No. 11-345

In the Morris Tyler Moot Court of Appeals at Yale

ABIGAIL NOEL FISHER ET AL.,

Petitioners,

v.

UNIVERSITY OF TEXAS AT AUSTIN ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

In *Grutter v. Bollinger* this Court held that the Equal Protection Clause allows the narrowly tailored use of race in admissions decisions to promote student body diversity. 539 U.S. 306, 343 (2003). The University of Texas at Austin considers the race of undergraduate applicants when making admissions decisions. The questions presented are:

1. Whether the Court should overturn *Grutter*'s holding that promoting diversity can be a compelling state interest; and
2. Whether the University of Texas at Austin's use of race in undergraduate admissions is narrowly tailored.

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is sought to be reviewed is as follows:

Petitioners are Abigail Noel Fisher and Rachel Multer Michalewicz.

Respondents are University of Texas at Austin; David B. Pryor, Executive Vice Chancellor for Academic Affairs in His Official Capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; James R. Huffines, as Member of the Board of Regents in His Official Capacity; Janiece Longoria, as Member of the Board of Regents in Her Official Capacity; Colleen McHugh, as Chair of the Board of Regents in Her Official Capacity; Robert L. Stillwell, as Member of the Board of Regents in His Official Capacity; James D. Dannenbaum, as Member of the Board of Regents in His Official Capacity;

Paul Foster, as Member of the Board of Regents in His Official Capacity; Printice L. Gary, as Member of the Board of Regents in His Official Capacity; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; Francisco G. Cigarroa, M.D., Interim Chancellor of the University of Texas System in His Official Capacity.

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 18, 2011. A petition for rehearing en banc was denied on June 17, 2011. A timely petition for a writ of certiorari was filed on September 15, 2011, and was granted by this Court on February 21, 2012. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

STATEMENT

I. History of UT's Admissions Policy

Until 1996, admissions decisions at the University of Texas at Austin ("UT" or the "University") were based on two metrics: an Academic Index ("AI") and race. *See Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 222 (5th Cir. 2011). The AI, still in use today, is a calculation of predicted GPA for each major based on high school class rank, standardized test scores, and the extent to which an applicant exceeded UT's required high school curriculum. *Id.*; *see also* University of Texas at Austin, *Proposal To Consider Race and Ethnicity in Admissions*

27 n.5 (2004) [hereinafter *2004 Proposal*] (describing the AI calculation). Although the record is vague about the precise use of race at the time, the court below found it "undisputed that race was considered directly and was often a controlling factor in admission." *Fisher*, 631 F.3d at 222-23.

In 1996, the Fifth Circuit struck down UT's race-based admissions program in *Hopwood v. Texas*. 78 F.3d 932 (1996). The *Hopwood* decision was interpreted by the Texas Attorney General as prohibiting the use of race as a factor in admissions in any Texas state university. *Fisher*, 631 F.3d at 223. In response, UT replaced its direct consideration of race with a Personal Achievement Index ("PAI"); the PAI is derived from a holistic consideration of a number of factors, including personal essays, work experience, and special circumstances such as socioeconomic status. *See 2004 Proposal* at 27-28. Although facially race-neutral, "the PAI was in part designed to increase minority enrollment" as many PAI factors disproportionately affected minority students. *Fisher*, 631 F.3d at 223.

Responding in part to the *Hopwood* decision, in 1997 the Texas legislature enacted HB 588, known as the "Top Ten Percent Law." TEX. EDUC. CODE § 51.803 (1997). Under the Top Ten Percent Law, Texas high school seniors in the top ten percent of their class are automatically admitted to any Texas state university (though not necessarily to their first-choice major). *Fisher*, 631 F.3d at 224. Since 1998, "freshman admissions have largely been governed by [the Top Ten Percent Law]." *2004 Proposal* at 30.

In addition, in 1999 the University introduced the Longhorn Opportunity Scholarships program. *2004 Proposal* at 31. The scholarships provide financial assistance to students from high schools without strong traditions of sending graduates to UT and with lower average parental incomes. *Id*. The program was designed to "serve[] underrepresented, low-income, first-

generation students." *Id*. The AI/PAI system, the Top Ten Percent Law, and the Longhorn Opportunity Scholarships program were in place together from 1999 to 2004.

In 2003, this Court decided *Grutter v*. *Bollinger*, authorizing the "narrowly tailored use of race in admissions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." 539 U.S. 306, 343 (2003). In response to *Grutter*, the UT Board of Regents authorized individual institutions in the university system to examine whether to consider race and ethnicity in admissions decisions. *Fisher*, 631 F.3d at 225. The University of Texas at Austin conducted two studies and incorporated those findings into its June 2004 *Proposal to Consider Race and Ethnicity in Admissions*. *See Fisher*, 631 F.3d. at 225. The *2004 Proposal* recommended adding race as an additional factor to be considered in the PAI. *Id*. at 226. The University adopted this proposal starting with the 2005 admissions cycle. *Id*.

II. UT's Current Admissions Policy

UT reserves 90% of the available seats in each incoming class for Texas residents.[1] *Fisher*, 631 F.3d at 227. These seats are filled using a two-tiered process: seats are first filled by students automatically admitted under the Top Ten Percent Law; remaining seats are filled by consideration of other applicants' AI and PAI scores. *Id*. In 2008, when petitioners were denied admission, students admitted under the Top Ten Percent Law filled 88% of the seats allotted to Texas residents. *Id*. The University filled the remaining 12% of the seats based on applicants' AI and PAI scores. *Id*.

[1] The other 10% of the available seats are filled by domestic non-Texas residents and international students. *Fisher*, 631 F.3d at 226-27. Admissions decisions for these groups are based upon the applicants' AI and PAI scores. *Id*. at 227 n.73.

Some applicants' AI scores are high enough that they are admitted on that basis alone.[2] Admissions officers evaluate the remaining applications based on both AI and PAI scores. The PAI is a composite of several scores. Two essays written by the applicant are evaluated holistically as "piece[s] of writing" and scored between 1 and 6. *Fisher*, 631 F.3d at 227-28. Each applicant is also given a personal achievement score from 1 to 6. *Id*. This score is based upon a variety of factors, including work experience, extracurricular activities, and other "special circumstances" (which include socioeconomic status, family responsibilities, and the applicant's race). *Id*. These factors are not weighed separately and added together; they are assessed holistically in context to arrive at a single score. *Id*. The final PAI is a weighted average of the two essay scores and the personal achievement score. *Id*.

An offer of admission is ultimately tied to an individual school or major; the Top Ten Percent Law, while guaranteeing admission, does not guarantee offers from a particular school or major. *Fisher*, 631 F.3d at 229. Certain popular majors limit automatic admission to 75% of their seats to allow admission of some non-Top Ten Percent applicants.[3] *Id*. Top Ten Percent applicants who are not automatically admitted to the major of their choice compete for open slots; these applicants are placed into a matrix based on their AI and PAI scores. *Id*. Cutoff scores are provided for each major or school. *Id*. Top Ten Percent applicants who do not make the cutoff for their major of choice are entered into the matrix for their second-choice major with new score cut-offs established. *Id*. Any Top Ten Percent applicants who do not make the cutoff for their second-choice major are automatically admitted as Liberal Arts Undeclared majors. *Id*.

