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 First Circuit**

BRIEF FOR RESPONDENTS

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December 16, 2022

QUESTIONS PRESENTED

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

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TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)

Agostini v. Felton, 521 U.S. 203 (1997)

Alexander v. Sandoval, 532 U.S. 275, 281 (2001), *United States v. Fordice*, 505 U.S. 717, 732, n.7 (1992), and *Alexander v. Choate*, 469 U.S. 287, 293 (1985))

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

Davis v. Federal Election Commission, 554 U.S. 724 (2008)

Dobbs v. Jackson Women's Health Organization, 597 US (2022)

Fisher v. University of Texas at Austin, 570 U.S. 314 (2013)

Fisher v. University of Texas at Austin, 579 U.S. 365 (2016)

Gratz v. Bollinger, 539 U.S. 244 (2003)

Grutter v. Bollinger, 539 U.S. 306 (2003)

Hirabayashi v. United States, 320 U. S. 81 (1943)

Hollingsworth v. Perry, 570 U.S. 693, 707 (2013)

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)

Johnson v. California, 543 U.S. 499, 515 (2005)

Korematsu v. United States :: 323 U.S. 214 (1944)

Owen v. Sharp, 39 Va. 427, 12 Leigh 427 (1841)

Palko v. Connecticut, 302 U.S. 319 (1937)

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2004).

Pearson v. Callahan, 555 U. S. 223 (2009)

Plessy v. Ferguson, 163 U.S. 537 (1896)

Regents of University of California v. Bakke, 438 U.S. 265 (1978)

Ricci v. Destefano 557 U.S. 557 (2009)

Roe v. Wade, 410 U.S. 113 (1973)

Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291

Students for Fair Admissions, Inc., v. President & Fellows of Harvard College, 672 F. Supp. (D. Mass. 2019)

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545 (2015)

United States v. Carolene Products Co., 304 U.S. 144 (1938)

United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966)

Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976)

Weser v. Glen, 190 F. Supp. 2d 384, 396 (E.D.N.Y.), aff'd, 41 F. App'x 521 (2d Cir. 2002)

Wisconsin Legislature v. Wisconsin Elections Comm'n, 142 S. Ct. 1245, 1248 (2022)

Constitutional Provisions

U.S. Const. Amend. I

U.S. Const. Amend. XIV § 1

U.S. Const. Amend. XV

STATUTES

Ariz. Const. art. II, § 36

Cal. Const. art. I, § 31

Fla. Exec. Order No. 99-281

Idaho Code Ann. § 67-5909A

Mich. Const. art. I, § 26

Neb. Const. art. I, § 30

N.H. Rev. Stat. Ann. § 187-A:16- a

Okla. Const. art. II, § 36A

Wash. Rev. Code Ann. § 49.60.400

OTHER AUTHORITIES

Magliocca, Gerard N. *American Founding Son - John Bingham and the Invention of the Fourteenth Amendment,* New York University Press: 2013.

Andrew Johnson, *Veto Message* 1866, Online by Gerhard Peters and John T. Woolley, *available at* https://www.presidency.ucsb.edu/node/202444.

Cong. Globe, 39th Cong., 1st Sess. 632 (1866).

The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry, 92 Nw. U. L. Rev. 477, 559 (1998).

Eric Foner, *Reconstruction: America's Unfinished Revolution*, 1863-1877 (1988).

Eric Stirgus, *Court Ruling Changed Georgia's Approach to Race-Based College Admissions*, 2018, The Atlanta Journal-Constitution. *available at https://www.ajc.com/news/local-education/court-ruling-changed-georgia-approach-race-based-college-admissions/vT9wYxSGa0kCv7EqkdczdK/.*

Fla. Exec. Order No. 99-281, 1999. *available at https://www.dms.myflorida.com/content/download/705/3389/file/ExecutiveOrder99-281.pdf.*

The Carolina Story: A Virtual Museum of University History *available at https://museum.unc.edu/exhibits/show/integration/leroy-frasier--john-lewis-bran.*

Nicole Leidholm, *Race riots shape Travis' history* (Nov. 8, 2013).

Richard Stillman, *Racial Unrest in the Military: The Challenge and the Response*, 34 Pub. Admin. Rev. 221, 221 (1974).

FACTS OF THE CASE

In 2014, Petitioner Students for Fair Admissions, Inc, sued the University of North Carolina over an alleged violation of the Fourteenth Amendment's Equal Protection Clause by considering applicants' race in admissions deliberations. The University of North Carolina considers race along with forty other factors of an application in its admissions process.

Six years later, in November of 2020, the bench trial began, lasting for eight days. Nearly a year later, on October 18, 2021, the United States District Court for the Middle District of North Carolina issued a 155-page opinion, ruling for the University of North Carolina and upholding *Grutter* and establishing that the University's admissions processes satisfied strict scrutiny and were constitutionally permissible. Petitioner appealed this ruling and the United States Court of Appeals for the Fourth Circuit affirmed the ruling for the University. On November 11, 2021, Petitioner filed a petition for *writ of certiorari* asking the Supreme Court to review the ruling for University of North Carolina. Petitioner also sought review of *Students for Fair Admissions, Inc., v. President & Fellows of Harvard College*, 672 F. Supp. (D. Mass. 2019) adjudicated by the United States Court of Appeals for the First Circuit. This case challenged the admissions policies of Harvard University under Title VI of the Civil Rights Act of 1964. On January 24, 2022, the Supreme Court of the United States granted *certiorari* to Petitioner and consolidated the two cases. On July 22, 2022, the Court ordered that these two cases were no longer consolidated in light of two factors: 1) The testimony of Judge Ketanji Brown Jackson in which she swore that, if confirmed to the Court, she would recuse herself from the

Harvard case to avoid conflict of interest, as she sits on the Harvard Board of Overseers. 2) Harvard College is a private institution. The University of North Carolina is a public school regulated by both Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. Harvard, of these two, is only regulated by the former, therefore separating the two cases will yield one case that governs public higher education institutions and one that governs those that are private.

SUMMARY OF ARGUMENT

The Court correctly held in *Grutter* that the Fourteenth Amendment's Equal Protection Clause does not prevent the limited consideration of race by admissions offices as part of a holistic process, as long as that consideration is narrowly tailored to the compelling interest of the educational benefits of "student body diversity." By the precedents: *Regents of University of California v. Bakke* in 1978, *Grutter v. Bollinger* in 2003, *Fisher I* in 2013, and *Fisher II* in 2016, the University of North Carolina's use of race-conscious policies in its admission process is constitutional under the Fourteenth Amendment's Equal Protection Clause. These precedents which have for over forty years upheld affirmative action in the holistic review of college applicants are affirmed by the text and history of the Fourteenth Amendment, which clearly demonstrate the Framers of the Fourteenth Amendment believed race-conscious measures used to promote equality of opportunity and integrated learning environments were consistent with the original meaning of the Equal Protection Clause. The Framers time and again rejected constitutional language that would have prohibited race-conscious measures with the interest of helping African Americans achieve equal citizenship and protection of the law. This Court's decision in *Brown v. Board of Education* does not categorically prohibit the consideration of race in education, and it was, in fact, *Brown's* vision to form integrated, diverse student bodies. UNC's admissions process unequivocally satisfies the standards of strict scrutiny specified in *Grutter* and *Fisher II*. For these reasons, the judgments of the courts of appeals should be affirmed.

ARGUMENT

I. Petitioner Lacked Standing at the Time the Suit Was Filed

Petitioner does not have proper standing for the Court to adjudicate this case. No individual(s) whom they have explicitly identified has been harmed by the University of North Carolina and Petitioner has not sufficiently argued or proved the contrary. Before SFFA filed the two lawsuits against UNC and Harvard, it had no actual members and was run by its founders, whom, to the district court's knowledge, had not been harmed by UNC. Furthermore, SFFA was founded only months before these lawsuits were filed, calling into question the validity of their standing claims. D.Ct. Dkt. 107-8 at 2. Even in SFFA's bylaws, their members are denied any and all rights. D.Ct. Dkt. 107-4. Structural changes to SFFA's internal governance were made only after they filed the lawsuits, as noted by the district court. For example, the court noted a change that one of the five managing directors of SFFA is now elected by the organization's members, however, this was not the case when the organization filed the lawsuit. Pet. App. 233. Additionally, the court noted that SFFA began charging membership dues—a policy not in place when the lawsuit was filed. Pet. App. 234. Thus, these changes were made—evidently—to improve Petitioner's claims of standing, and at the time relevant to the origin of the lawsuit, SFFA was not a "voluntary membership organization," as this Court's precedent so defines. See *Hunt*, 432 U.S. at 343-44.

