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

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QUESTIONS PRESENTED

1. Is race-conscious affirmative action consistent with the Fourteenth Amendment to the United States Constitution?

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SUMMARY OF THE ARGUMENT

The argument presented discusses the reasons why race-conscious affirmative action is consistent with the Fourteenth Amendment to the United States Constitution. This will be presented in three points.

Primarily, the University of Carolina has a compelling interest in facilitating a diverse student body. This is because race can be an added to a student's unique perspective, and a multitude of these benefits a learning environment exponentially. *Grutter v. Bollinger* observed this and concluded that "Diversity in… education is essential to harnessing… strength and preparing students for success in modern society." Not only can instruction in a diversified class benefit the university, but also the workforce.

Secondly, the history of the United States of America shows the importance and necessity of diversity. The leaders of the Reconstruction had the initial intent to protect all people, especially black Americans, from the lack of opportunities due to their race. Also, the Fourteenth Amendment was formed in order to protect a certain race, that being black Americans, and therefore it is justified for UNC to apply their own race-conscious applications.

Lastly, under *Bakke* and *Grutter*, affirmative action must be narrowly tailored in order to be constitutional, and UNC has continued to uphold these conditions. Similarly, these cases set a precedent that affirmative action cannot include any quota systems. UNC acknowledges this and uses race simply as an add-on and not the definitive factor in admissions, but a way to ensure diversity while maintaining equal qualification standards among students admitted.

ARGUMENT

I. UNC has a compelling interest in facilitating a diverse student body.

A. Acknowledging race as a factor in a student's unique perspective introduces students to cultural and racial differences that can have positive impacts on a learning environment.

UNC's mission is "to serve as a center for research, scholarship, and creativity and to teach a diverse community of … students to become the next generation of leaders," *J.A.1371*. This should include the involvement of race-based applications in order to acquire this "diverse community," as stated above. This court ruled in *Grutter v. Bollinger* that "Diversity in higher education is essential to harnessing that strength and preparing students for success in modern society." Diversity produces not just better students, but better humans in general. "[E]ducation … is the very foundation of good citizenship." *Brown, 347 U.S. at 493*. It is "pivotal to 'sustaining our political and cultural heritage" and plays a "fundamental role in maintaining the fabric of society." *Grutter, 539 U.S. at 331 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982))*. Allowing institutions of higher learning to bring together students of varied backgrounds,

including different races, is central to achieving these goals. Diversity can be attained through the different perspectives of students, which can include race. While race is not the only factor that goes into reviewing a student's unique perspective, it certainly figures into it. In a society in which racial discrimination persists, involving one's unique perspective in regard to their race and being as a whole can benefit a school environment substantially. This is not to say that race should be the only factor in admitting a student, however, it can be an addition, in order to better the community as a whole. The Fourteenth Amendment's authors themselves pursued race-conscious policies that were necessary to ensure that "the gulf which separates servitude from freedom is bridged over," *Congressional Globe, House of Representatives, 39th Congress, 1st Session.* As stated by Gregory Garre in *Fisher vs University of Texas*, "Considering an applicant on purely the test scores you completely disregard the personal experiences and you are refusing to round out the class." While it would seem that admitting students based on their test scores would allow a fair process of admitting only the brightest and best, a study conducted by Georgetown University found that "Children from wealthier families, who can afford better teachers, AP courses and college counselors, are better positioned to score higher," *What Would Happen If College Admission Was Based Solely On SAT Scores? - Study*

International. Not only would these students come primarily from wealth, but also the study found that "[t]he White enrollment would grow by about 14 percent. Meanwhile, the combined Black and Latino enrollment at selective colleges would be reduced by 43 percent, and Asian enrollment would decline as well—by about nine percent.¨ Both Petitioner and Respondent in the case at hand acknowledge the impact of diversity in higher education.