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[2] Some applicants' AI scores are also low enough that they are presumptively rejected. These applications are reviewed by senior admissions staff and may be placed back in the applications pile for full consideration notwithstanding the low AI score. *See Fisher*, 631 F.3d at 227 & n.78.

[3] A few programs, such as the School of Fine Arts, have special portfolio and other requirements and are exempt from the Top Ten Percent Law. *Id*. at 229.

All other applicants then compete for remaining seats using the same AI/PAI process described above.[4] *Id*.

III. Procedural History

Abigail Fisher is a graduate of Stephen F. Austin High School in Sugar Land, Texas. Rachel Michalewicz is a graduate of Jack C. Hays High School in Buda, Texas. Both Ms. Fisher and Ms. Michalewicz applied for admission to the University of Texas at Austin for the Fall of 2008. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009). Both Ms. Fisher and Ms. Michalewicz are white. *Id*. Both were denied admission. *Id*.

On April 7, 2008, Ms. Fisher brought suit in the Western District of Texas; she was joined by Ms. Michalewicz on April 17. *Id*. The suit named a number of defendants, including the University of Texas at Austin and certain members of the University leadership in their official capacities. *Id*. Ms. Fisher and Ms. Michalewicz contended that "admissions policies and procedures currently applied by [respondents]" discriminated against them "on the basis of their race in violation of their right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution." *Id*.

The district court granted the defendants' motion for summary judgment. *Id*. at 613. A three-judge panel of the Court of Appeals for the Fifth Circuit affirmed. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011). Although all three judges concurred in the judgment, each filed a separate opinion. *See id*. at 216-47 (Higginbotham, J.); *id*. at 247 (King, J., specially concurring) (declining to join the analysis of the Top Ten Percent Law); *id*. at 247-66 (Garza, J.,

[4] Although this process is used to fill the Fall admission seats at UT, no Texas resident who submits a timely application is denied admission. *See Fisher*, 631 F.3d at 229-30. Texas applicants who narrowly miss the AI/PAI cutoffs are admitted to a summer study program and then join the other admitted students in the Fall. *Id*. All other timely Texas applicants are automatically enrolled in the Coordinated Admission Program (CAP). *Id*. CAP students who complete thirty credit hours at another system campus and maintain a 3.2 GPA are guaranteed admission to UT as transfer students. *Id*.

specially concurring) ("I concur in the majority opinion, because, despite my belief that *Grutter* represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. The [Morris Tyler Moot Court of Appeals] has chosen this erroneous path and only the Court can rectify the error. In the meantime, I write separately to underscore this detour from constitutional first principles.").

Ms. Fisher and Ms. Michalewicz petitioned this Court to review the judgment of the court of appeals. The Court granted certiorari on February 21, 2012.

SUMMARY OF THE ARGUMENT

1. Allowing state-sponsored racial classifications as a means to promote diversity in higher education imposes costs on individuals and society at large: through these classifications, the government stigmatizes and stereotypes minorities. Moreover, an interest in promoting diversity is susceptible to abuse without a meaningful judicial check. The interest is amorphous, unlimited in scope and duration, and can easily disguise underlying constitutional violations.

For these reasons, promoting diversity is not a compelling state interest. To the extent this Court's opinion in *Grutter* holds otherwise, it should be overruled. Conformity with fundamental principles of equal protection provides "special justification" for not adhering to recent precedent. To give meaning to the Equal Protection Clause, this Court should hold that promoting diversity is not a compelling state interest.

2. Even if promoting student body diversity remains a compelling state interest, equal protection requires more. "[I]n the limited circumstances when drawing racial distinctions is permissible to further a compelling state interest, government is still constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be

specifically and narrowly framed to accomplish that purpose." *Grutter*, 539 U.S. at 333 (citing *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)) (internal quotations omitted).

The University of Texas at Austin did not narrowly tailor its race-conscious admissions program. First, the University failed to heed this Court's clear command that "[c]ontext matters" in equal protection. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007) (citing and quoting *Grutter*, 539 U.S. at 327). The University imported an admissions plan from another context and failed to tailor the plan to its own specific needs. Second, the University did not carry out a "serious, good faith consideration of workable race-neutral alternatives that w[ould] achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. The University limited consideration of race-neutral alternatives to those it had already employed, downplaying the success of those programs as well as overlooking the success of race-neutral programs at other public universities. Finally, equal protection mandates that "all governmental use of race must have a logical end point." *Grutter*, 539 U.S. at 342. Despite this requirement, the University has adopted incoherent metrics to evaluate the need for racial classifications; these metrics will ensure racial classifications always appear necessary. Such open-ended justification is inconsistent with the dictates of equal protection.

ARGUMENT

I. PROMOTING DIVERSITY IS NOT A COMPELLING STATE INTEREST

In *Grutter* this Court held that "student body diversity is a compelling state interest that can justify the use of race in university admissions." 539 U.S. at 325. This holding should be overruled. The "core purpose" of the Equal Protection Clause of the Fourteenth Amendment is "to do away with all governmentally imposed discrimination based on race" and to create "a Nation of equal citizens . . . where race is irrelevant to personal opportunity and achievement."

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)); *see also Shaw v. Reno*, 509 U.S. 630, 642 (1993) (noting that the central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race") (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). The use of race by a State to distinguish and prefer certain individuals to others is a fundamental departure from the Equal Protection Clause's guarantee of governmental nondiscrimination.

UT's admissions policy, a racial classification imposed by the government, "must be analyzed by a reviewing court under strict scrutiny." *See Grutter*, 539 U.S. at 326 (citations omitted). Strict scrutiny is "the most exacting judicial examination." *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citations omitted). The use of race is "a highly suspect tool," which is permitted only in "extreme" cases, *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 509 (1996) (plurality opinion), and "only for the most compelling reasons." *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). This standard applies "with equal force regardless of the race of those burdened or benefited by a particular classification." *Miller*, 515 U.S. at 904; *see also Wygant*, 476 U.S. at 273 (plurality opinion) ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."). Moreover, "scrutiny . . . is no less strict for taking into account complex education judgments in an area that lies primarily within the expertise of the university." *Grutter*, 539 U.S. at 328. Because promoting diversity perpetuates stereotypes and stigma and unnecessarily uses a constitutionally suspect means, it is not a compelling state interest.

A. Using Race To Promote Diversity Causes Harm

The use of racial classifications to promote diversity in higher education imposes costs on individuals and society at large. Government preference of one race to another stigmatizes the preferred race, who is viewed as having been given an unfair advantage in the competitive admissions process. Furthermore, the government's use of racial classifications is based on harmful stereotypes of both minority and nonminority populations. To achieve viewpoint diversity, the government must assume that the minority holds a particular—i.e., diverse—viewpoint solely on account of his or her race. Moreover, the use of a classification stereotypes nonminorities, by assuming that a nonminority will attribute a single viewpoint to a minority classmate. Because the use of race imposes real harms on individuals and society at large, promoting diversity is not a compelling state interest.

First, the government's use of racial classifications in college admissions stigmatizes minorities by calling into question the merit of their achievements. Affirmative action directly affects the experiences of minority students on college campuses:

> If white students believe that many of their black peers would not be at a college were it not for affirmative action and, more important, if black students perceive whites to believe that, then affirmation action may indeed undermine minority-group members' academic performance by heightening the social stigma they already experience because of race or ethnicity.