The new policies and rules notwithstanding, SFFA's

claim is non-justiciable, as it is not proper, nor is it legal to attempt to create, or create conditions for standing after a lawsuit has already been filed. See *Davis*, 554 U.S. at 734. In the past, standing of a plaintiff has always been measured at the time when the complaint is filed. When SFFA filed, the organization lacked a specific interest in the outcome of the case and was nothing more than a "concerned bystander[]," and was seeking standing "simply as a vehicle for the vindication of value interests." *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013). Hence, the Court lacks Article III jurisdiction to consider this case and it should have been dismissed as non-justiciable.

A. SFFA's suit lacked ripeness, because no facial violation of the Fourteenth Amendment occurred

Because affirmative action is constitutional under *Grutter*, no facial violation of the Equal Protection Clause of the Fourteenth Amendment has occurred. This case has not yet evolved into a justiciable controversy in that Petitioner cannot provide a specific example of UNC harming one of their members, other than a vague allegation that the University "... 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]." D.Ct. at 2. SFFA's facial challenge sought to expressly overrule *Grutter v. Bollinger,* 539 U.S. 306 (2003), the case that upheld affirmative action. However, this facial challenge cannot be adjudicated, as affirmative action processes and race-conscious admissions are constitutional under *Grutter*, and were reaffirmed by *Fisher*. Since Petitioner have not provided a specific and detailed instance where one or more of their members were harmed, this case is

non-justiciable. There is simply no controversy to assess in this case. Without providing evidence that the University inappropriately considered race in their admissions processes, a facial challenge cannot be brought against the University seeing as they were clearly operating within the realm of constitutional action.

There is no legitimate claim by Petitioner for imminent potential harm, as admissions offices are given a particular level of discretion, making them independent from most oversight that may hinder their timely admissions processes. *Grutter* already legitimized the interest of public universities to consider race in the way that UNC does. Therefore, no justiciable controversy has arisen from this case and Petitioner has failed to prove otherwise.

II. The History and Tradition of the Fourteenth Amendment's Equal Protection Clause Support This Court's Ruling in *Grutter*

A. The Fourteenth Amendment's Equal Protection Clause does not categorically prohibit considerations of race

The Equal Protection Clause of the Fourteenth Amendment reads, "No State shall … deny to any person within its jurisdiction the equal protection of the laws." However, Equal Protection does not prohibit all race-conscious policies. In fact, race-consciousness is inherent to the text and history of the Fourteenth and Fifteenth Amendments.

The same members of Congress who drafted the Fourteenth Amendment guaranteed equal protection of

the laws to all persons by enacting numerous race-conscious policies, in order to promote racial equality. The centuries of slavery and racism against African Americans could not have been erased simply by declaring former slaves free and protected from future discrimination.

According to congressional records from 1866, the Framers understood that race-conscious policies were needed to ensure "the gulf which separates servitude from freedom is bridged over;" "[i]t was impossible to abandon [the newly freed slaves] without securing them their rights as free men and citizens;" "[t]he adoption of this amendment is essential to the protection of Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been at arms against them." Cong. Globe, 39th Cong., 1st Sess. 632 (1866); *Id.* at 1093; *Id.* at 1263. We see this through the Freedmen's Bureau Act in 1865 and the extensive affirmative action and voting rights legislation passed during the Reconstruction era.

In fact, the Framers of the Fourteenth Amendment rejected numerous drafts of proposed constitutional language that would have prohibited race-conscious measures designed to help African Americans achieve equal citizenship. See Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (proposed "[a]ll national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color"); Benjamin B. Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction*, 39th Congress, 1865-1867, at 46 (1914) (proposed "all laws, state or national, shall operate impartially and equally on all persons without regard to race or color"); *id.* at 83 (proposed "[n]o discrimination

shall be made . . . as to the civil rights of persons because of race, color, or previous condition of servitude").

Reconstruction Framers in these debates firmly rejected the arguments that race-conscious legislation was inconsistent with the principle of the Equal Protection Clause. They believed legislation passed to ensure equal opportunity for African Americans was consistent with, and not contrary to, the newly passed Fourteenth Amendment.

This Court has held: "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995). The Court has in the past recognized instances in which the use of race was justified by interests of the state. In *Adarand Constructors*, the Court clearly recognized: "All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors*, 515 U.S. at 212-231; 235-239. In the case, the Court upheld a policy permitting that "[m]onetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals." *Id.* at 213. This was justified by the interest of addressing "the lingering effects of racial discrimination"). See also *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam) (compliance with the Voting Rights Act); *Johnson v. California*, 543 U.S. 499, 515 (2005) (prison security).

These interests are distinct from other times at

which the use of race was or should have been prohibited. When the Court in *Hirabayashi v. United States*, 320 U. S. 81 (1943) reviewed a curfew that applied to only people of Japanese ancestry, the Court was correct in asserting "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Id*. at 100.

It is noteworthy that opposition to Reconstruction-era affirmative action and voting rights legislation was justified in terms of colorblindness, the same argument Petitioner makes in this case by interpreting the Equal Protection Clause as equal treatment, not equal opportunity. Over 150 years ago, opponents of affirmative action argued that the Freedmen's Bureau made "a distinction on account of color between the two races" *Id.* at 397. which made Black Americans "superior" and not "equal before the law." (544). They claimed that the Freedmen's Bureau Act was "in opposition to the plain spirit" of the Constitution.

President Andrew Johnson also twice used the power of veto over bills of the Freedmen's Bureau, because the Bureau, he said, supported "one class or color of our people more than one another." Andrew Johnson, *Veto Message* 1866, Online by Gerhard Peters and John T. Woolley, https://www.presidency.ucsb.edu/node/202444. Yet in 1866, hardly a month after it sent the Fourteenth Amendment to the states for ratification, Congress overrode President Johnson's veto of the Act with supermajorities, clearly demonstrating that the intent of the Framers of the Fourteenth Amendment viewed

affirmative action and race-conscious legislation as permissible under the Equal Protection Clause of the Fourteenth Amendment.

By approving race-conscious policies in order to promote racial equality, the Framers clearly recognized that the true goal of the Fourteenth Amendment was to "break down discrimination between whites and blacks," not to ensure colorblindness. Cong. Globe, 39th Cong., 1st Sess. 632 (1866).

1. The Fifteenth Amendment similarly allows for race-conscious practices

The Fifteenth Amendment was also ratified based on the concept that race is significant. The Framers of the Fifteenth Amendment had to recognize that guaranteeing equal voting rights was necessary in order to combat the deep racial prejudice and heavily white state legislatures that African Americans were up against in the South. They knew the right to vote was necessary for African Americans to "protect themselves in the southern reconstructed States" from discrimination and efforts to take away their rights. *Id*.

Similar to opposition to the Freedmen's Bureau policies under the Fourteenth Amendment, some states even opposed the ratification of the Fifteenth Amendment based on the argument that it "singl[ed] out the colored races as its special wards and favorites." Cong. Globe, 39th Cong., 1st Sess. 632 (1866). After the Fifteenth Amendment was ratified, opponents still claimed voting rights legislation enacted to ensure African American citizens could vote was a form of "class legislation against the great white race to which we all belong." *Id*. Ultimately, these arguments failed. For the Framers of the

Reconstruction Amendments, the Fifteenth Amendment guaranteed the right of African Americans to vote in order to ensure equal political voice and opportunities. It did not suppose the notion that race could not be considered.

B. Fourteenth Amendment Framers employed race-conscious policies

The Framers of the Fourteenth Amendment explicitly pursued race-conscious policies when they were justified by compelling government interests, which included remediation in the short term, as well as seeking to ensure equal opportunity of races in order to fulfill the promise of equality contained in the Fourteenth Amendment in the long term.

The Freedmen's Bureau Act in 1865 established the Freedmen's Bureau for the explicit purpose of aiding African Americans by providing them food, clothes, fuel, work, healthcare, land, and education. The Bureau was enacted in 1865 and expanded in 1866 and "provided its charges with clothing, food, fuel, and medicine; it built, staffed, and operated their schools and hospitals; it wrote their leases and their labor contracts, [and] rented them land." Stephen A. Siegel, *The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 559 (1998). Significantly, though the Act extended to both freed slaves and refugees of all races from the South, the Act clearly delineated between the benefits available to the two different groups. In 1866, the act authorized "aid" to freed African American slaves in any way "in making the freedom conferred by proclamation of the commander in chief, by emancipation under the laws of States, and by constitutional amendment," and only provided "loyal refugees" what was

"necessary to enable them . . . to become self-supporting citizens." *Freedmen's Bureau Act*, § 2, 14 Stat. 173, 174 (1866).