B. Diversity acquired through affirmative action benefits not only students but also the workforce.

In order for the court to decide whether affirmative action is still necessary, it should look at the effects removing it would have outside of universities. One study suggested that "At baseline (measured as a pooled sample of states who had or have affirmative action programs) full-time public state-level employees were: 53% white men, 31% white women, 5% Black men, 4% Black women, 4% Hispanic men, 2% Hispanic women, 0.6% Asian or Pacific Islander men, 0.5% Asian or Pacific Islander women, 0.4% Native American or Alaskan Native men, and 0.2% Native American or Alaskan Native women. Once affirmative action was repealed in a state (four states in the years ranging from 1996 to 2008 within the study period of 1990 to 2009), minorities working in state or local government decreased relative to the control group of states that kept affirmative action in

place: Hispanic men's participation decreased by 7%, Black women's decreased by 4%, and Asian women's decreased by 37%, (Although this figure for Asian women might seem disproportionately large, it is due to the fact that there were very few Asian women in the workforce in the first place, so any change would produce a large effect.), *Kurtulus, Fidan Ana. "The Impact of Eliminating Affirmative Action on Minority and Female Employment: A Natural Experiment Approach Using State-Level Affirmative Action Laws and EEO-4 Data." 30 Oct. 2013. TS.* Allowing institutions of higher learning to bring together students of varied backgrounds, including different races, is central to achieving these goals. The "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v Bollinger*. This is just one of many examples, diversity is indispensable to military readiness. "To fulfill its mission, the military … must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting," *Id.* Building a diverse officer corps requires that universities from which the military draws officers also be diverse. This rationale applies fully here, where UNC makes efforts to recruit and enroll military-affiliated students. More broadly, universities serve as a "training ground for a large number of our Nation's leaders," *Id,* in all sectors of society. "In order to cultivate a

set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity," *Id.* If the court were to remove the affirmative action precedent set in *Grutter* and *Bakke*, diversity in the workforce would suffer alongside the diversity within universities.

II. Diversity is our nation's greatest source of strength, but as our Reconstruction authors understood and our nation's history confirms, it also poses unique challenges to the American experience.

A. Affirmative action is necessary to give equal opportunity to all races.

College admission without affirmative action would be a clear violation of the equal protection clause because it would put those races with fewer opportunities for education growing up at a disadvantage.

Affirmative action is one way to contextualize the opportunities that a studentAffirmative action is one way to

contextualize the opportunities that a student had during their K-12 experience and the disadvantages in access to high-quality teachers and high-quality advisers that they may have had during high school. Affirmative action gives equal opportunity to all races instead of creating a clear bias towards those that are more fortunate in educational opportunities.

The U.S. democracy exists so that all voices may be heard. It was this court's vision in Brown that education could be the engine of our democracy. Our government wanted to assemble a student body that is diverse, along with many dimensions that matter in American life, including race, social class, geography, military status, intellectual views, and much more. This learning environment helps students seek truth, build bridges with their peers of different backgrounds, and, critically here, equip students with the tools needed to function effectively as citizens and leaders in our complex and increasingly diverse society.

The University of North Carolina pursues the interest of diversity in compliance with this Court's precedents, which have consistently held for decades that seeking the educational benefits of diversity is a compelling interest of the highest order and that universities may consider all aspects of an applicant's background to build a thriving campus

community. These precedents are supported by the original and historical intent of the fourteenth amendment.

B. The Fourteenth Amendment was formed with a specific race in mind.

The equal protection clause. *U.S. Cont. amend. XIV.* was created to stop state governments from discriminating against black Americans.

The leaders of the Reconstruction had the initial intent to protect all people, especially black Americans, from lack of opportunities and unequal treatment due to their race.

Section Two of the 14th Amendment repealed the three-fifths clause (Article I, Section 2, Clause 3) of the original Constitution, which counted enslaved people as three-fifths of a person for the purpose of apportioning congressional representation. This shows the historical intention of the fourteenth amendment was to protect black Americans. The framers of the fourteenth amendment wanted to protect a minority group who had been discriminated against for years. So, they created an amendment that would give them life, liberty, and freedom along with counting them as full citizens of the United states.