Camille Z. Charles et al., *Affirmative-Action Programs for Minority Students: Right in Theory, Wrong in Practice*, CHRON. HIGHER EDUC., Mar. 27, 2009, at A29 (examining affirmative action programs at 28 universities across the country). This stigma creates real harm for minority individuals. Research indicates that heightened social stigma and increased academic performance pressure experienced by minority students lead to lower grades. *Id*. Moreover, "affirmative action exacerbates the psychological burdens that minority students must carry on

campuses. . . . Those who feel they are representing their race every time they are called on to perform academically will have a heightened sense of responsibility." *Id*. The Court has warned against this danger in other contexts: "Classifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility." *Croson*, 488 U.S. at 493. Using race to promote diversity on campus stigmatizes all minority students, regardless of whether the minority was admitted by means of racial classification.

Second, an admissions plan that uses race as a means of achieving diversity is premised on stereotypes that defy the principle of equality embedded in the Equal Protection Clause. The assumption that individuals possess characteristics or viewpoints by virtue of being a member of a certain racial group replicates the harm that the Fourteenth Amendment was designed to eliminate. *See* Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 12 (1974) ("[T]he use of a racial characteristics to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry.").

Put simply, to use race as a proxy for viewpoint is to stereotype. This Court has held that it is legally inappropriate, for instance, to impute to minorities "a different attitude about such issues as the federal budget, school prayer, voting, [or] foreign relations" because of their race. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 627-28 (1984). Drawing racial classifications on the premise that minority status can be equated with viewpoint is undisputedly an impermissible basis for drawing racial classifications.[5] Yet, if a school genuinely recognizes that race does not

[5] *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996) ("[s]upposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications"); *Miller*, 515 U.S. at 914 (explaining that the Equal

determine a person's belief and behavior, then the logic of its justification for granting a racial preference as a means of achieving viewpoint diversity collapses entirely. Rather, the use of race simply leads to a student body that looks different.

To the extent a public university seeks candidates with diverse backgrounds, experiences, viewpoints or "achievements in light of the barriers [an applicant has] had to overcome," *DeFunis v. Odegaard*, 416 U.S. 312, 331 (1974) (Douglas, J., dissenting), it can focus on numerous race-neutral factors. These factors might include a history of overcoming disadvantage, geographic origin, socioeconomic status, challenging living or family situations, reputation of high school, volunteer and work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to particular causes, extracurricular activities, and individual outlook as reflected in application essays. *See Metro Broad.*, 497 U.S. at 623 (O'Connor, J., dissenting). Seeking experiential diversity directly would lead to the admission of a more diverse student body without using constitutionally suspect means. This Court has stressed in a wide variety of contexts that the Equal Protection Clause does not allow government decision-makers to presume that individuals, because of their race, gender, or ethnicity think alike or have common life experiences. The Court should not allow universities to make such a presumption.

Protection Clause forbids the belief that "individuals of the same race share a single political interest [since] [t]he view that they do is 'based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens'") (quoting *Metro Broad. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)); *Shaw*, 509 U.S. at 647 (rejecting the perception "that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same . . . interests," or have a common viewpoint about significant issues); *Wygant*, 476 U.S. at 316 (Stevens, J., dissenting) (noting that the "premise that differences in race, or in the color of a person's skin, reflect real differences . . . is utterly irrational and repugnant to the principles of a free and democratic society" (internal citation and quotation marks omitted)).

The method by which universities evaluate diversity confirms that race is being used only to achieve racial diversity, not diversity in a broader sense. At the University of Texas, for example, the school claims to evaluate diversity based on how race affects an applicant's life experiences (e.g., socioeconomic status and family life). *2004 Proposal* at 23-32. Yet, when the school determines when and whether diversity has been achieved, it looks only to the number of members of a certain race on its campus. *See infra* page 23. The Equal Protection Clause does not tolerate racial sorting cloaked as "diversity."

Using race to promote diversity also assumes that many or most white students believe that all minorities think alike. *Cf*. *Grutter*, 539 U.S. at 332 (explaining that the law school needed to admit more minority students to "diminish[] the force" of "the belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue"). Even if this assumption has "some empirical basis, equal protection principles prohibit" a university from crediting the assumption to justify racial preferences. *Metro Broad*., 497 U.S. at 620 (O'Connor, J., dissenting). As this Court has explained in multiple contexts: "Distinctions 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." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v*. *United States*, 320 U.S. 81, 100 (1943)). Using race as a means to achieve diversity undermines this principle and violates the Equal Protection Clause.

Moreover, racial diversity on college campuses is likely to increase regardless of the use of racial preference in admissions. The U.S. Department of Education's most recent education statistics project that, between 2009 and 2020, enrollment in postsecondary education will increase 25% for students who are Black, 45% for students who are Hispanic, and 25% for

students who are Asian/Pacific Islander. Nat'l Center for Education Statistics, Integrated Postsecondary Education Data System, *Fall Enrollment Survey: Spring 2001 through Spring 2010* (2011). By contrast, enrollment of White and American Indian/Alaska Native students is projected to increase by only 1%. *Id*. Because racial diversity will increase without the use of racial preferences, "promoting diversity" should not be deemed a compelling interest.

B. An Interest In "Promoting Diversity" Risks Invidious Discrimination

An interest in promoting diversity is not compelling because the interest can be abused, has no defined boundaries, and evades meaningful judicial review. As a result, the judiciary cannot enforce the promise of the Equal Protection Clause: that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See* U.S. CONST. amend. XIV, § 1. For these reasons, "promoting diversity" is ill-suited to be a compelling state interest.

1. The Interest Can Be Abused

Students of any race can succeed in college. The fact that UT's admissions procedures do not admit its desired number of minority students indicates a racial bias in admissions criteria. The constitutionally permissible solution is to change the racially biased criteria, not to use racial classifications to counterbalance the bias.

If certain admission criteria are biased and are not educationally justified, then they should be eliminated, not race-normed. For example, many schools use the SAT as an important, and sometimes determinative, factor in admissions decisions. In 2010, the average score of African American students on the reading part of the SAT was 99 points lower than the average score of white students. Maria Veronica Santelices & Mark Wilson, *Unfair Treatment: The Case of Freedle, the SAT, and the Standardized Approach to Differential Item Function*, 80

HARV. EDUC. REV. 106 (2010). The disparate result "throws into question the validity of the test and, consequently, all decisions based on its results. All admissions decisions based exclusively or predominantly on SAT performance—and therefore access to higher education institutions and subsequent job placement and professional success—appear to be biased against the African American minority group." *Id*.; *see also* Thomas J. Espenshade & Chang Young Chun, *Diversity Outcomes of Test-Optional Policies*, *in* SAT WARS: THE CASE FOR TEST-OPTIONAL ADMISSIONS (Joseph A. Soares ed., 2011) (finding that eliminating the SAT as an admissions requirement would increase the admissions rates of minority and economically disadvantaged students).