During Reconstruction, the Freedmen's Bureau directly financed Berea College, a college with a race-conscious admissions policy. The Bureau also assisted in establishing Howard University, which was a school open to students of all races, but had special provisions for those that had been freed from enslavement. By 1869, almost 3,000 schools, with over 150,000 pupils reported to the Bureau, which helped set the foundation for Southern public education of people of all races. See Eric Foner, *Reconstruction: America's Unfinished Revolution*, 1863-1877 (1988).

Race-conscious legislation was also passed in Congress during the Reconstruction era to establish a maximum fee that African American soldiers could be charged by agents for helping soldiers to collect bounties for enlisting in the Union army. Stephen Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 561 (1998); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985).

During Reconstruction, Congress also passed legislation designating one chaplain per regiment of troops of color with the expressed purpose of providing "the instruction of the enlisted men in the common English branches of education," a role chaplains for white regiments did not fulfill. Act of July 28, 1866, ch. 299, § 30, 14 Stat. 332, 337.

These measures were constitutionally justified,

because it was only with race-conscious efforts by the government that African Americans could enjoy the citizenship and equal protection of the law promised by the Fourteenth Amendment. According to congressional records from 1866, more than 150 yrs ago, opponents of the Freedmen's Bureau criticized it for making "a distinction on account of color between the two races" that made African Americans "superior" rather than "equal before the law." *Id.* at 544.

This is the same challenge affirmative action faces today. Significantly, however, the very members of Congress who drafted the Fourteenth Amendment stood behind the Freedmen's Bureau. The Freedmen's Bureau Act was not successfully vetoed by President Johnson nor was it struck down as unconstitutional. From 1865-1872, the Freedmen's Bureau acted in the interest of the Fourteenth Amendment to ensure equal protection through the passage of race-conscious legislation, and the Freedmen's Bureau activities are consistent with this Court's existing strict scrutiny rationale that remediation at the very least is an acceptable compelling interest.

This is apparent in the first cases of strict scrutiny applied to race-conscious policies. Since the Fourteenth Amendment protects "persons, not groups," the Court has held: "governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to the equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis in original). The Court was also clear in *Grutter* that "[s]trict scrutiny is not 'strict in theory, but fatal in fact'" and "[c]ontext matters when

reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 237).

The first case this Court heard that upheld a remedial race-conscious affirmative action policy under strict scrutiny was *Local 28 of Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421, 480 (1986) (plurality opinion). The Court upheld a remedial order on the basis that "the relief ordered in this case passes even the most rigorous test-it is narrowly tailored to further the Government's compelling interest in remedying past discrimination." *Id.*

In *Adarand Constructors* in 1995, Justice O'Connor, writing for the Court, rejected the notion "that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors*, 515 U.S. 200, 204-05 (1995). She suggested strict scrutiny can be overcome in the case of race-conscious policies when these policies respond to "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Id.*

1. The Equal Protection Clause within the Fourteenth Amendment exists because of classroom diversity made possible by a forerunner of affirmative action

The Fourteenth Amendment was originally drafted by John Bingham, who was a strong abolitionist before the Civil War and a leading Republican in the House of Representatives during the Reconstruction Era. He is the author of the language, "No State shall … deny to any person within its jurisdiction the equal protection of the laws" in the Fourteenth Amendment, which controls this

case.

However, the Fourteenth Amendment might not exist in the first place if it weren't for affirmative action. For, John Bingham was lifelong friends with his college classmate, Titus Basfield, who was an ex-slave whose freedom was bought by abolitionists in the 1830s. When Basfield moved to Ohio, he was recruited by Reverend John Walker, founder of Franklin College, to attend his institution and live without rent in order to pursue his education. Basfield in exchange did odd jobs and worked at Walker's church as the sexton, and was the first African-American to gain a bachelor's degree in the state of Ohio. He went on to be a successful minister. None of this would have been possible without the racial outreach and financial aid Basfield received from Walker, which contributed to making the student body more diverse. Because John Bingham spent his most formative years of schooling alongside Titus Basfield, a free black man treated equally to him in every way at Franklin College, that diversity seems to have had a significant impact on John Bingham's perspective as he went on to draft the Fourteenth Amendment. In the case of Titus Basfield, it took special circumstances of admittance in order to receive equal status and opportunities to his peers. This is no different from the principle behind modern affirmative action. Therefore, the history of the Fourteenth Amendment itself stands in support of this Court's holding in *Grutter*.

2. The history and tradition of the Equal Protection Clause does not forbid the use of race in college admissions

Even if the argument is made that Reconstruction

and the actions of the Freedmen's Bureau were justified by remediation, and not the interests of diversity, and were therefore constituent with a rationale of strict scrutiny, this still demonstrates the complexity of the issue of race integration at schools of higher education before *Brown v. Board of Education*. If remediation is acceptable as a compelling state interest, then the history of Reconstructive efforts to create diversity is difficult to separate from remediation.

This Court itself in *Brown* acknowledged, "The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education." *Brown v. Board of Education of Topeka*, 347 U.S. 483. Given that affirmative action only sprang up in the wake of the civil rights movement, a conclusive analysis of its history of constitutionality can only—if ever—be reached by reviewing history and precedent after *Brown*. Though in 1868 African Americans received Equal Protection through the Fourteenth Amendment and the right to vote through the Fifteenth Amendment, a century later in 1968, our nation was still faced with the crisis of the death of Martin Luther King Jr., and a history of racial discrimination that necessitated the implementation of race-conscious policies.

This interest today has evolved from remediation, seeing as no individuals living in the modern day were directly displaced by the Civil War itself. The current interest of diversity and educational richness stems from the Civil Rights Movement of the 1960s, the movement by African Americans to seek protection from past discrimination and inclusion in workplaces and universities.

C. Affirmative action embodies the spirit and intent of this Court's holding in *Brown v. Board of Education*

Brown, like the Fourteenth Amendment, also does not categorically prohibit the consideration of race in education. The Court in *Brown* held that the arbitrary separation of students on the basis of race violates the Equal Protection Clause. However, when it uses race in its admission process, UNC seeks to bring students from many different backgrounds, perspectives, and races *together*, not separate them. Neither *Brown v. Board of Education*, 347 U.S. 483 (1954), nor Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896) create the rule that race can never be considered; they simply reject laws of segregation that perpetuated the division of races into different social and economic classes. UNC's mission is the opposite.

The Court in *Brown* set forward the understanding that to separate white and Black students "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." It is part of UNC's mission, in assuring the compelling interest of diversity in education, to combat this feeling of inferiority. *Brown v. Board of Education,* 347 U.S. at 494. Justice Harlan's assertion that "[o]ur constitution is colorblind, and neither knows nor tolerates classes among citizens" similarly and simply suggests that the Equal Protection Clause doesn't allow for any "superior, dominant, ruling class of citizens." *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting). It is more accurate to acknowledge, "[t]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection

clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 876 (5th Cir. 1966). Therefore, "race may be considered in certain circumstances and in a proper fashion" to ensure the constitutional promise of equal protection. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,* 576 U.S. 519, 545 (2015).

Both *Brown* and Justice Harlan's dissent in *Plessy v. Ferguson* condemned the segregation of races and the perpetuation of a subordinate minority. Neither prevent the Court from considering race in the limited context of policies that are put in place to promote the integration of schools, diversity, and opportunities for disadvantaged minorities. Therefore, the over forty years of precedent stretching back to *Bakke* 1978 that has upheld affirmative action in college admissions is not at odds with *Brown v. Board of Education*.

D. Forty years of the Court's precedent supports the existence of affirmative action

To solely focus on this Court's holding in *Grutter* does not accurately account for the entire history of affirmative action precedent for colleges and universities. In fact, it isn't *Grutter* but Justice Powell's principle opinion in *Bakke* that has served as this Court's "touchstone" on affirmative action. *Grutter*, 539 U.S. at 323. Justice Powell's opinion specified that states cannot set aside seats to fulfill racial quotas, but they can consider race as one of many factors in admissions. This

position was affirmed in *Grutter* in 2003, but that is not even the last time affirmative action was reviewed by this Court. Only six years ago in 2016, *Fisher v. University of Texas* upheld a university's use of race as a factor in college admissions. *Fisher II*, 136 S. Ct. at 2215.

Over forty years ago, this Court held in *Bakke* that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and national origin." 438 U.S. at 321. Justice Powell's plurality opinion emphasized an applicant's race can be treated as "simply one element—to be weighed fairly against other elements—in the selection process." *Id*. at 318.