The 14th Amendment was enacted with the intent to support a series of race-conscious

programs that were created at the time to aid Blacks newly emancipated by the 13th Amendment. A series of programs such as the Freedmen's Bureau, special assistance for Black Civil War veterans, and special relief to Blacks in the District of Columbia were enacted in the period following the Civil War in the face of opposition arguing that the programs would make a distinction on account of color between the two races.

This directly affects our modern society showing the initial intent of the fourteenth amendment, to protect black Americans and place them into a society that values equality and representation.

When the fourteenth amendment defined citizenship, it clearly repudiated the Supreme Court's notorious 1857 *Dred Scott* decision, in which Chief Justice Roger Taney wrote that a Black man, even if born free, could not claim the rights of citizenship under the federal constitution. *Dred Scott v. Sandford 60, U.S. 393 (1857).*

This prohibition of discrimination against black Americans is reflected today by affirmative action. Affirmative action allows black Americans to have the same opportunity as white and Asian Americans for enrollment and admission to colleges. Because of the way that our founding fathers set up the fourteenth amendment, it specifically protects black Americans from unequal representation and

opportunity.

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). overruled the reasoning of *Plessy v. Ferguson, 163 U.S. 537 (1896)* (where this court found that separate but equal facilities were not a violation of the equal protection clause) and held that separate schools for blacks and whites did violate the Equal Protection Clause.

Brown was a decisive turning point in a decades-long struggle to dismantle governmentally imposed segregation, not only in schools but throughout American society. *National constitution center: equal protection clause.* UNC is currently, and must continue to be one of those societies, along with every other U.S. college campus.

Our governmental history and framers of The 14th Amendment were necessary to make clear that Black people, as well as anyone born in the country or naturalized, were American citizens and had the same rights as such.

i. The fourteenth amendment was not race-blind.

When conservatives seek to impose color blindness on the 14th Amendment, they are tossing aside their beloved originalism and ignoring the original intent of the Radical Republicans who championed it. The 14th Amendment was not written to make the

Constitution color-blind and race-neutral. The Congress that framed the amendment, after months of debate in 1866, was not color-blind but profoundly color-conscious. The same 14th Amendment that made citizens of newly freed African-Americans also denied citizenship to American Indians.

Numerous attempts to add the phrase "without distinctions of race or color" were voted down decisively, along with any language that might require desegregated schools *Brown v. Board of Education,* or restrictive laws against interracial marriage *Loving v. Virginia.*

The color-blind view of the fourteenth amendment has caused courts, legislators, and schools to see their hands as tied on key matters concerning race. However, after a thorough look at the legislative history, it is clear universities are not nearly as constrained as they think they are. "Color has been used in both directions: to give benefits to some people to harm other people." *James Anderson June/July 2007 issue of the AERA journal Educational Researcher.* Race neutrality, while might have a surface-level appeal, ignores what our fourteenth amendment was created for and poses challenges to the American experience.

The Fourteenth Amendment was never a colorblind document. The amendment was enacted specifically for the purpose of assisting newly freed Black people.

C. Banning affirmative action has a negative impact on campuses and communities.

In today's society, universities turn to affirmative action for many different purposes, and if they were to get rid of it, it would have effects beyond higher education. “Hiring, government programs, police departments, fire departments, and so much more.” *Michael Young, president emeritus and professor of law and public policy at Tx A&M.* Without affirmative action, this would put the racial diversity in these programs in jeopardy, and possibly the entirety of the programs in themselves. When California put a 24-year ban on affirmative action in its public universities, it had a huge negative impact. *1996 California Proposition 209.* Since voters in 1996 stopped the California State University system from recruiting students based on race and offering recruited students scholarships to relieve financial burdens, the share of Black and Native American students has dramatically fallen. But the widest enrollment gap exists among Latinos at the University of California, where there is a double-digit difference between the percentage of high school graduates and those enrolled in the 2019 freshman class: 52% vs 29%. And even for those students who completed the required course sequence for admission, known as A-G, the gap was 13