If the test is biased, schools should cease using it. If a university continues to use the test, yet uses racial classifications to offset the effect, then the school's underlying interest is in *being elite*. *See Grutter*, 539 U.S. at 347 (Scalia, J., concurring in part and dissenting in part) (arguing that Michigan's interest was in "maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities."); *id*. at 361 (Thomas, J., concurring in part and dissenting in part) ("The interest in remaining elite and exclusive . . . requires the use of admissions 'standards' that, in turn, create the Law School's 'need' to discriminate on the basis of race."). A school's desire to use racially biased criteria cannot justify state-sponsored racial preferences in the name of diversity.

The standard explanation offered by defenders of standardized tests is that the large gaps reflect inequities in American society: African American students are less likely than white students to attend well-financed, generously-staffed elementary and secondary schools, and their scores reflect the difference. *See generally* Santelices & Wilson, *Unfair Treatment*. If the test is not biased, but rather reflects a socioeconomic disadvantage, then the solution is not to offset the results with racial classifications—a constitutionally suspect means. Instead, the school should

control for experiential, geographical, political, or economic factors that contribute to a student's disadvantage on the test. Whether the low scores reflect racial bias or an explanation such as socioeconomic status, neither justifies the use of racial classification in college admissions.

2. The Interest Is Amorphous

Promoting diversity is an amorphous goal that easily can be manipulated or misunderstood. The meaning of "diversity" is "ill-defined" and "could be used to 'justify' race-based decision making essentially limitless in scope and duration." *Croson*, 488 U.S. at 497-98 (quoting *Wygant*, 476 U.S. at 276 (plurality opinion)). The University of Texas at Austin's program demonstrates the unlimited scope of the diversity interest. The interest in diversity that was upheld in *Grutter* was that of "diverse student body." *Grutter*, 539 U.S. at 342. The University has read this interest to encompass separate interests in diversity at the classroom level and in training future state leaders. *See 2004 Proposal* at 24-26. Other universities may find that "student body diversity" encompasses a host of other interests.

Moreover, a racial or ethnic group will always be "underrepresented" to an extent, unless the student body is racially balanced. But this Court made clear in *Grutter* that "racial balancing . . . is patently unconstitutional." 539 U.S. at 329-30 (citations omitted). Even if a school does not use proportionality to determine if a minority population has reached a "critical mass," it evaluates this goal *with respect to* proportionality. *See, e.g.*, *infra* pages 31-32. Either way, the school's measurement of diversity is antithetical to the meaning of the Equal Protection Clause.

3. The Interest Defies Meaningful Judicial Review

An interest in promoting diversity defies meaningful judicial review. The *Grutter* Court established, and the court below applied, a standard of deference to school administrators at

every level of analysis. A reviewing court defers to the school with respect to *whether* promoting diversity is appropriate, *how* to achieve the desired diversity, and *when* diversity goals have or have not been satisfied. Thus, the University of Texas, as well as other public universities across this country, can justify indefinite racial preferences in admissions by the possibility, in their sole discretion, of unmeasured educational benefits. The University is not required to demonstrate that the harms of racial classification—stigma, racial hostility, and perpetuation of stereotypes—are outweighed by the asserted educational benefits. Nor must the school ascertain whether any benefits are derived from the increase in diversity resulting from the use of race (as opposed to the increase in diversity from applicants who were admitted to the school without consideration of race). Thus, promoting diversity can become a *permanent* justification for racial preferences.

In this way, promoting diversity is fundamentally different from other compelling state interests that justify the use of race, such as remedying past or present identified violations of equality. A clearly identified remedial goal permits guidance in determining the "precise scope of the injury" and the "extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 498, 510. Promoting diversity as an interest contains neither of these limitations and could thus be used to "justify a preference of any size or duration." *See id*. at 505.

Deference to university administrators is an inevitable result of finding that universities have a compelling interest in promoting diversity. The *Grutter* Court quoted Justice Powell, who "recogniz[ed] a constitutional dimension, grounded in the First Amendment, of educational autonomy." *Grutter*, 539 U.S. at 329. Integral to this autonomy is "[t]he freedom of a university to make its own judgments as to education includ[ing] selection of its student body." *Id*. (quoting *Bakke*, 438 U.S. at 312) (internal quotation marks omitted). This deference is precisely what pushes the diversity rationale outside of meaningful strict scrutiny review. *See Adarand*, 515

U.S. at 228 ("[T]he point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race." (citation omitted)). The courts cannot ferret out invidious discrimination if they must defer to university judgments about the necessity of racial classifications.

C. Equal Protection Concerns Outweigh *Stare Decisis*

The diversity interest relied upon by the University of Texas, and approved by this Court in *Grutter*, is no longer suited to be a compelling interest. In constitutional cases, "adherence to precedent is not rigidly required." *Adarand*, 515 U.S. at 231 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)) (internal quotation marks omitted). However, "any departure from the doctrine of *stare decisis* demands special justification." *Id*. Because using race to promote diversity undermines important principles of equal protection without the possibility of meaningful judicial review, "special justification" exists to depart from the Court's holding in *Grutter*.

The Court's practice with respect to *stare decisis* supports the decision to overrule a recent precedent that is at odds with established constitutional jurisprudence. In *Adarand*, the Court overruled its holding in *Metro Broadcasting* because it "undermined important principles of this Court's equal protection jurisprudence." 515 U.S. at 231 (plurality opinion). The Court similarly overruled *Grady v. Corbin*, 495 U.S. 508 (1990), in *United States v. Dixon*, 509 U.S. 688 (1993), because *Grady* "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." *Id*. at 704. While *stare decisis* generally controls, the Court has overruled recent precedent when policy and constitutional principles so require.[6]

[6] A plurality of the *Adarand* Court noted recent precedent that the Court overruled out of consideration for policy and constitutional jurisprudence, including: *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)); *Monell v. New York City*

The Court's holding in *Grutter* that promoting diversity is a compelling state interest should be overruled. The interest is based on stereotypes, creates harmful stigmas, is unlimited in scope and duration, and escapes meaningful judicial review. Moreover, the asserted interest in diversity can be achieved by race-neutral means that do not require schools to layer racial bias on top of racial bias.

The Equal Protection Clause was enacted to create "a Nation of equal citizens . . . where race is irrelevant to personal opportunity and achievement." *Wygant*, 476 U.S. at 277 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). Because the holding in *Grutter* permits the use of race in violation of this ideal, equal protection concerns outweigh *stare decisis*.

II. THE UNIVERSITY'S USE OF RACE IS NOT NARROWLY TAILORED

The University of Texas at Austin did not narrowly tailor its race-conscious admissions policy. First, the University failed to heed this Court's clear command that "[c]ontext matters" in equal protection. *See, e.g.*, *Parents Involved*, 551 U.S. at 725 (citing and quoting *Grutter*, 539 U.S. at 327). The University has imported an admissions plan from another context and failed to tailor the plan to its own specific needs. Second, the University did not carry out a "serious, good faith consideration of workable race-neutral alternatives that w[ould] achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. The University limited its consideration of race-neutral alternatives to examining those programs it had already employed. UT downplayed the success of those programs and overlooked the success of race-neutral programs at other public universities. Finally, equal protection mandates that "all governmental use of race must have a

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Dep't of Soc. Servs., 436 U.S. 658, 695-701 (1978) (partially overruling *Monroe v. Pape*, 365 U.S. 167 (1961), because *Monroe* was a "departure from prior practice" that had not engendered substantial reliance); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) (overruling *Kesler v. Dep't of Pub. Safety of Utah*, 369 U.S. 153 (1962), to reaffirm "pre-*Kesler* precedent" and restore the law to the "view . . . which this Court has traditionally taken" in older cases). *See Adarand*, 515 U.S. at 232-33 (listing overruled precedents).

logical end point." *Grutter*, 539 U.S. at 342. Despite this requirement, the University has adopted incoherent metrics to evaluate the need for racial classifications; these metrics will ensure racial classifications always appear necessary. Such open-ended justification is inconsistent with the dictates of equal protection.