Twenty-five years later, this Court in *Grutter* upheld a University of Michigan's Law School policy of using race as one factor in admission in order to obtain a diverse, accomplished class. *Grutter* applied strict scrutiny and "endorsed Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in admissions." *Id*. at 325. The Court held that it is constitutional to factor race into admission to ensure "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id*. at 332, 333. Therefore, *Grutter* recognized that the government can enact race-conscious policies in the interest of ensuring equality in education.

In *Fisher II*, this Court applied *Grutter's* decision and upheld the race-conscious admission policy at the University of Texas at Austin's. The Court affirmed, "a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'" 579 U.S. at 381.

Additionally, "enrolling a diverse student body 'promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.'" *Id*. Significantly, that the university used race in a limited way to boost racial diversity in a small number of cases was "a hallmark of narrow tailoring, not evidence of unconstitutionality." *Id*. at 384-85. The same can be said of the University of North Carolina's use of race with substantial impact in only about 1.2 percent of admissions cases.

E. *Stare decisis* exists to prevent sudden changes to the law

This Court should not overturn *Grutter v. Bollinger*, because *Grutter* was correct in upholding affirmative action under *Bakke*. In 2016, this Court affirmed in *Fisher II* that *Grutter* is "a hallmark of narrow tailoring, not evidence of unconstitutionality." It is clear that the *stare decisis* in this case is consistent in its support of the use of affirmative action in college admissions under the Fourteenth Amendment.

If Petitioner is to make the argument that affirmative action contradicts the original meaning and historical application of the Fourteenth Amendment, according to *Gamble v. United States*, the Court needs "something more than ambiguous historical evidence" before it "flatly overrule[s] a number of major decisions." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (cleaned up). *Stare decisis* exists in the interest of preventing sudden sweeping changes in the law. If seeking to overturn precedent on a historical ground, parties have a "burden" to present evidence that settles "the historical

question with enough force" to replace precedent. *Gamble v. United States*, 139 S.Ct. 1960, 1974 (2019).

When the Court is asked to overrule its past precedents, a vital question is whether the precedent is consistent with or departs from the Constitution's text and history. We saw this in *Ramos v. Louisiana* in 2020, in which the court voted to overrule a "egregiously wrong" prior precedent conflicting with the Constitution's original meaning. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 (2020) (Kavanaugh, J., concurring).

We saw it again in 2022, in *Dobbs v. Jackson Women's Health Organization*, in which Justice Alito wrote that *Roe v. Wade* was "egregiously wrong from the start." Specifically, the Court ruled that "procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history." In his discussion of *stare decisis*, Justice Alito, citing *Pearson v. Callahan*, wrote "*stare decisis* is not an inexorable command" and, citing *Agostini v. Felton*, it "is at its weakest when [the Court] interpret[s] the Constitution" *Dobbs v. Jackson Women's Health Organization*, 597 US _ (2022). (citing *Pearson v. Callahan*, 555 U. S. 223, 233; *Agostini v. Felton*, 521 U. S. 203, 235). Finally, Justice Alito wrote that in order to fall under the Constitution's protection, a right must be either in the text of the Constitution or "deeply rooted in [our] history and tradition." *Id.*

However, UNC's case differs significantly from recent cases like *Ramos, Dobbs*, and *Bruen*. In this case, it is Petitioner who has lost sight of the Fourteenth Amendment's text, history, and original meaning. As we discussed earlier, the text and history of the Fourteenth Amendment allow for race-conscious policies to be put in

place to ensure equal opportunity for all people, regardless of race The race-conscious policies put in place under the Freedmen's Bureau Act and by Congress during Reconstruction—by the Framers of the Fourteenth Amendment itself—demonstrate that such policies are inherently permissible in the intent of the Fourteenth Amendment and are "deeply rooted in history and tradition," fulfilling the standard that abortion fell short of in Dobbs.

III. Diversity Has Unequivocal Educational and Professional Benefits

A. Diversity is central to the University of North Carolina's mission

UNC takes quite seriously its mission to produce model citizens and this simply would not be possible without the rich educational benefits of diversity. In order to prepare their students for future employment, which is accompanied by meeting and conversing with individuals of all backgrounds, UNC has a number of initiatives that ensure that their students are educated in a diverse environment. Efforts of the University to achieve this include measures such as student-housing initiatives, course-offerings, and campus discussion forums, all with the goal of maintaining a diverse and educationally rich campus.

Furthermore, UNC constantly monitors its progress toward achieving the benefits of educational diversity. Notably, the University routinely conducts quantitative analysis on their student population, as well as comprehensive qualitative studies about the impact of diversity on the experience of the student-body. Pet. App.

15-17, 59-60. After careful review of these assessments, the University has determined that they have yet to achieve the full benefits of educational diversity and will work to continue their efforts until they do. Pet. App. 19-20, 60. These culminating factors clearly demonstrate that diversity is something that the University does not take lightly in its deliberations and that they have been extremely precautious in the constitutionality of their deliberate actions.

B. The University of North Carolina makes use of many race-neutral policies and constantly evaluates its race-conscious practices

In addition to being committed to diversity, the University has already implemented many effective race-neutral admissions policies, and UNC has over forty different policies that they utilize when assessing applications. UNC continually assesses the viability of other race-neutral policies in tandem with the ones that they have already successfully implemented. The district court acknowledged that UNC, in good faith, relentlessly pursues new race-neutral admissions policies. Pet. App. 176-83. Furthermore, the court also acknowledged that UNC has already implemented many promising race-neutral alternatives in a fashion that goes "well beyond the suggestions" that Petitioner put forth. Pet. App. 118-23, 181. The University constantly reevaluates the use of its race-conscious policies, makes adjustments accordingly, and implements race-neutral alternatives wherever possible. However, the court also found that SFFA's proposed slate of race-neutral alternatives were flawed, and would sacrifice the diversity of the student-body in favor of strict race-neutrality; the court concluded that UNC had shown that no alternative

approach beyond what they were already employing in terms of race-neutrality was feasible at this time. Pet. App. 114, 143. If the court had found differently, then the diversity of UNC's student-body would have greatly suffered.

C. *Stare decisis* overwhelmingly allows the limited use of race in college admissions decisions

A ruling in favor of Petitioner would require this Court to overturn the cases *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); and *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016). This makes more sense than just focusing on *Grutter*, especially given that *Grutter* specifically calls Justice Powell's main opinion in Bakke the "touchstone" of the Court. And just in 2016, *Fisher v. University of Texas* upheld the decision in *Grutter* to use race as a factor in admissions, strengthening its influence on university affirmative action cases today (i.e. it has not outgrown its relevance). *Grutter* held that the University of Michigan Law School's use of race in admissions processes was narrowly tailored and had the compelling interest of gaining the educational benefits of a diverse student body, not prohibited by the Equal Protection Clause, Title VI, or § 1981. *Fisher* similarly held that the race-conscious admissions program used by the University of Texas at Austin was lawful under the Fourteenth Amendment's Equal Protection Clause.

Bakke shows that race cannot be the only factor in an admissions decision, but can play a factor when it comes to a holistic review. Though *Bakke* does not officially have a majority opinion, the only thing the Court held was

that the plaintiff was harmed by the fact that he couldn't compete for all places in a class when entering medical school. This is the first precedent of the Court on race-conscious policies for admissions programs. Justice Powell's opinion in this case is the one most commonly accepted (called the "principle opinion" in *Fisher I*, 570 U.S. 297, 307 (2013)), but all of Justices Powell, Brennan, White, Marshall, and Blackmun concluded that "Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies." *University of California Regents v. Bakke*, 438 U.S. 281-287 (1978). They all also agreed that racial classifications in admissions call for strict scrutiny. Justice Powell, however, specified that the goal of building a diverse student body is compelling enough to justify considering race in admissions, but preventing all students from applying to specific programs geared only toward groups decided by race isn't valid under the Equal Protection Clause. Considering race in admissions, Justice Powell explained, must be narrowly tailored to the interest of creating diversity within the student body. He justifies this with the First Amendment: by promoting a "robust exchange of ideas," diversity within a student population contributes to "[a]cademic freedom, [which] though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312.

The criticisms for accepting Justice Powell's opinion in Bakke as binding are largely due to the Court's "failure to produce a majority opinion in Bakke," causing the legality of making racial preferences in admissions to be "unresolved." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 221 (1995). However, if *Bakke*'s justification of its holding was unclear, the standard of review of the Court's

holding in *Bakke is* made clear by *Grutter*. *Grutter*, like *Bakke*, held that diversity is a compelling interest for keeping race-based admissions, and said that Bakke "served as the touchstone for constitutional analysis of race conscious admissions policies." *Grutter*, 539 U.S. at 323. Out of anything, this signals that at least in *Grutter*, a majority of the Court believed that the opinion in *Bakke* was binding. The current Court should read Bakke through the same lens.