percentage points. At the same time, Asians were overrepresented at the University of California — nearly triple their share of high school graduates. Along with this, white students on campus remain slightly below their share of graduates. The effects of "Proposition 209, which banned affirmative action, also extends to the racial and ethnic makeup of state university faculty, who do not come close to reflecting California's ethnic diversity." *Ban created "a fundamental opportunity gap" for students of color.* With this, minority racial groups have fewer opportunities for reasons that are often beyond their control like financial issues, the quality of their schools, and are the first member of their family to go to college. At UC, this ban significantly affected the diversity on their campus. "Since this ban, native American, African American, American Indian, and Latino representation and admission decreased by 10% in some races, while Asian representation hit a dramatic and unbalanced increase." *Faculty and student racial diversity in California's public colleges.* While in some things Asian Americans are a minority group, in college admissions and campuses this is not the case. Affirmative action is to help underrepresented groups of people to be able to achieve the same success as those who are adequately represented. In the case of campus diversity, Asians have been widely overrepresented. Proposition 209 gives insight into how UNC's diversity alone would

be affected and how the environment of the campus would be negatively affected. If universities were to get rid of affirmative action, this would be reflected on many campuses across the nation too.

Along with the decrease in diversity after California's ban on affirmative action, many other states followed in their footsteps leading to dramatic decreases in already underrepresented populations. To explore the long-term implications of banning affirmative action, this court should also look to Michigan, Florida, Oklahoma, and Nebraska. These states imposed bans on race-conscious affirmative action in their college admissions.

On average, in the year prior to these states' affirmative action ban, the share of underrepresented students enrolled in college was 15.7 percentage points lower than their representation among that state's high school graduates. The gap then widened, on average, to 16.8 percentage points the year after the ban was set, and then further to 17.9 percentage points.

Coinciding with this, when UT-Austin stopped considering race from 1996–2004 due to a contrary decision from the Fifth Circuit *Hopwood v. Texas*, the number of African American and Latinx students immediately declined, with African American enrollment dropping by 40 percent and Hispanic enrollment dropping by 5 percent (despite the rapidly increasing number of Hispanics in the

admissions pool). California experienced similar declines after the passage of proposition 209, which banned affirmative action in education and employment. When implemented, African Americans experienced a 55 percent decline in admissions offers to UC Berkeley and UCLA, the state's two most selective universities. Despite significant investment in race-neutral alternatives over 20 years, the UC system has never returned to its previous levels of diversity.

These decreases in minority race representation show the significant impact affirmative action has on diversity on campus. UNC would have this same problem if this court were to find that affirmative action is a fourteenth amendment violation, and removed it. This is why this court must once again find that affirmative action is necessary and beneficial.

III. This Court must stand firm in its commitment to ensuring racial equality and

equal opportunity by affirming the *Bakke/Grutter* framework.

A. Precedent cases are consistent with the equal protection clause.

When this Court discussed the issue of race-based applicant admissions in *Regents of the University of California v. Bakke, 438 U.S. 265 (1978),* it addressed whether it is constitutionally permissible for a university to consider race to achieve a diverse student body. Bakke held that the University of California's medical school admissions policy with a separate program for minority and non-minority applicants requiring minorities to fill 16 of the 100 available seats, was invalid. Through a separate majority opinion, however, the Court preserved the availability of race as a factor in admissions decisions.

Since *Bakke*, the debate has been whether race may be used as a factor in admissions to achieve a diverse student body (Justice Powell's lone opinion) or only as a remedial measure to address the effects of past discrimination. In *Grutter*, the Law School's admissions policy evaluated an applicant's LSAT standardized testing scores and undergraduate grade point average in determining which students to admit. In addition to these objective factors, the Law School also considered "soft" variables such as

letters of recommendation, admissions essays, and the difficulty of undergraduate programs. Even after taking these soft variables into account, however, the Law School still admits some students with relatively low scores to help achieve the Law School's goal of having a diverse student body.