A. The University's Use Of Race Is Not Tailored To The Context

The University attempts to *Grutter*-proof its use of race by mimicking the race-conscious policy this Court approved for the University of Michigan Law School. This mimicry is so complete that except for the Top Ten Percent Law, the district court had "difficulty imagining an admissions policy that could more closely resemble the Michigan Law School's admissions policy." *Fisher*, 645 F. Supp. 2d at 612. But given the stark differences between UT and Michigan Law, this admissions policy could be narrowly tailored to the needs of both institutions only by accident. UT is "the largest single-campus institution of higher education in the United States," *2004 Proposal* at 32, while Michigan Law each year only admits "a class of around 350 students." *Grutter*, 539 U.S. at 312-13.

But size is not the only thing that distinguishes UT from Michigan Law; UT is using the race-conscious admissions plan in an attempt to further a very different interest. In *Grutter*, Michigan Law asserted "only one justification for their use of race," which the Court described as "a compelling state interest in student body diversity." 539 U.S. at 328. In contrast, the University's *2004 Proposal* identified these interests:

> The University has a compelling educational interest to produce graduates who are capable of fulfilling the future leadership needs of Texas.
>
> . . . .
>
> [T]here is a compelling educational interest for the University not to have large numbers of classes in which there are no students – or only a single student – of a given underrepresented race or ethnicity.

2004 Proposal at 24-25.

UT undoubtedly has an interest in producing capable leaders for the State of Texas. But such an interest has never been recognized as a legally compelling justification supporting the use of racial classifications. UT also certainly has an interest in classroom-level diversity, but contrary to the University's reading of *Grutter*, the Court did not approve the pursuit of classroom-level diversity as a standalone interest. The *Grutter* Court recognized that one *benefit* that flows from a diverse student body is that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." 539 U.S. at 330 (internal quotation marks omitted). *Compare id*. at 319 (citing testimony that diversity "enhance[s] classroom discussion and the educational experience both inside and outside the classroom"), *with id*. at 328 (finding "a compelling interest in attaining a diverse *student body*.") (emphasis added), *id*. at 325 ("*[S]tudent body diversity* is a compelling state interest.") (emphasis added), and *id*. at 343 (describing "a compelling interest in obtaining the educational benefits that flow from a diverse *student body*") (emphasis added). UT has converted a *benefit* of student body diversity into a standalone *interest*.

This difference matters because equal protection principles require that race-conscious measures be tailored narrowly to the particular interest claimed.[7] *See, e.g*., *Adarand* 515 U.S. at 235 ("[R]acial classifications . . . must serve a compelling governmental interest, and must be narrowly tailored to further *that interest*.") (emphasis added). A plan narrowly tailored to the context of one interest is not likely to be narrowly tailored to the context of a different interest.

[7] The University's *2004 Proposal* can be read to implicitly assert an interest in student body diversity, in addition to the more explicit articulations of interests in producing capable leaders and achieving classroom-level diversity. The relevant question for tailoring, though, is not whether the University has (or has asserted) an interest in student body diversity; the question is whether the use of race *to that end* is narrowly tailored. UT has designed an admissions system geared towards improving classroom-level diversity: what is narrowly tailored to this end is not likely to be narrowly tailored to the different end of improving student body diversity.

By placing the principal focus on classroom-level diversity, UT overlooks the other benefits of student body diversity and all but guarantees that it will miss opportunities to employ more narrowly tailored strategies.

Nor can an interest in student body diversity be equated directly to an interest in classroom-level diversity. The *Grutter* Court recognized that student body diversity enhances the educational experience through interactions "outside the classroom." 539 U.S. at 319. The *Grutter* majority endorsed and drew heavily on Justice Powell's controlling opinion in *Bakke*. *See*, *e.g*., *Grutter*, 539 U.S. at 325 ("[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."); *id*. at 334 (citing Justice Powell's narrow tailoring formulation from *Regents of the Univ*. *of Cal*. *v*. *Bakke*, 428 U.S. 265 (1978)). In *Bakke*, Justice Powell was keenly aware that classroom interaction was only one way in which a diverse student body paid dividends:

> In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.

428 U.S. at 312, 313 n.48 (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7, 9 (Sept. 26, 1977)). Many of the benefits of diversity accrue in a host of extracurricular ways, and thus classroom diversity cannot be equated with student body diversity.

Further, the University's focus on snapshot views of classroom-level diversity is supremely ill-suited to measuring whether UT students are "trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *See Bakke*, 428 U.S. at

313 (opinion of Powell, J.) (internal quotation marks omitted). It is true that if there are large numbers of classes without students of a given minority, nonminority students will take some non-diverse classes. But this is simply tautological. Over the course of a college education, a student will take many different classes (not to mention play quite a few ball games and attend more than the recommended number of soirées). Even if half of the courses on campus are non-diverse by UT's metrics, UT can expect on average that nonminority students will arrive at graduation having taken half of their coursework in a diverse setting. Moreover, it is phenomenally unlikely that any great number of courses a student takes will lack viewpoint diversity entirely. As one example, UT's data shows that more than 50% of participatory classes are diverse for both Asian Americans and, separately, Hispanics. *2004 Report* at 26. Unless those classes are the same 50%, (they aren't, *see generally* University of Texas, *Diversity Levels of Undergraduate Classes at The University of Texas at Austin: 1996-2002*), a significant majority of classes will be diverse in at least one dimension. A far better measure of actual classroom diversity levels would be to follow the path of an average nonminority student through his or her four years at UT. The University's own data suggests that this average student will have plentiful opportunities to hear from classmates of different races.[8]

Unfortunately, for all the emphasis UT has placed on the importance of diversity at the classroom level, its understanding of that diversity is decidedly limited. The University has demonstrated that it is in fact in pursuit of *racial* diversity in the classroom. All of the data the

[8] The University also appears to overestimate the ability of small groups of students to take large numbers of courses. If, for instance, African Americans were to enroll at demographic rates, they would compose 12.6% of the student body. *See* U.S. Census Bureau, *The Black Population: 2010*, at 8 tbl.5 (2011). Even the most assiduous student can take only so many classes. The odds against just over a tenth of the student body randomly registering in a way that they distribute into every class (or even most classes) are astronomical. In fact, UT has experienced this phenomenon directly. For the four years leading up to 2002, Hispanics enrolled at greater than this 12.6% rate. Office of Admissions, *Diversity Levels of Undergraduate Classes at the University of Texas at Austin: 1996-2002*, at 6 tbl.1. In 2002, fully 43% of participatory classes had one or no Hispanics. *2004 Proposal* at 26.