In *Grutter*, this Court held that The University of Michigan Law School's race-sensitive admissions programs were narrowly tailored because race was only one factor being considered in the decision-making process; every application was given individualized consideration. It held, "The 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, Title VI, or § 1981." *Bollinger*, 539 U.S. 306 (2003). Based on the fact that *Grutter* had to satisfy strict scrutiny, clearly the Court decided that building diversity of a student body serves a compelling government interest. *Grutter* "recognize[d] a constitutional dimension, grounded in the First Amendment, of educational autonomy." *Grutter*, 539 U.S. at 329. For, education is "the very foundation of good citizenship." *Brown v. Bd. of Educ.,* 347 U.S. 483, 493 (1954). Based on this reading of *Brown*, equal opportunity actually required enhanced opportunity for those who have grown up in this country at a significant disadvantage. *Grutter* also claims the "educational benefits" of student body diversity (e.g. preparing students for a diverse workforce and improving "classroom discussions." *Id.* at 330). That is because the "experience of being a racial minority" is "likely to affect

an individual's views." *Id*. at 333. With the clarifications that strict scrutiny applies to race-based admissions and that race is "only a 'plus'" and not going to cause "unduly harm" to applicants, nor be their only "defining feature" *Id*. at 334-39; the Court would "defer" to the universities' "educational judgment that such diversity is essential, presum[ing] they were acting in good faith. " *Id*. at 328-29.

The Court upheld *Bakke* in the duo of cases against the University of Michigan in 2003, those cases being *Grutter v. Bollinger,* 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003). *Gratz* in particular held that the principle set forth in *Bakke* concerning race-based admissions practices was being violated by the university's office of undergraduate admissions.

The program in question in *Gratz* gave minority applicants an automatic, point-based advantage over non-minority applicants, similarly unsatisfactory as *Bakke's* program that unduly favored minority applicants. Chief Justice Rehnquist's majority opinion held that "Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court's decision upholding the guidelines." *Id.* at 247. *Grutter*, *Gratz's* companion case, held that the University of Michigan Law School's admissions process that took race into consideration was constitutional, with Justice O'Connor writing in the majority opinion, "Today, we hold that the Law School has a compelling interest in obtaining a diverse student body." *Grutter,* 539 U.S. 306 (2003) at 328. Justice O'Connor then listed a plethora of scientific studies endorsing diversity in the workplace, learning environment, and military as being a positive and

necessary presence in order to have the most enriching environment for all. The interest of diversity in education today is what justifies the utilization of race-conscious admissions processes.

The Court's decision in *Gratz* illustrates how public institutions, whilst having a compelling interest in considering race in college admissions processes, are also legally required to operate these policies in the most narrowly tailored fashion possible. The use of race in the University of Michigan OUA (Office of Undergraduate Admissions) was found to be unconstitutional due to the aforementioned policies assigning members of a minority race or ethnicity "points" that predetermined applicants to groups that were proven to have higher chances of admission to the University in spite of all other application considerations. The practice was overturned because it failed to consider the diversity of applicants individually and treated race as an automatic "plus" factor that made minority applicants more paramount to admission than non-minority applicants. Justice Rehnquist in the majority opinion said "[b]ecause we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court's decision upholding the guidelines." *Gratz*, 539 U.S. at 251.

Furthermore, the OUA was found to be admitting minority applicants with the reasoning that they would be more likely to enroll, costing other applicants acceptances. "In all application years from 1995 to 1998, the guidelines provided that qualified applicants from underrepresented minority groups be admitted as soon as possible in light of the University's belief that such applicants were more

likely to enroll if promptly notified of their admission." *Id.* at 256. The Court found this behavior unconstitutional as it blatantly favors minority applicants predicated on the idea that they would enroll if accepted to the University. This program did not consider students' race and diversity individually, and instead sought to advantage minority applicants automatically, a practice that does not bring about a compelling state interest as prescribed and legitimized by *Gratz's* companion case, *Grutter*. Therefore, *Gratz* is evidence of the Court appropriately restricting the use of race-conscious admissions processes and ensuring that universities do not have the complete liberty to consider race however they desire.

We can also look to *Fisher I* and *Fisher II* as clear examples of the Court applying *Grutter* to the race-based admission process. *Fisher v. University of Texas*, 579 U.S. 365 (both in 2013 and 2016) held that the race-based admission program used at the University of Texas at Austin was lawful under the Equal Protection Clause of the Fourteenth Amendment.

The cases concerned one Abigail Fisher, a white high school student in the state of Texas. Fisher filed a lawsuit against the University of Texas at Austin alleging that their affirmative action admissions practices were unconstitutional. The University asserted that their practices did not violate the affirmative action precedents, to which the United States Court of Appeals for the Fifth Circuit agreed. The Court vacated this appellate decision and remanded the case to the circuit court, saying that "Strict Scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Fisher*

I, 570 U.S. 297.

Despite language in *Grutter* that claimed to defer race-based decisions to the university and presume good faith, the Court in *Grutter* clearly affirmed that universities should get "no deference" to decide if their race-based admissions process is narrowly tailored. For, in *Fisher I*, a seven-justice majority agreed that "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts." *Fisher I*, 570 U.S. at 314.

In *Fisher II*, when the Fifth Circuit ruled in favor of the University again, the Court affirmed. In a decision that was 4-3, the Court backed the University of Texas's claim that it couldn't gain a "critical mass" of underrepresented minorities as students without factoring race into admissions. *Fisher II*, 579 U.S. at 382-83. An important fact of the case is that it did not even matter to the Court that almost all of the underrepresented minorities were admitted under Texas's top ten percent plan, as opposed to Texas's "holistic" race-based admissions. The top ten percent plan still was ruled to be not truly race-neutral, since its main purpose was "to boost minority enrollment." *Id*. at 385-86. Focusing only on class rank could "compromise the University's own definition of the diversity it seeks." *Id*. at 386-87. In *Fisher II*, the Court laid out "three controlling principles" that should control constitutional analysis: 1) considering race in admissions needs to satisfy strict scrutiny, 2) when a university can demonstrate a "reasoned, principled explanation" linking its decision to use affirmative action to the educational benefits of diversity, they should be treated with judicial deference, and 3) courts decide on their own whether an affirmative action program's

consideration of race is narrowly tailored. *Id*.

Both *Fisher* and this case were filed at similar times, with Petitioner filing litigation less than one year after the Court vacated the Fourth Circuit's opinion in *Fisher I* and remanded the case. It is supremely optimistic for Petitioner to assert that within this short period of time that the social atmosphere drastically changed enough to shift the threshold as to what satisfies the compelling state interest of diversity.

1. The use of racial preferences in college admissions are not without an endpoint

Justice O'Connor, wrote in the *Grutter* opinion that "25 years [after this case], the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter* 539 U.S. 306 (2003) at 310. *Grutter* was self-limiting, in that it required we reevaluate race-conscious policies rigorously and assess potential race-neutral alternatives consistently. We firmly support the idea of a self-limiting holding in the interest of ensuring the means of ensuring educational diversity are narrowly tailored under strict scrutiny, especially due to the unique nature of race in our political and social discourse, and the prospective principles of inclusion and equality.

The compelling interest of educational diversity will always exist. The question is whether or not affirmative action policies will be the means necessary to achieve that interest. Today, that answer is yes; these are still the means necessary to achieve diversity in this case, because race-neutral policies alone are not sufficient in achieving the same levels of diversity and educational

standards UNC has for its applicants today. Justice O'Connor, writing for the majority in *Grutter*, said "We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Id*. at 308. This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." The Court has upheld *Grutter's* holding as recently as 2016 in *Fisher II*, and the Court should reach the same decision today as they did in this case six short years ago. In *Fisher II*, Justice Kennedy wrote in his majority opinion, "...[t]he University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling state interest." *Fisher II*, 579 U.S. 365 (2016). This indicates that universities should change their approaches in maintaining a diverse student body by slowly implementing more race-neutral policies as our society becomes increasingly more equal.

