No. 21-707

In the Supreme Court of the United States

STUDENTS FOR FAIR ADMISSION, *PETITIONER*,

v.

UNIVERSITY OF NORTH CAROLINA AND STUDENTS, *RESPONDENTS*.

On Writ of Certiorari to the Supreme Court of the United States

BRIEF FOR RESPONDENT

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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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I. UNC's affirmative action policy is constitutional under the precedent this court established in Grutter.

A. This court's ruling on Grutter set a precedent that UNC's admissions policy dutifully applied.

The Court's opinion within *Grutter* established that a university is required to satisfy strict scrutiny and to do so, they have to show a fair admissions policy which does not impose a racial quota nor use the race of applicants in a "mechanical, predetermined" way. *Grutter*. 539 U.S at 337 Additionally, a school may not use race as a "predominant factor" in the school's admissions process because it would give applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." Id. at 317.

Instead, the university's use of race "must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. Id. at 337. UNC incorporated these standards within their admissions policy and defined diversity broadly, recognizing "that no person is one dimensional and no two people [are] the same in every respect." They afforded each candidate a comprehensive, holistic, and individualized review. As one longtime member of the

admissions office testified, applicants are "not just the test score, not just the GPA, not just an essay. They're a whole person." By applying all these standards, and evaluating each student equally, UNC admissions policy has been extensively tailored to serve a compelling governmental interest.

B. UNC shows a compelling governmental interest in pursuing the benefits of diversity in education.

UNC has made it their mission to serve as a fair center for research, scholarship, and creativity to teach a diverse community of students to become the next generation of leaders. The university embodied the nation's highest ideals by defining diversity broadly, recognizing "that no person is one dimensional and no two people [are] the same in every respect." In accordance with five decades of precedent, UNC's admissions policy has been narrowly tailored to achieve educational benefits of a student-body diversity.

This court has consistently affirmed that "the interest of diversity is compelling in the context of a university's admissions program." *Bakke*. The holding in *Bakke* reflects the belief that the equal protctions

clause does not prohibit the Law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefit that flow from a diverse student body. Because no two people are the same, it's important to factor race as a means of diversifying campus.

It's important for the government to have a compelling governmental interest in the education of students and considering race as one of the factors out of many other factors is an essential way to improve education in the UNC campus.

II. The university has a flexible admission program where the use of race is narrowly tailored

A. Previous precedent cases allows the use of race in admissions

In 1978, the supreme court for the first time addressed Regents of the University of California v. Bakke over affirmative action. The U.C. medical school had an application program where 16/100

spots were reserved for minority students, which the court deemed was a quota and unconstitutional. The court specified that while a quota was unconstitutional, "the use of race as a criterion in admissions decisions in higher education was constitutionally permissible". Regents of the University of California v. Bakke. The ruling in Bakke set the principle that quotas are unconstitutional but the use of race as one of many factors is permissible. This precedent is used in the case Grutter v Bollinger, where the Michigan Law school's admission program that put substantial weight on the applicant's race was deemed constitutional. The Michigan university used race similarly to UNC and used race alongside many other factors in an individualized review of each applicant. It is evident that the use of race in admissions has already been established and deemed constitutional when the use of race is narrowly tailored.

B. The university used race as a sub factor and not as a predominant factor

The university does not use race as a predominant factor, the race is considered as one of

the dozens of factors. The UNC's admission program has the students fill out a common application alongside an essay, two short answer prompts, and their test scores. In the application, race is one of more than 40 criteria that admission readers consider. The admission program uses race in a way where it does not largely impact the applications. If a student that applies is a race of a minority group, it does not mean that the student is guaranteed to be accepted. Applicants are not required to say their race and are not penalized if they choose not to. The university performs a thorough holistic review of each applicant regardless of their race. The court in Bakke reiterated that the university "May consider race as only a "plus" factor, and must be "flexible enough to consider all pertinent elements of diversity." The way UNC uses race is very different from the way the universities used race in Gratz or Bakke. In Gratz, the university awarded an automatic 20 points to minority races which the court found "The automatic awarding of twenty points made the factor or race decisive for virtually every minimally qualified underrepresented minority candidate." Bakke. It is also different from Bakke where the university set a

quota system that was deemed unconstitutional. UNC doesn't have a quota system or an automatic advantage given to minority races and does not make race the defining feature in their applicant.

C. The university has seeked out race-neutral alternatives

The court in Grutter stated that "narrow tailoring does require serious, good faith consideration of potential workable options." Grutter. For the use of race in the admissions program to be narrowly tailored, the university must have considered race-neutral alternatives and show that they do not promote the goals of educational benefits as well as race-conscious strategies. That doesn't require the university to try every conceivable race-neutral alternative. There is sufficient evidence that UNC has engaged in good faith considerations of race-neutral alternatives over several years. In 2004, the university worked with legal experts and college administrators to learn about other schools' race-neutral alternatives. In 2012 Mr. Farmer and Ms. Kretchmar evaluated a race-neutral alternative that was implemented at the university of texas. It demonstrated that while it

would increase the URM by roughly 1%, every other academic indicator would have declined. In 2013 Mr. Farmer convened a race-neutral alternative working group of faculty and staff that explored 5 race-neutral alternatives that all demonstrated a decline in racial diversity and academic quality. In 2016 UNC convened the Committee on Race Neutral Strategies which still operates today, that explores the RNA's. Over the course of several years, UNC has demonstrated a good faith consideration of race-neutral alternatives. All of the race-neutral alternatives proposed by the SFFA do not promote the educational benefits of diversity as well as the race admissions do and are unrealistic. The models proffered by the SFFA have the university choosing between a reputation for excellence and an effort to provide educational opportunities to all racial groups, which the precedent from Grutter says that the university should not have to choose between those two choices. In 2015, The New York Times researched the effects of the banning of affirmative action in states. The research showed that in nearly every state, the minority population rose but the amount of minorities that got enrolled decreased after the ban on affirmative action. There is simply no race-neutral

alternative that can replicate the educational benefits that race-based admissions produce. The university has put serious effort to seek a race-neutral alternative and to try to achieve a race-neutral alternative that is workable in the 25-year time set in Grutter.

III.

CONCLUSION

In conclusion the court should affirm the lower courts decision.

Respectfully submitted,

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