University uses to declare its classrooms to be non-diverse is racial data. *See generally 2004 Proposal*. It is not even clear from reports in the record that the University makes any attempt to collect data on classroom-level diversity in any other of the dimensions that it considers relevant to diversity during the admissions processes. The University may genuinely give weight to these other factors when reviewing applications; but if UT is in fact concerned with diversity in the classroom, it has adopted a decidedly non-holistic approach to measuring it.

Finally, UT and Michigan Law have significantly different institutional missions, which in turn inform their admissions practices. Although the University of Michigan is a public institution, Michigan Law is "funded almost entirely through tuition and private giving" and considers itself an elite "national" law school. *See* University of Michigan School of Law, *About*, http://www.law.umich.edu/historyandtraditions/Pages/default.aspx. In contrast, the University of Texas at Austin reserves 90% of its seats for Texas residents, *Fisher*, 631 F.3d at 227, and its mission as the "flagship" of the UT system requires it to "prepare its students to be the leaders of the State of Texas." *2004 Proposal* at 24. While Michigan Law only accepts some 10% of its applicants, *Grutter*, 539 U.S. at 312-13, the University of Texas guarantees admission to every "Texas resident who submits a timely application." *Fisher*, 631 F.3d at 229. Unlike the all-or-nothing admissions at Michigan Law, any Texas resident who applies on time and can maintain a "B" average at another UT system school *will* have the option to spend their sophomore through senior years at UT Austin.[9] A great many UT graduates are not four-year students who enrolled

[9] As described by the court of appeals:

> Marginal applicants who missed the cutoff for the fall class are offered admission to the summer program, which permits students to begin their studies at UT during the summer and then join the regularly admitted students in the fall. . . . All remaining Texas applicants are automatically enrolled in [the Coordinated Admissions Program], which guarantees admission as a transfer student if the student enrolls in another UT system campus for her freshman year and meets

as first-time freshmen; in 2008 the senior class was 89% larger than the freshman class. University of Texas at Austin, *Statistical Handbook: 2008-2009*, at 1.

In fact, UT's race-conscious admissions plan is better understood as a race-conscious sorting plan that determines the timing of entry at Austin. The difference seriously undercuts the University's justification for using racial classifications. An individual applicant disadvantaged by the race-conscious plan suffers injury from the racial classification itself, and may face the further burdens of having to attend classes during the summer or having to relocate after his or her freshman year. The benefit of the race-conscious sorting to the University is far more attenuated; even if the sorting results in a more racially diverse freshman class, a great many of those students passed over for Fall admission will transfer to UT for their sophomore, junior, and senior years. For 2008, a full 25% of the new students on campus were transfer students. *See Statistical Handbook: 2008-2009*, at 20 tbl.S12A (6,718 first-time freshmen and 2,228 transfer students). The percentages of minority students in the transfer cohort were significantly lower than the first-time freshman cohort: 3.3% vs. 5.6% for African Americans, 13.6% vs. 18.6% for Asian Americans, and 15.8% vs. 19.9% for Hispanics. See *id*. at 21 tbl.S12B. Thus UT's race-conscious sorting will have its principal effect only on freshman-class diversity, and the program's effect on the overall composition of graduates is seriously diminished. Further, the mission of "produc[ing] graduates who are capable of fulfilling the future leadership needs of Texas," *2004 Proposal* at 24, is a mission generally shared by the eight other UT campuses that "account for nearly half of all undergraduate degrees awarded in Texas." University of Texas

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> certain other conditions, including the completion of thirty credit hours with a cumulative grade point average of 3.2 or higher.

Fisher, 631 F.3d at 229-30.

System, *About the UT System*, http://www.utsystem.edu/about. Small increases in freshman-class diversity will only marginally benefit this statewide project.

"Context matters when reviewing race-based government action." *Grutter*, 539 U.S. at 327. The University of Texas has adopted a plan designed for Michigan Law. *See Fisher*, 645 F. Supp. 2d at 612. But Austin is not Ann Arbor. UT is a decidedly different institution, with a special obligation to the State of Texas, and in search of a different type of diversity. The University has imported the *Grutter* solution to solve a non-*Grutter* problem. Narrow tailoring requires more.

B. The University Did Not Give Serious Consideration To Race-Neutral Alternatives

"Narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. UT's *2004 Proposal* limited the consideration of alternatives to those programs that the university was already using. The University asserts that the experience with race-neutral programs between *Hopwood* and *Grutter* prove that UT "has made good faith efforts to achieve racial and ethnic diversity through a . . . race-neutral process for freshman admission." *2004 Proposal* at 23.

The narrow tailoring analysis, however, does not look to whether the University has a tradition of acting in good faith to achieve diversity; strict scrutiny requires the university to undertake serious, good faith consideration of readily available alternatives. *See Grutter*, 539 U.S. at 339. The University has overlooked a host of potential alternatives readily available both within the Texas system and in other states.

The University asserts that "[t]he use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity." *2004 Proposal* at 25. But by its own admission, these race-neutral policies restored pre-*Hopwood* diversity levels the first year after they were fully implemented. *See 2004 Proposal* at 23-24. Moreover, while the percentage of underrepresented minorities was the same in 2003 (pre-*Grutter*) as in 1996 (pre-*Hopwood*), the absolute numbers of minorities had increased due to an expansion of the freshman class size. *2004 Proposal* at 24 n.4. In short, UT was able to achieve the same percentage enrollment, and higher absolute numbers, of minority students with a race-neutral policy as it had with a policy that explicitly used race. Narrow tailoring precludes race-conscious measures if there are acceptable race-neutral alternatives that serve the interest "about as well." *Grutter*, 539 U.S. at 339 (citing and quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280 n.6 (1986)). It is clear that UT had a proven set of race-neutral admissions policies that worked "just as well" as prior explicit racial policies.

The one area where the University asserts that race-neutral policies have not worked as well has been in achieving diversity at the classroom level. *See 2004 Proposal* at 25. The University notes: "[F]or Fall, 2002, there were *more* classes with no or only one African American or Hispanic student than there had been in Fall, 1996." *2004 Proposal* at 25. [10] Regardless of whether classroom-level diversity is a compelling interest on its own, none of the

[10] UT elides the most obvious reason that classroom diversity levels decreased from 1996 to 2002. The number of participatory classes was increased nearly 25% from 2,880 to 3,616. *2004 Proposal*, at 26 tbl.8. The study that generated the data recognized this fact. *See* Office of Admissions, *Diversity Levels of Undergraduate Classes at the University of Texas at Austin: 1996-2002*, at 5 (2003) ("Undoubtedly, some of the increase is due to the larger number of sections observed."). For instance, the study indicated that there were 266 and 272 African American first-time freshmen in 1996 and 2002, respectively, but the percentage of participatory classes with at least two African American students actually decreased. *Id*. at 6 tbl.1 & 8 tbl.3. Given that there were more African American students in 2002, the data strongly suggests that the increase in number of classes drove the lower observed diversity levels.

race-neutral policies UT considered would be expected to significantly improve the distribution of minority students among classes.

