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 RESPONDENTS

Bianca Flores
Counsel of Record
Creekview High School
3201 Old Denton Rd
Carrollton, TX 75007

Lizbeth Alvarez
Creekview High School
3201 Old Denton Rd
Carrollton, TX 75007

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QUESTION 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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JURISDICTION

This case comes to the court on Writ Certiorari from the United States District Court for the Middle District of North Carolina, arising under jurisdiction granted by 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, U.S. Const. Amend. XIV, provides:

"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."

SUMMARY OF THE CASE

In November 7, 2014, the plaintiff, Students for Fair Admissions, Inc. brought three claims for relief in Complaints against the Defendants, University of North Carolina (UNC), alleging that its race-conscious affirmative action violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The students alleged that the University "had intentionally discriminated against certain of [its] members on the basis of their race, color, or ethnicity in violation of the Fourteenth Amendment and [federal law]."

UNC Defendants seek judgment in their favor on Counts I and II of Plaintiff's Complaints, which allege that 1) "the University does not merely use race as a 'plus' factor in admissions decisions to achieve student body diversity," and 2) "the University employs racial preference in undergraduate admissions when there are available race-neutral alternatives capable of achieving student body diversity." Count III of Plaintiff's Complaint was resolved by a prior Court Order.

SUMMARY OF ARGUMENT

The Fourteenth Amendment does not prohibit state universities from using race-conscious affirmative action. Therefore, race-conscious affirmative action is consistent with the Fourteenth Amendment of the United States Constitution.

SUMMARY OF THE ARGUMENT---Continued

When looking at United States history, the Fourteenth Amendment was written to serve and protect the rights of freedmen following the issuing of the Emancipation Proclamation. In siding with the petitioner, the court in this case would essentially be neglecting the purpose that the Fourteenth Amendment was written to serve.

A compelling interest of diversity should be found to be applicable to race-conscious affirmative action in our case as it ensures a "critical mass" of students from minority groups. Additionally, the education system is actually benefited through a diverse student body.

Race-conscious affirmative action is comparatively, the best option to turn to when seeking to increase student body diversity.

ARGUMENT

I. The Fourteenth Amendment was written to protect the rights of African Americans, and therefore is *not* violated in our case.

It is a fact that the Fourteenth Amendment of the Constitution was passed in order to tackle the Black Codes, which were statutes that limited the rights of African Americans by governing their conduct after African American slaves were freed following the issuing of the Emancipation Proclamation in 1863. Furthermore, after the establishment of the

Emancipation Proclamation, the United States government sought to provide a remedy for freed slaves. Rep. Charles Sumner claimed that "The curse of slavery is still upon them. Someone must take them by the hand; not to support them, but simply to help them to that work which will support them… The intervention of the national Government is necessary." when speaking in favor of freedmen in *Cong. Globe, 38th Cong., 1st Sess. 2799 (1865)*. When turning to, *Arguments for Remediation for a Longer or Indefinite Period of Time*, an example of a remedy was sought to be provided "in the form of university education" - something that the majority of African Americans did not previously have access to in the United States prior to the Emancipation Proclamation. According to the *Act of June 21, 1866, ch. 130, § 2, 1866 Stat. 69, 14 Stat. 66*, access was granted in order to create "the establishment of a charitable institution for the instruction of freedmen in the industrial pursuits of life and fit them for independent self-support." In support of this was President Andrew Jackson. According to his *Veto of the Freedmen's Bureau Bill (February 19, 1866)*, "A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution. Nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than for another." President Johnson's veto supported the continuation and expansion of The Freedmen's Bureau, an agency that "provided, the supervision and management of all abandoned lands, and the control of all

subjects relating to refugees and freedmen from rebel states," according to the *Act of*

March 3, 1865, ch. 90, § 1, 13 Stat. 507. In addition, the Freedmen's Bureau bill, S. 60, introduced by Senator Lyman Trumbull (companion to the Civil Rights Act of 1866), "authorized Congress to appropriate funds for the purchase of school buildings for refugees and freedmen," according to *Affirmative Action and the Legislative History of the Fourteenth Amendment*. The Freedmen's Bureau "almost exclusively" provided the funding for The Charter for Howard University in Washington, D.C. - a historically black research university - until the year 1879, after it ceased operations. Following the issuing of the Emancipation Proclamation by President Lincoln, 'Black Codes' were established in Southern states with the primary goal to curtail and abridge the rights of African Americans. As a result, the Fourteenth Amendment was passed by the Senate to directly address these codes and grant African Americans rights that had previously been restricted to them. Overall, this court should find that the Fourteenth Amendment's purpose was to repair previous issues concerning race in the United States. While the petitioner is trying to argue that affirmative action should be race-*neutral* instead of race-*conscious*, their argument completely undermines and neglects the purpose that the Fourteenth Amendment was written to serve, which would be to provide a remedy for the discrimination and oppession that a large minority of African Americans had to face.