Although the Law School did not set aside a specific number of seats for minority students, it did seek to admit a "critical mass" of minority students; enough minority students so that minority students do not feel isolated or compelled to act as "spokespersons" for their race. The district court held that the law school's admissions policy was unconstitutional and, on appeal, the Sixth Circuit reversed. Upon appeal from the Sixth Circuit, the Supreme Court adopted Justice Powell's view in *Bakke* that "student body diversity is a compelling state interest that can justify the use of race in university admissions," and affirmed the Sixth Circuit's decision. This Court reaffirmed that, under the Equal Protection Clause, all governmental racial classifications are subject to the "strict scrutiny" standard.

To withstand "strict scrutiny," the University was required to demonstrate that the use of race in its admissions program employed "narrowly tailored measures" that furthered "compelling governmental interests." This Court rejected the notion that race can only be given positive weight when necessary to

remedy past discrimination. Instead, this Court deferred to the Law School's informed judgment that diversity is essential to its educational mission and held that race may be considered to achieve that compelling state interest. The Law School's admissions program was ruled to be narrowly tailored to achieving a diverse student body because it was flexible enough to provide each applicant the "individualized consideration" necessary to withstand constitutional challenge.

Reaffirming that universities may not use quotas, this Court found that the Law School's goal of attaining a "critical mass" of minority students did not transform the program into a quota because it was based on "individualized inquiry" without any preset numerical goals. The Court in *Grutter* further found that to be "narrowly tailored," the program must not "unduly burden" individuals who are not part of the favored racial groups. Because the Law School considers all elements of diversity (not just race), and non-minorities are not foreclosed from admission, the policy does not unduly burden non-minorities, this Court held.

Finally, this Court noted that race-conscious admissions policies must be limited in time and periodically reviewed to determine whether racial preferences are still necessary to achieve a diverse student body. *Jackson Lewis, Discussion of the Holdings in the Cases Grutter v. Bollinger and Gratz v. Bollinger.*

Therefore the precedents of Grutter and *Bakke* should be upheld as they align with the fourteenth amendment and will facilitate UNC's compelling interest in diversity.

B. Consideration and maintenance of diversity in admissions is not a violation of the equal protection clause.

While courts have found from precedent cases that a quota system is a violation of the equal protection clause, there are remedies available to maintain diversity on campuses such as UNC. Pro-minority racial classifications have been established and allowed, to a large degree, if they were used as remedies to redress proven past discrimination or if they were "add-on" benefits without adverse effects on others. Simply put, if affirmative action is not directly detrimental and unfair to majority groups, it is not a violation. The Davis program in *Bakke* was unconstitutional as it inappropriately ignored the qualifications of some applicants because of the racial quota it had to fill.

When discussing the question of affirmative action in *Bakke*, The Stevens opinion took an even narrower view to avoid dealing with the question of whether Davis could use race some other way. He argued the technical point that there was no outstanding injunction in the California courts to forbid any consideration of racial criteria in processing applications. This allows universities to analyze admission situations individually instead of as a whole quota system. While quota systems have been found to

be unconstitutional, they are also impractical and possess long-term problems. Instead of using this, UNC has a holistic system that allows for race to be only one of many considerations in accepting students. The University is not required to meet a certain quota of minority students, instead, it takes all qualifications into account and allows minority students to get the same opportunities as their white and Asian peers do. UNC fits into the narrowly tailored requirements for affirmative action to be accepted under the fourteenth amendment and should pass under strict scrutiny when looking at its constitutionality due to its holistic admissions process.

Furthermore, if this court keeps affirmative action by maintaining diversity instead of requiring it through these systems, it will be greatly beneficial to *campuses* nationwide.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals should be affirmed.

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