To illustrate, in the last year for which data exists in the record (Fall of 2002), there were 2,350 classes of participatory size with no African American students and 904 classes with only one. *See 2004 Proposal* at 26 tbl.8. Because of the large number of automatic admissions via the Top Ten Percent Law, the race-conscious portion of the admissions process operated on applications for only 841 offers of admission. *See Fisher*, 631 F.3d at 239, 240 n.145. With African Americans composing 12.6% of the Texas population, *see* U.S. Census Bureau, *The Black Population: 2010*, at 8 tbl.5 (2011), even if the race-conscious policies somehow led to offers of admission at *double* the demographic rate, there would be only 212 offers to African American students. Assuming every single offer was accepted and each student took four different participatory-sized classes, and assuming these students distributed perfectly to different classes without overlap, there would still be 57 classes with only one African American student and *2,350 classes with none*. Clearly race-conscious admissions can at best affect classroom diversity only minimally, and prior race-neutral admissions served this interest "about as well." *Grutter*, 539 U.S. at 339 (citing and quoting *Wygant*, 476 U.S. at 280 n.6). Further, the *2004 Proposal* provides no indication that UT considered any programs designed to address classroom-level diversity directly.

UT's race-neutral programs had worked just as well as UT's legacy race-based ones at achieving student body diversity. As for classroom-level diversity, minimal investigation would have shown admissions officials that even wildly improbable racial "pluses" in the admissions process would not change classroom diversity levels in any meaningful way.[11] UT's minimal

[11] In fact, the UT admissions office would not have had to carry out even the straightforward calculation above. Their own data demonstrates that improving classroom-level diversity requires different measures than simply

efforts to consider alternatives tailored specifically to achieving classroom diversity are facially inconsistent with the "serious, good faith consideration" of alternatives that narrow tailoring requires.

Further, there is no evidence in the record that UT considered the experience of similar universities in states that prohibit racial classifications in admissions. The *Grutter* Court specifically noted:

> Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.

539 U.S. at 342. These universities face challenges to achieving student body diversity significantly similar to those faced by UT. The failure of UT to examine the admissions policies of other public universities shows a lack of serious consideration of race-neutral alternatives.

For instance, the California Constitution bars the University of California from considering race in university admissions. *See* CAL. CONST. art. I, § 31(a). Although of course there are differences between California and Texas, there are prominent similarities that should have led UT to examine the policies implemented by the University of California.[12] Indeed, California's race-neutral admissions have historically outperformed UT's in certain areas. For example, after the 2000 Census, the California population was only 7.4% African American

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increasing minority representation in the student body. In the Fall of 2002, Asian American students composed 19% of Texas freshmen, a rate nearly *six times* their statewide demographic share. *Compare 2008 Top Ten Report* at 7 tbl.1a, *with* U.S. Census Bureau, *The Asian Population: 2000*, at 5 tbl.2 (3.1% of statewide population). Despite this overrepresentation, 46% of the participatory classes that Fall had one or no Asian American students. *2004 Proposal* at 26 tbl.8. The University had this data readily available when reviewing the need to consider race in admissions.

[12] Both California and Texas have large, diverse, and growing populations. As of the 2010 Census, California was 7.2% African American, 14.9% Asian American, and 37.6% Hispanic; Texas was 12.6% African American, 4.4% Asian American, and 37.6% Hispanic. *See* U.S. Census Bureau, *The Black Population: 2010*, at 8 tbl.5 (2011); U.S. Census Bureau, *The Asian Population: 2010*, at 7 tbl.2 (2011); U.S. Census Bureau, *The Hispanic Population: 2010*, at 6 tbl.2 (2011).

compared to 12.0% for Texas. *See* U.S. Census Bureau, *The Black Population: 2000*, at 4 tbl.2 (2001). The next Fall (2001), the University of California enrolled the same percentage of in-state African American students as UT, despite the significantly smaller statewide percentage.[13] The University of California employs a comprehensive admissions and recruiting program, which currently includes a variety of outreach programs, alumni engagement, targeted financial aid, and system-wide efforts to foster a climate of inclusion. *See, e.g.*, University of California, *Accountability Sub-Report on Diversity* (2010). While UT is not obligated to adopt California's policies, UT's failure to even consider them in light of their success is further evidence of the lack of serious consideration of alternatives to the use of race.[14]

C. The University's Use Of Race Has No Logical End Point

UT defines a "critical mass" of minority students in a way that will permanently justify the use of race in admissions until minority groups approach representation proportionate to statewide demographics. As the Court explained in *Grutter*:

> Enshrining a permanent justification for racial preferences would offend [the] fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.

539 U.S. at 342.

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[13] California enrolled 879 students (or 2.9% of the incoming class). *See* University of California, StatFinder tbl.3-2001, http://statfinder.ucop.edu/library/tables/table_3-2001.aspx. Texas enrolled 242 students (or 3% of the incoming class). *See* University of Texas at Austin, *2008 Top Ten Percent Report* at 6 tbl.1 (2008).

[14] *Grutter* acknowledges that narrow tailoring does not "require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." 539 U.S. at 339. There is no evidence to suggest that importing some of the programs from California would have required UT to sacrifice its reputation for excellence. School pride aside, the University of California system campuses consistently rank among the top public universities in the nation. *See, e.g.*, *Top Public Schools: National Universities*, U.S. NEWS & WORLD REP., http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/top-public (2011) (ranking five California campuses in the top ten).

For UT, "critical mass" is "an adequate representation of minority students to assure educational benefits deriving from diversity." *2004 Proposal* at 25. This definition is somewhat circular and begs the question of what qualifies as "adequate representation." The University's *2004 Proposal* and the testimony of admissions officials in the district court provide some insight into how UT in fact determines what constitutes "adequate" representation. The University concludes its "Rationale" for adopting a race-conscious admissions policy by summarizing the evidence showing a lack of "critical mass":

> The use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin. While the number of African American and Hispanic students has risen slightly above 1996 levels, these students still represent only 3% and 14%, respectively, of the entering freshman class. . . . The race-neutral efforts have also failed to improve racial diversity within the classroom. In fact, . . . for Fall, 2002, there were *more* classes with no or only one African American or Hispanic student than there had been in Fall, 1996. With so few underrepresented minorities in the classroom, the University is less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.

2004 Proposal at 25. UT apparently considers the student body percentages of African American and Hispanic students to be below critical mass, either as an independent metric or as an intermediate metric affecting classroom diversity levels. The *2004 Proposal*, then, provides at least a lower bound for the University's understanding of critical mass.

Evidence in the district court provides an indication of what UT considers an upper bound on critical mass to be. The University's Vice Provost and Director of Undergraduate Admissions stated that UT does not consider Asian Americans to constitute an underrepresented minority. *Fisher*, 645 F. Supp. 2d at 593, 594 n.5. However, Asian Americans are underrepresented compared to Hispanics by every relevant metric *except* statewide demographics. There more classes with one or no Asian Americans than classes with one or no

Hispanics. *2004 Proposal* at 26 tbl.8. There have also been fewer enrolled Asian American freshman residents than Hispanics for each year that the race-conscious policy was in effect through 2008. *See* University of Texas at Austin, *Top Ten Percent Report* at 7 tbl.1a (2008). By both metrics the University has articulated for evaluating critical mass, Hispanics outperform Asian Americans: the number of diverse classes and the percentage of the student body. However, Asian Americans enroll in numbers greater than their statewide demographic share. *Compare* U.S. Census Bureau, *The Asian Population: 2010*, at 7 tbl.2 (2011) (4.4% of the Texas population), *with* University of Texas, *Statistical Handbook: 2010-2011*, at 7 tbl.S3 (17.9% of undergraduates). The record discloses no other plausible reason for the University to consider Asian Americans to be above critical mass than that they exceed their comparable share of the statewide population.