II. The compelling interest of diversity should be found to be applicable to

race-conscious affirmative action in our case as it ensures a "critical mass" of students from minority groups.

The compelling interest of diversity is one that should not be dismissed when looking at the facts of today's case. Historically, racial minority groups - such as Hispanic and African American groups - have been clearly discriminated against in this country. Furthermore, this court should also acknowledge that in the past, the United States college education system has failed to properly represent the country's minority populations in its student bodies. For instance, only 29%of Hispanic high school graduates - specifically, those between the ages 18 and 24 - were attending college in the year 1990, according to *The New York Times* article titled *Minority College Attendance Rose in Late 80's, Report Says*. Furthermore, this percentage of Hispanic college students comes from the 9% of the total Hispanic population in the United States in the year 1990, according to *Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000* from the *United States Census Bureau*. In *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the University of California, Davis School of Medicine relied on a quota system in order to diversify their student body and increase the population of minority students at their school. The court noted that racial quotas, such as the one in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), are impermissible.

In our case, however, there is no presence of such a quota and the university's

admissions process is in fact, clearly distinguishable from such hard-line. Furthermore, in our case, the University of North Carolina's race-conscious affirmative action should pass constitutional muster as it does *not* set strict racial quotas for minorities. Instead, the university actively recruits minorities and seeks to include them in a racially and culturally diverse student body.

A racially diverse student body benefits from "the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans", which can “ensur[e] their ability to make unique contributions to the character” of a school, according to *Grutter v. Bollinger,* 539 U.S. 306 (2003). Furthermore, a more diverse student body allows for a greater range of academic success to be introduced. In *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), Justice Powell concurred that Universities have “the right to select those students who will contribute the most to the ‘robust exchange of ideas.’" Moreover, in the court in *Grutter v. Bollinger,* 539 U.S. 306 (2003), held that "numerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals,” and that "the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."

Overall, a diverse student body can expose students to a vast array of work skills

that can be successfully acquired through exposure to great diversity. Therefore, this Court should find that a race-conscious admissions process can ultimately lead to the beneficial discovery of new ideas, concepts, and skills to students, brought about by a widely diverse group of people.

III. Turning to race-conscious affirmative action is the most effective method in efforts to increase student body diversity when compared to any other method.

Having race-conscious affirmative action can help universities increase their student body diversity in an effective manner. For instance, income is also a common factor in college admission consideration, however, it cannot benefit diversity the way race and ethnicity can. According to the *American Progress* article, *5 Reasons to Support Affirmative Action in College Admissions,* it is suggested that even if a minority applicant grew up in an environment of wealth they would still undoubtedly have different experiences and perspectives of the educational system in the United States. The article provides further insight by stating "students of color are less likely to be referred to 'gifted and talented programs, even after controlling for test scores, health, socio-economic status, and classroom and school characteristics." In addition, the article claims that "schools are more likely to suspend or expel students of color than white

students." By not allowing college admissions to take race into consideration, this Court would only be furthering the

limited experiences minority students face throughout their life.

Historically, minority students are forced into contributive family stress and find it challenging to seek higher education and instead will seek a more affordable replacement of education that isn't of the same caliber of "quality". Income alone isn't a sufficient enough indicator because of the racial wealth gap. All cases that include the use of affirmative action have one common goal: a narrowly-tailored diverse student body that provides equal opportunity and benefits not only minority students but also non-minority students. Race is not a firm indication of acceptance or denial from a university. In *Fisher v. University of Texas at Austin I, 133 S. Ct. 2411 (2013)* and *Fisher v. University of Texas at Austin II, 136 S.Ct. 2198 (2016),* the Petitioner contended that she was denied admission into the University of Texas at Austin because of her race. However, other factors were taken into consideration such as testing scores, GPA along with other academic data. Race alone does not hold the substantial amount of power and weight to be a tie-breaker from an acceptance and denial of a college, even when compared to another's applications. However, it is the most effective and overall fair factor to turn to when looking at affirmative action. By turning to race in the admissions process, improvement in education, empathy and social interactions within our education system is attainable. Being race-conscious doesn't leave anybody at a disadvantage, but instead helps historically-oppressed groups to have equal

opportunities in higher education that a non-minority student would be able to experience.

CONCLUSION

Based on both common law and case law, the Fourteenth Amendment of the United States does *not* prohibit state universities, such as the one in our case, from using race-conscious affirmative action. The University of North Carolina's race-conscious affirmative action follows through with the purpose the Fourteenth Amendment was written to serve, effectively promotes a diverse student body through compelling interest, and is the most effective form of affirmative action in university admissions. For the foregoing reasons, this Court should affirm.

Respectfully submitted,

Bianca Flores
Counsel of Record
Creekview High School
3201 Old Denton Rd
Carrollton, TX 75007

Lizbeth Alvarez
Creekview High School
3201 Old Denton Rd
Carrollton, TX 75007

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