Firstly, many schools, of their own volition, have transitioned to race-neutral admissions practices. The University System of Georgia, which includes 26 institutions throughout the state, in 2018 issued a joint statement that announced that none of their institutions consider race in college admissions. "At all 26 USG institutions, race or ethnicity is not a determining factor in admissions." Eric Stirgus, *Court Ruling Changed Georgia's Approach to Race-Based College Admissions*, 2018, The Atlanta Journal-Constitution. The University has not had any significant dropoff in class diversity since these changes. Similarly, public Florida universities have been complying with the 1999 executive order by then-Governor Bush that prohibited affirmative action practices. The order read "I hereby request that the Board

of Regents implement a policy prohibiting the use of racial or gender set-asides, preferences or quotas in admissions to all Florida institutions of Higher Education, effective immediately." Fla. Exec. Order No. 99-281, 1999. Again, the universities had no measurable drop in diversity since the order took effect.

According to the opinion from the United States District Court for the Middle District of North Carolina, "...UNC Defendants argue that it has demonstrated a serious, good-faith consideration of race-neutral alternatives but has "found none that would allow it to achieve its compelling interest about as well and at tolerable administrative expense." D. Ct. at 3.

Additionally, UNC has a unique history compared to these institutions that have phased out race-conscious policies. The university was specifically founded to educate the children of slave owners, and UNC itself acknowledges that "Black enrollment remained low for many years. There were four black freshmen in 1960 and only eighteen in 1963." (The Carolina Story: A Virtual Museum of University History). There were *de jure* segregation practices in place at the university until the 1980s.

SFFA also ignores the history of anti-Black discrimination in this nation's universities—and its present-day impacts. The group rightly notes historical discrimination against Jewish and Asian American students, but studiously avoids acknowledging the history of anti-Black discrimination. That approach is disingenuous. When considering whether race may play some role in a holistic admissions policy, the Supreme Court must frankly acknowledge the unique (and uniquely long) history of anti-Black discrimination in higher

education when determining what the 14th Amendment's equal protection clause requires or permits in that unique context.

We bring up this history not to advocate for remediation, but to signal that this history has led us to the society that we find ourselves in today. UNC's unique past that involves racism and discrimination indicates that some institutions may take longer than others to progress to the point where they sufficiently reduce the bias in their process that has historically disadvantaged or outright discriminated against minority applicants.

The Court should allow racial preferences to continue so long as they do not overreach based upon the holding of *Fisher II*. As time progresses, it is desirable for universities to constantly reassess and evolve their admissions practices to be race-neutral while still maintaining a diverse student body whenever and wherever possible, as *Grutter* already calls for. If there is a proven opportunity for all universities to do this and it is proven that they would retain their diverse student body while achieving the same university-specific standards, then and only then should the Court end these preferences based upon the merits of whatever case(s) may be brought before them.

D. *Parents Involved* has no bearing on cases about higher education

Parents Involved was a case that assessed how racial preferences could be used in terms of demographic representation of Seattle School District No. 1. The case only involved elementary and secondary institutions, and did not involve any policies at any higher education institution. *Parents Involved* held that a Washington law

"does not prohibit the Seattle School District's open choice plan tiebreaker based upon race so long as it remains neutral on race and ethnicity and does not promote a less qualified minority applicant over a more qualified applicant." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2004). Essentially, *Parents Involved*, in order to avoid a reliance on *Grutter*, went back to say that any discussion of racial classifications in education must start with *Brown*. In *Brown*, under Petitioner's reasoning, the violation to the constitution—the impossibility of "separate but equal"—was "government classification": the failure to "'determin[e] admission to the public schools on a nonracial basis.'" *Parents Involved*, 551 U.S. at 746-47, (Roberts, J.). The "position that prevailed" was that the Constitution doesn't provide "'any authority … to use race as a factor in affording educational opportunities.'" *Id*. at 747. However, the fact that this is a case about public high schools means it is not relevant to college affirmative action programs than other past precedents that are more instructive (namely *Grutter, Bakke*, and *Fisher*). Additionally, the case does recognize the fact that admissions decisions that take into account applicants as individuals, and only use race as one of many factors to determine their acceptance or rejection, are constitutional in higher education.

In 2007, Chief Justice Roberts wrote in *Parents Involved* that "The way to stop discriminating on the basis of race is to stop descriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School District No. 1,* 551 U.S. 701 (2004). While this seems a pristine train of thought, its simplicity cannot accurately or wholly account for the conditions of race of the United States in the modern day. Rather, the Court should take

the more nuanced view expressed by Justice Sotomayor, in the Court's 2014 *Schuette* decision: “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.” *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291.

E. Law against discrimination in the 1964 Civil Rights Act differs between sex and race

While this case doesn't cover affirmative action policies that benefit people on the basis of sexual orientation or gender identity, Title VII of the Civil Rights Act of 1964 protects against discrimination on the basis of sexual orientation and gender identity. This was affirmed in the case Bostock v. Clayton County (2020), in which Justice Gorsuch, writing for the majority, held “that employers are prohibited from firing employees on the basis of homosexuality or transgender status…”

Furthermore, Title VII prohibits discrimination in the workplace that is based on race, color, religion, sex and national origin. The 2009 case *Ricci v. Destefano* 557 U.S. 557 (2009) was about twenty firefighters who sued the New Haven Fire Department alleging that they were refused promotions solely because of their race. Nineteen of these firefighters were white and one of them was hispanic, and all of them outperformed minority candidates on an exam that assessed which employees would be promoted. Subsequently, the tests were discarded and no firefighters were promoted. The Court held "that race-based action like the City’s in this case is impermissible under Title VII…” *Id.* at 2. The Court’s ruling in this case, according to the five justice majority, the opinion of which was authored by Justice Kennedy, the

decision ensured "that the workplace be an environment free of discrimination, where race is not a barrier to opportunity." *Id.* at 20. Although we fully acknowledge this decision, it is important to note the difference between promotions being granted or not granted in a workplace environment, and an educationally rich environment at a higher education institution. This decision casts no doubt on the compelling state interest of educational diversity.

Like Title VII of the 1964 Civil Rights Act, Title VI of the Civil Rights Act also treats discrimination. It reads, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

As previously mentioned, the Civil Rights Act is derived from the Civil Rights Movement of the 1960s, which included demonstrations by many oppressed groups, such as the March on Washington for Jobs and Freedom of 1963. This advocated for African Americans to be economically and civilly equal to white Americans. Another example would be the Stonewall Riots of 1969—which spearheaded the movement for gay and transgender liberation in the United States.

Because the movement for gay and transgender rights is a similar derivation as the movement for Civil Rights of African Americans, and because these groups faced their own unique discriminatory roadblocks, it falls under the same argumentation as does the previous question. Although the Framers may not have explicitly considered sexual orientation or gender identity, these still fall under the same protection and consideration as do the other groups, seeing as the Fourteenth Amendment's

Equal Protection Clause protects each "person" from statutes and policies that favor one group over another.

We acknowledge that Title VII bans discrimination on the basis of sex, and Title VI bans discrimination on the basis of race, yet each of these has their own history of scrutiny that we believe does not bar the Court from affirming its past decisions and upholding affirmative action under strict scrutiny.

F. ***Bakke, Grutter, Fisher I*, and *Fisher II* set a correct and encompassing constitutional standard for race-conscious affirmative action**

Bakke, Grutter, and *Fisher* (*I* and *II)* are three cases that have worked in coalition to structure the confines of the constitutional issue of race-conscious affirmative action, allowing for democratic process to govern our acceptance or rejection of the processes of affirmative action. They have made us ask the questions: do race-conscious admissions have a place in the university setting? Whatever the answer, that is for the people to decide, not the Courts, though the Court still can rule as to whether or not a college's policy is narrowly tailored to the interest of promoting a more diverse campus. In *Grutter*, the Court recognized that "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." 539 U.S. at 323. And since *Grutter*, the Court has invited university to "serve as laboratories for experimentation" on the "enduring challenge . . . to reconcile the pursuit of diversity with the constitutional promise of equal

treatment and dignity." *Fisher II*, 136 S. Ct. at 2214. This type of democratic process, too, could work in Petitioner's favor. In North Carolina, for example, there is a proposed constitutional amendment that would ban affirmative action in public institutions of higher education (and nine states have passed similar laws—one as recently as last year—Ariz. Const. art. II, § 36; Cal. Const. art. I, § 31; Fla. Exec. Order No. 99-281; Idaho Code Ann. § 67-5909A; Mich. Const. art. I, § 26; Neb. Const. art. I, § 30; N.H. Rev. Stat. Ann. § 187-A:16- a; Okla. Const. art. II, § 36A; Wash. Rev. Code Ann. § 49.60.400). To summarize, the Court's precedents have created a balance between the courts and democratic processes, while SFFA only wants to halt the democratic debate by giving people no option to decide for themselves what they want. This isn't for the courts to decide any more than it has already been decided. So we can apply strict scrutiny, without tearing down affirmative action altogether. If legislative bodies want to decide that it is discriminatory, they can do that through a democratic process. But then at least this Court doesn't have to sacrifice the integrity of the Equal Protection Clause.