The University's definition of critical mass is thus indefensible. If critical mass depends on the number of students of a given minority, or their share of the undergraduate population, Hispanics have reached critical mass because they outnumber Asian Americans. If critical mass depends on the number of diverse classes, Hispanics have reached critical mass because there are more diverse classes with 2 or more Hispanics than diverse classes with 2 or more Asian Americans. The only metric that Hispanics have not reached is a share of the undergraduate population proportional to their statewide share. *Compare* U.S. Census Bureau, *The Hispanic Population: 2010*, at 6 tbl.2 (37.6% of the Texas population), *with* University of Texas, *Statistical Handbook: 2010-2011*, at 7 tbl.S3 (19.4% of undergraduates).

The University has placed itself in an untenable position. In an effort to adhere to *Grutter*'s admonition that race-conscious programs have logical end points, the University has established a periodic review of the use of race in admissions:

> [T]he admission process will be reviewed every five years to assess whether consideration of an applicant's race is necessary in order to create a diverse student body, or whether race-neutral alternatives exist that are able to achieve the same results. The next review will begin in Fall, 2009.

2004 Proposal at 32.[15] But the standards UT has demonstrated for reviewing alternatives and evaluating critical mass ensure that periodic reviews will find a continuing need to use race in admissions.

The *Grutter* Court reiterated what had long been clear in the law: attempting to "assure within [a] student body some specified percentage of a particular group merely because of its race or ethnic origin . . . would amount to outright racial balancing, which is patently unconstitutional." 539 U.S. at 329-30 (internal quotations and citations omitted). The University knows it cannot simply employ race in admissions until African Americans and Hispanics have followed Asian Americans to proportional representation at UT. In light of this limitation, UT reviews the efficacy of its race-conscious policy solely by observing classroom diversity levels.

Waiting for classroom diversity levels to increase effectively ensures the continued justification for UT's race-conscious admissions efforts. A simplified hypothetical can illustrate this reality: consider the effect on classroom diversity if UT's race-conscious policies from 2005 to 2008 had led to enrolling African American applicants in full proportion to their statewide share of the population of 12.6%. *See* U.S. Census Bureau, *The Black Population: 2010*, at 8 tbl.5. Following four years of such admissions, UT could expect that the student body would

[15] The court of appeals noted that "the first of UT's periodic five-year reviews was to begin in the fall of 2009." *Fisher*, 631 F.3d at 217. The results of that study do not appear in the record. The University's undergraduate admissions website indicates that race is still considered in undergraduate admissions. *See* University of Texas, *What We Consider*, http://bealonghorn.utexas.edu/freshmen/after-you-apply/factors (last visited Apr. 14, 2012) ("The special circumstances we consider include: . . . Race and ethnicity.").

contain 2,275 African American students.[16] What UT should not expect, given the 37,389 total undergraduates, is that classroom-level diversity would improve in any significant way.

To quantify this intuition, in 2002 there were 3,616 classes of participatory size (65% of all classes), and 1,674 African American students distributed among them such that 65% of classes had no African American students and 25% had only one. *See 2004 Proposal* at 26 tbl.8; *Statistical Handbook: 2008*, at 10 tbl.S5. In our hypothetical, the efficacious race-conscious admissions policy enrolled 2,275 African Americans, or 601 more than in 2002. How much of an effect would those 601 students have on UT's classroom-level diversity? In the best-case scenario, these 601 students pair off and enroll in classes that currently have no African American students. Assuming each of these students enrolls in four different classes a semester, and 65% of the classes are participatory, they can "diversify" only 782 total classes (601 students * 4 classes each * 0.65 for participatory classes * ½ so that each class has two students).

If UT were to redo its classroom diversity study incorporating this calculation, it would find 43% of all classes (1,554) had no African American students, and 68% of all classes (2,459) had either one or none. In short, even if UT's race-conscious policy were to enroll African American students at demographic rates, there would still be:

> [A] large-scale absence of African-American . . . students from thousands of classes indicat[ing] [that] UT has not reached sufficient critical mass for its students to benefit from diversity and illustrat[ing] UT's need to consider race as a factor in admissions in order to achieve those benefits.

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[16] In 2008, there were actually 1,803 African American undergraduates. *Statistical Handbook: 2008*, at 8 tbl.S4A. The counterfactual 2,275 is derived by summing the number of African American Top Ten Percent enrollees, the number of African American transfer students, and 12.6% of the available seats in the student body. There were 1,109 total African American students enrolled from 2005 to 2008 via the Top Ten Percent Law. *Top Ten Percent Report* at 7 tbl.1a. There were 259 total African American transfer students from 2005-2008. *Statistical Handbook: 2008*, at 20 tbl.S12A. There were 7,197 total enrolled non-Top Ten Percent students over that period of time, 12.6% of which would result in 907 enrolled African American students. *Top Ten Percent Report* at 7 tbl.1a.

Fisher, 645 F. Supp. 2d at 607. Given the mathematical reality, UT can review its race-conscious admissions program every five years, but it will never conclude that it has reached critical mass.[17] An otherwise unconstitutional policy does not become constitutional because it is reviewed periodically. UT has established criteria that will justify the use of race in admissions indefinitely. Equal Protection demands "that all governmental use of race . . . have a logical end point." *Grutter*, 539 U.S. at 342. UT's program has no such end.

The better resolution to the incoherency of the University's definition of critical mass is to recognize that UT has already reached critical mass as the Court understood it in *Grutter*. The court in *Grutter* endorsed Michigan Law's concept of "critical mass," noting that it was defined in reference to the educational benefits of diversity. These benefits include "[promoting] cross-racial understanding," "break[ing] down racial stereotypes," and "enable[ing] [students] to better understand persons of different races." *Grutter*, 539 U.S. at 330. A "critical mass" of minority students was required because "diminishing the force of . . . stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students." *Id*. at 333. The critical mass concept endorsed in *Grutter* was designed to allow the use of race-conscious admissions to boost minority enrollment beyond token representation.

The University of Texas has flipped the concept on its head, using race-conscious policies to push minority enrollment towards racially balanced levels. When Abigail Fisher was denied admission in 2008, the entering class of Texas freshman included 1,322 Hispanic students accounting for 21% of the total. *2008 Top Ten Report* at 7 tbl.1a. Campus-wide, there were over *fifteen thousand* African American, Asian American, and Hispanic students. *Statistical*

[17] In other words, the University is waiting for Godot. *See* Samuel Beckett, *Waiting for Godot* (Dougald McMillan & James Knowlson eds., 1994) (He never arrives.).

Handbook: 2008, at 8 tbl.S4A. Whatever the limits of "token numbers" might be, fifteen thousand is surely above it. The University may still have a strong interest in further increasing minority enrollment. Their legally compelling interest in that end has long since run out.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully Submitted,

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April 16, 2012