conclude that the only way to fight discrimination is through race-neutral methods.

Respondents reject this argument with the attempt to distinguish the malpractices of segregation within public education from what

University of California Regents v. Bakke described as "benign" race-based policies that "bring students of diverse backgrounds *together."* 438 U.S. 265 (1978). Brief by University Respondents at 31, Students for Fair Adimissions Inc. v. University of North Carolina, No. 21-707 (July 25, 2022) (emphasis in original)

However, attempts to distinguish benign racial classification from malevolent ones prove to be futile. Segregationists in Brown parroted the exact same argument, framing *their* classification as "benign, not invictus." *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. at 778 n.27 (Thomas, J., concurring).

Indeed, the argument for affirmative action in Grutter—that race is used as a part of the "holistic review" process and that "they never gave race any more or less weight"---completely disregards the reality that race is used as a plus factor for one renders it as a negative for the others in the admissions context, where there is a limit to the number of students that can be accepted. *Bakke* echoed this sentiment, arguing that "it may not always be clear that a so-called preference is in fact benign." Affirmative action policies dictate that the descendants of the perpetrators pay for the crimes of their ancestors from 150 years ago. History has proved time and time again that such discrimination disguised as a "benign remedial purpose" cannot work under the Constitution; it is time that this Court overturned these precedents. *Id.*

II. Race-conscious affirmative action fails under strict scrutiny.

All government racial classifications must be analyzed by a reviewing court under strict scrutiny. *Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200, 227. The Court in *Bakke* held that "[t]he Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause." *Id.* The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' ... th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond* v. *J. A. Croson Co.,* 488 U. S., at 493 (plurality opinion).

Second, strict scrutiny requires that UNC achieves its compelling interest through the "least intrusive means," or least restrictive means. *Bakke*

This Court, in its precedents, has discussed the educational benefits of diversity in depth. They "enhance cognitive development, improve learning outcomes, and prepare effective leaders and citizens." Brief by University Respondents at 5. The officer's corps is composed of citizens from service academies and the Reserve Officer Training Corps (ROTC), which must use race-conscious recruiting to achieve a "highly qualified *and* racially diverse" officer corps. Brief for Julius W. Becton, Jr. et al. as *Amici Curiae*, 27. (emphasis in original).

Bakke, among other precedents, held such a goal "constitutionally permissible;" *Id*. However, because race-conscious affirmative action is neither narrowly tailored nor the least restrictive means to achieve the compelling interest, it is impermissible.

A. Race-based affirmative action is not narrowly tailored to meet the compelling interest.

In order to achieve the compelling interest, *Grutter* relies on the standard of "critical mass." *Grutter* defines critical mass "by reference to the educational benefits that diversity is designed to produce." *Id. Fisher v. University of Texas at Austin,* expands on this definition as "an adequate representation of minority students so that the . . . educational benefits that can be derived from diversity can actually happen." 570 US 297 (2013). The University of Texas at Austin furthers that it "will . . . know [that] it has reached critical mass" when it "see[s] the educational benefits happening." *Id.* Based on this circular logic, the educational benefits of diversity are attained by achieving a critical mass; concurrently, critical mass is determined through the benefits that it is meant to produce. Essentially, "critical mass" adopts Justice Stewart's "I know it when I see it" mentality. Such a loose definition of the compelling interest renders it impossible to determine whether "the means chosen 'fit' ... th[e] compelling goal so closely."

This renders it impossible to set an ending point to the plan. The Court in Grutter requires that a narrowly tailored plan is limited in time and that the university uses "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* If only race-based affirmative action programs can meet this critical mass of the educational benefits of diversity, then it will always be necessary to meet this standard, for

the compelling interest won't change once we've met it.

Further, Grutter requires that universities consider available alternatives and ruled that there weren't *Id.* Since Grutter, many universities without race-based affirmative action have been able to maintain their racial diversity. Using data from the Integrated Postsecondary Education Data System, the amicus brief for *SFFA v. Harvard College* reveals that the University of Oklahoma, for example, "remains just as diverse today (if not more so) than it was when Oklahoma banned affirmative action in 2012," National Center for Education Statistics, https://nces.ed.gov/ipeds/., Brief of Oklahoma and Thirteen Other states as Amici Curiae in Support of Petitioner at 11 (No. 20-1199), and that there are similar "Hispanic populations [in universities in] Florida and Arizona," when "compared with universities in states like Nevada and Colorado, which have not [banned affirmative action]." *Id.* Such developments since *Grutter* allow this Court to reconsider *Grutter's* ruling that there are no workable alternatives to race-conscious affirmative action policies.

B. Racial classification is not the least restrictive means to achieve the compelling interest.

The Court in *Seattle School District* held that the District's plan employed a very limited notion of diversity ("white" and "non-white"). *Id.* UNC's racial classification is not any more varied—it classifies students as Native American, Hispanic, Native American, Asian American, and white. App.15 While the university classifies the "non-whites" into their

own categories, on the individual level, race does not inform anyone about an applicant's ability to contribute to the educational benefits of diversity.

For instance, UNC and Harvard's category of "Hispanic" includes indigenous immigrants from Latin America whose first language, surnames, and ethnic and cultural backgrounds are not Spanish. Jack D. Forbes, The Hispanic 11 Spin: Party Politics and Governmental Manipulation of Ethnic Identity, 19 LATIN AM. PERSP. 59, 64 (1992)

Further, their classification of "Asian" also aims to encompass its cultures and nations into one category. Unsurprisingly, "[t]he term 'Asian' . . . is extremely broad and masks 6 important variations by country of origin, religion, language, diet, and other factors." Raj S. Bhopal, *Migration, Ethnicity, Race and Health in Multicultural Societies* 18 (2d ed. 2014). Race-based affirmative action programs essentially disregard this *cultural* diversity and operate under the stereotype that people of similar races share similar experiences. To answer Justice Alito's inquiry, a family background to the person from Afghanistan has next to nothing in common with someone with a family background in Japan. Transcript of Oral Argument at 95, *UNC*. Racial diversity, while it is certainly an aspect, is an arbitrary proxy to use to achieve educational benefits that derive from *overall* diversity and not the least restrictive means of meeting it.

CONCLUSION

"25 years [after this case], the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* Before this observation, Justice O'Conner remarked that the Court "take the law school at its word that it… will terminate its race-conscious admissions program as soon as practicable." *Id.* According to these remarks, Justice O'Conner's statement should be interpreted as that, until the end of that 25 years, schools make active efforts to find "a race-neutral formula" in order to reduce our reliance on race until we no longer need it to promote the educational benefits of diversity. However, based on the respondents' argument that racial preference is still necessary to achieve this compelling interest, it is clear that we have failed O'Conner's mission, suggesting that it is time that we move on to race-neutral methods.

Petitioners do not intend to undermine the racial injustices and systematic racism that exists to this day but simply argue that combatting racial discrimination with racial discrimination has proven not only unconstitutional but unjust and unreliable and request that this Court reverse.

Respectfully submitted,

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