IV. Affirmative Action as Applied By the University of North Carolina Satisfies Strict Scrutiny

The Court has held that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995).

Justice Cardozo, in the 1938 case of *Palko v. Connecticut*, wrote in the majority opinion that a fundamental right is one "of the very essence of a scheme of ordered liberty" such that "neither liberty nor justice

would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319 (1937). Using this standard, we can recognize the the right to Equal Protection under the Fifth Fourteenth Amendments is a fundamental right, requiring the U.S. government and individual states to practice equal protection.

Justice Stone outlined in Footnote Four of the 1938 decision of *United States v. Carolene Products Company* that we must have a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *United States v. Carolene Products Co.,* 304 U.S. 144 (1938). This narrower scope is known today as strict scrutiny. Justice Rehnquist summarized this process in the majority opinion of the 1997 decision of *Washington v. Glucksberg*, quoting the 1993 case *Reno v. Flores*, writing, "the Fourteenth Amendment 'forbids the government to infringe … "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Washington v. Glucksberg*, 521 U.S. 702.

In essence, strict scrutiny examines the constitutionality of both the means and the ends of a governmental action. The ends are the compelling state interest, which in the context of affirmative action means the educational benefits that come from "diversity," such as offering different worldviews or making people feel comfortable and well-represented on campus. The means are what should be the most narrowly tailored way of achieving diversity, which under current law and *Grutter* permits the use of race as a 'plus' factor, if it is only one

aspect of a holistic application review.

UNC's admissions process meets the standard of scrutiny in *Fisher II*, by showing that its admissions programs does engage in individualized, holistic review of every applicant file, and only ever used race as a "plus" factor when it existed alongside many other factors. Aside from this, a university "bears the burden of proving a nonracial approach would not promote its interest in the educational benefits of diversity about as well and at tolerable administrative expense." *Fisher II*, 136 S. Ct. at 2208. Therefore, in order to satisfy narrowly tailoring, the university has to have considered race-neutral alternatives that might be available and workable, and demonstrate that they don't satisfy the goals of the university *as well as* the race-conscious strategies they have employed. Significantly, "it is not required that every conceivable race-neutral alternative has been tried." SFFA v. UNC-Chapel Hill, 254 F. Supp. (M.D.N.C. 2021). That would for obvious reasons be unfeasible, especially as Mr. Kahlenberg for the plaintiff (at least in Harvard's case) presented himself four potential simulations with varying results in the academic and racial diversity represented in the hypothetical makeup of the student body.

A. The promotion of student body diversity is a compelling state interest

This Court has held for over forty years that "the interest of diversity is compelling in the context of a university's admissions program." *Bakke*, 438 U.S. at 314. We know that being exposed to diverse ideas leads to "enhanced classroom dialogue," "lessening of racial isolation and stereotypes," and increased "crossracial understanding." *Id.* at 313; *Fisher I*, 570 U.S. at 308;

Grutter, 539 U.S. at 330. Naturally, these benefits apply to all students, regardless of their race or background.

The experience of interacting with students of diverse backgrounds prepares students for success in "an increasingly diverse workforce and society." *Grutter*, 539 U.S. at 330. Therefore, diversity also contributes to producing better citizens. *Brown* tells us, "education … is the very foundation of good citizenship." *Brown*, 347 U.S. at 493. Education is "pivotal to 'sustaining our political and cultural heritage'" and has 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)).

Grutter also clarifies that these benefits are measurable. The "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id*. at 330.

As we already discussed, just one example of this is diversity's importance to the efficacy of our nation's military "To fulfill its mission, the military … must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." *Id*. at 331.

B. The University of North Carolina's race-conscious policies are narrowly tailored

The Court has clearly established a framework of several prongs in order to determine whether a university's admissions policy is narrowly tailored to the interest of diversity. First, "[r]ace may not be considered unless the admissions process can withstand strict scrutiny." *Fisher I,* 570 U.S. at 309. *Fisher*'s "searching examination" requires schools to prove their admissions

policies are needed to advance a "compelling governmental interest," and their use of race is "narrowly tailored" to that interest. *Id*. at 310.

Additionally, a school may not impose racial quotas or use race in a "mechanical, predetermined" way. *Grutter*, 539 U.S. at 337. Race also cannot be "the predominant factor" in the school's "admissions calculus." *Id*. at 320.

Finally, the university has to show that race-neutral policies alone would not further its compelling interest "about as well and at tolerable administrative expense." *Fisher II*, 579 U.S. at 377.

If a university can fulfill all of these criteria, it can lawfully consider race as one of many factors in admissions.

The district court found that UNC has scrupulously followed the Court's standards for its race-conscious admissions policy. It has a rigorous process of holistic review that includes forty separate factors of an application, and it created a system to evaluate and implement potential race-neutral alternatives on an ongoing basis. In 2012, the U.S. Department of Education's Office on Civil Rights looked at UNC's admissions policies and found that the University had "given serious, good faith consideration to race-neutral alternatives." *SFFA v. UNC-Chapel Hill*, 254 F. Supp. (M.D.N.C. 2021). In February of 2016, UNC established its Advisory Committee on Race Neutral Strategies (CRNS), comprised of faculty and administration with experience in fields relevant to looking at RNAs (Race-Neutral Alternatives)—e.g. data integration, modeling, undergraduate admission, student affairs, and diversity and inclusion. Their job includes "(1) considering whether

there are workable race-neutral strategies and practices that the Admissions Office could employ in evaluating applications for undergraduate admission; (2) advising the Admissions Office about these strategies and practices; and (3) reporting to the Advisory Committee on the CRNS's consideration of specific race-neutral strategies approximately every two years." *SFFA v. UNC-Chapel Hill*, 254 F. Supp. (M.D.N.C. 2021).

Furthermore, UNC already employs a range of race-neutral strategies. Firstly, the university actively seeks to recruit students that are low-income, first-generation, and underrepresented students enrolling in college." Pet. App. 119-20. Secondly, it targets making college affordable for low-income applicants through a need-blind admissions process that does not consider whether an applicant can afford to go to a school while considering them for admission. Thirdly, the university boosts diversity by admitting transfer students, including some students from community colleges. The Carolina Student Transfer Excellence Program was established by the University of North Carolina in 2006, which guaranteed that low- and moderate-income transfer students admission from partner colleges of UNC, with an ability to receive an associate's degree. This program has since grown to include about 400 students from 14 partner colleges per year, approximately 10% of the university's incoming class.

Additionally, the University of North Carolina has continued to review whether new race-neutral policies would be successful in achieving student body diversity. In 2007, 2009, and 2012, the admissions office reviewed race-neutral alternatives and how they would impact the university's class composition, finding each time that there

were no alternatives that could yield the same diversity and academic qualifications of students as its existing holistic, race-conscious process.

C. Race-neutral policies alone are not presently sufficient in achieving the university's goals in diversity and education

Under the strict scrutiny rubric established by the Supreme Court, a school can only consider race to achieve diversity in admitted students only if there is no "workable" race-neutral alternative to considering race for the purposes of ensuring this diversity. *Fisher II*, 579 U.S. 365 (2016). UNC's expert and professor, Dr. Caroline Hoxby, conducted more than 100 simulations to see the potential impact of a large number of UNC's admissions process. Her conclusion was that "none of these simulations, even when using very generous assumptions that strongly favored the Plaintiff's proposed plans, achieved diversity about as well as UNC's race-conscious admissions policies." *SFFA v. UNC-Chapel Hill*, 254 F. Supp. (M.D.N.C. 2021). The models offered by Mr. Kahlenberg for SFFA would force UNC to choose between "maintaining a reputation for excellence and providing educational opportunities to all racial groups." *SFFA v. UNC-Chapel Hill*, 254 F. Supp. (M.D.N.C. 2021). The Supreme Court was clear in *Grutter* that a University isn't required to make this decision. See *Grutter*, 539 U.S. at 339.

To evaluate an example of whether race-neutral admissions policies achieve the same level of diversity, we can look to California schools under Proposition 209. Does affirmative action give underrepresented minorities opportunities they wouldn't otherwise have, or is it—as

Justice Thomas believes—setting them up for failure? Justice Thomas has in past affirmative action cases, in dissent, demonstrated he is a proponent of the mismatch theory in regards to affirmative action: the theory that by admitting a student to a class they aren't academically able to survive in, they are caused to perform much worse than if they had gone to a school that admitted them solely based on their academic ability.

California public schools present a clear model of what an American world without affirmative action would look like. Under Proposition 209, which was passed into law on November 5, 1996 (with 55 percent of the vote) in California, in all state institutions, admissions offices can't use race in any context in higher education. Justice Thomas explicitly talked about Proposition 209 in his dissent in *Grutter*. He wrote, "The sky has not fallen at Boalt Hall at the University of California, Berkeley, for example. Prior to Proposition 209's adoption of Cal. Const., Art. 1, §31(a), which bars the State from 'grant[ing] preferential treatment … on the basis of race … in the operation of … public education,'8 Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics … The Court is willfully blind to the very real experience in California and elsewhere, which raises the inference that institutions with 'reputation[s] for excellence,' *ante*, at 16, 26, rivaling the Law School's have satisfied their sense of mission without resorting to prohibited racial discrimination." *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Thomas, J., dissenting).

However, California schools like UCLA have a disproportionately large percentage of Asian students

(33%) compared to the percentage of Asian people in the country (7.2% in 2020). Therefore, while racial preference is institutionalized by affirmative action, racism is also institutionalized in a race-neutral admissions scheme due to factors like racially discriminatory SAT and LSAT tests or the lower rate of schools admitting low-income students. While in 1996, California voted to ban affirmative action in its public universities through Proposition 209, in fact, UC President Michael Drake and all ten chancellors submitted an amicus brief *supporting* UNC and Harvard's affirmative action processes. The brief said that UC as a "laboratory for experimentation" fell short, even with decades of outreach to low-income students, in creating a diverse student body. The brief says, "UC struggles to enroll a student body that is sufficiently racially diverse to attain the educational benefits of diversity." The enactment of Proposition 209 led to a direct drop in diversity across California's most competitive college campuses. In 1998, the first year the ban was in place, Black and Latino first-year students dropped by almost half at UCLA and UC Berkeley.

In a 2020 study, Bleemer found that Proposition 209 led to Black and Latino students who might have gotten into UCLA and UC Berkeley to attend less competitive schools or not apply to UC altogether. These students earned fewer undergraduate and graduate degrees and, for Latinos, eventually lower wages. By the mid-2010s, Proposition 209 had reduced the number of young Black and Latino workers in California earning more than $100,000 by approximately 3%, or 1,000 workers.

D. Should affirmative action be overturned, the diversity of our nation's armed forces would

suffer

Without the ability to use affirmative action in the event that *Grutter* is overturned, the military would have difficulties recruiting a diverse armed service, because at present, current race-neutral strategies are not enough to achieve a diverse, capable armed service. The US military depends on an officer corps that is diverse and well qualified. The Department of Defense has recognized that this diversity is "integral to overall readiness and mission accomplishment." Department of Defense (DoD), *Department of Defense Board on Diversity and Inclusion Report: Recommendations To Improve Racial and Ethnic Diversity and Inclusion in the U.S. Military* 3 (2020) (D&I Report). The Department of Defense has identified diversity as a "strategic imperative," and has specified the need to "ensure that the military across all grades reflects and is inclusive of the American people it has sworn to protect."

During the Vietnam War, this played out in the racial conflicts caused by the lack of diversity in military leadership. In 1969, fights between Black and white marines at Camp Lejeune resulted in 15 injured and one dead. See Richard Stillman, *Racial Unrest in the Military: The Challenge and the Response*, 34 Pub. Admin. Rev. 221, 221 (1974). In 1971, racially charged conflicts at Travis Air Force Base lasted for two days and injured at least ten airmen. See Nicole Leidholm, *Race riots shape Travis' history* (Nov. 8, 2013). And in 1972, racial unrest on the *U.S.S. Kitty Hawk* injured 47 sailors and resulted in 26 all-Black sailors being charged with offenses under the Uniform Code of Military Justice. Stillman 222. Therefore, to achieve more diverse military leadership, the department of defense must "ensure the development of a

diverse pipeline of leaders." *D&I Report* 21.

Currently, race-neutral alternatives fail to create that pipeline. A percentage plan like the one Texas public universities have that offers admission to a percentage of students at each high school based on class rank wouldn't work for service academies that recruit from all over the country and require additional skills like leadership, physical ability, and personal character. An admissions policy based on socioeconomic status isn't sufficient, since West Point reported that focuses on socioeconomic status have led to a decrease in racial diversity. The University of Texas in 2016 likewise "tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors." *Fisher II*, 136 S. Ct. at 2213. Lastly, focusing efforts on recruiting diverse candidates specifically has thus far fallen short of the diversity standards of these service academies.

Therefore, should *Grutter* be overturned, the diversity of our armed forces, particularly at the leadership level, would suffer.

E. In light of *SFFA v. Harvard*, the benefits of diversity achieved by race-conscious policies exist in all university settings under the Fourteenth Amendment and Title VI

Students for Fair Admission (SFFA) claims that the Court's "analysis would be more complete if it considered both a private university (Harvard) and a public university (UNC) and both the Constitution (UNC) and Title VI (Harvard and UNC)." Pet. 11. However, this Court has held in *Grutter* and *Bakke* that Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause are coextensive here. Grutter held that the failure of the

plaintiffs' claims of equal protection also meant that their Title VI claims failed as well. *Grutter*, 539 U.S. at 343. Title VI claims were largely shaped by the Equal protection clause. Title VI reads, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. This view has been affirmed by other courts: "intentional discrimination proscribed by Title VI is discrimination that violates the Equal Protection Clause of the Fourteenth Amendment." *Weser v. Glen*, 190 F. Supp. 2d 384, 396 (E.D.N.Y.), aff'd, 41 F. App'x 521 (2d Cir. 2002), as well as by the Supreme Court in *Bakke*, stating that Title VI reflects a "congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution," but according to Justice Powell,"proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Bakke*, 438 U.S. at 284, 286, and *Gratz*: "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz*, 539 U.S. at 276 n.23 (citing *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001), *United States v. Fordice*, 505 U.S. 717, 732, n.7 (1992), and *Alexander v. Choate*, 469 U.S. 287, 293 (1985)). Thus, any time a university in the United States makes a classification based on race, they need to satisfy strict scrutiny.

The district court in Harvard's case concluded as much: "Harvard College is … subject to the same standards that the Equal Protection Clause imposes upon

state actors for the purposes of a Title VI claim." *SFFA v. President & Fellows of Harvard College*, 672 F. Supp. (D. Mass. 2019).

While this case isn't Harvard's, it in light of both SFFA cases demonstrates sufficiently that affirmative action in its missions to achieve diversity under the framework of *Grutter* (employing race-neutral measures and consistently evaluating race-conscious ones) is constitutional in university settings both private and public. The issue under existing precedent is certainly in UNC's case already sufficiently narrowly tailored and is the least restrictive means of ensuring the compelling interest of diversity. For these reasons, UNC should prevail under the standards of strict scrutiny.

CONCLUSION

The Court correctly held in *Grutter* that both the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964 do not prevent the limited consideration of race done by admissions offices as

part of a holistic process, so long as that consideration is narrowly tailored to the compelling state interests of the educational benefits of "student body diversity." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

Petitioner cannot prevail should *Grutter* be upheld. *Grutter* is the governing precedent on affirmative action, and if *Grutter* remains intact, then affirmative action would remain constitutional under the *Grutter* strict scrutiny assessment affirmed by *Fisher II*. Justice O'Connor, writing for the majority in *Grutter*, detailed that in applying strict scrutiny in *Grutter*, the Court "endorsed Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in admissions," and explained that diversity is crucial to educational experience in terms of preparing citizens for future employment and success. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). The *Grutter* opinion limits the consideration of race in admissions processes to ensure that the University of Michigan Law School did not overreach to meet its compelling state interest of diversity, with Justice O'Connor confirming that the holding "ensure[d] 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*.

Grutter held that it is constitutionally permissible to take race into account to ensure that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id*. Should the Court uphold the decision in *Grutter*, UNC will remain able to factor race into its admissions processes, as one of the forty aspects of an application that they review.

Simply, under *Grutter*, race can be used as a means to foster equality of opportunity in higher education.

The claim that the Fourteenth Amendment's Equal Protection Clause forbids all use of race-conscious policies by the government was rejected over and over by the Framers of the original Amendment in that they enacted a litany of race-conscious measures during reconstruction.

A ruling in favor of Petitioner would result in radical change to the law under the Fourteenth Amendment, with a willful blindness to the significant historical context of the Amendment's ratification. Petitioner has lost sight of the history, text, and original meaning of the Fourteenth Amendment. *Grutter* respects that history. It should therefore be reaffirmed.

Respectfully submitted,

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December 16, 2022