No. 11-345

IN THE

Morris Tyler Moot Court of Appeals at Yale

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN et al.,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. Whether the University of Texas at Austin's use of race as part of a holistic review of applicants is consistent with *Grutter v. Bollinger*, 539 U.S. 306 (2003), which permits public universities to use narrowly tailored race-conscious measures to attain a diverse student body.

II. Whether this Court should adhere to the principles of *stare decisis* and refuse to overrule *Grutter v. Bollinger*'s reaffirmation of *Regents of Univ. of Cal. v. Bakke*'s holding that promoting diversity can be a compelling state interest under the Equal Protection Clause.

PARTIES TO THE PROCEEDING

The petitioner in this action is Abigail Noel Fisher.

The respondents are: the 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 JURSIDICTION

The court of appeals entered judgment on January 18, 2011 and denied *en banc* review on June 17, 2011. The petition for a writ of certiorari was filed on September 15, 2011 and granted on February 21, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. The History of the Use of Race in Undergraduate Admissions at UT.

Student body diversity at public universities promotes cross-racial understanding and prepares students to participate in a diverse workforce. *Grutter v. Bollinger*, 539 U.S. 306, 330-332 (2003). It also helps ensure the "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation." *Id.* at 332. This participation "is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332. As Texas's flagship public university, the University of Texas at Austin (UT) seeks to attract diverse students who will become the leaders of Texas and the United States. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009). UT is highly selective, annually receiving four times as many applications as

available spots. *Id.* at 590. In the fall of 2008, the year Fisher applied, UT accepted only 12,843 out of 29,501 applicants, with 6,715 choosing to enroll. *Id.* UT's admissions policies, like those of many universities, have evolved over time in response to changing legal conditions. *Id.* at 591.

A. Admissions Pre-Hopwood.

Prior to the Fifth Circuit's 1996 *Hopwood* decision, UT based admissions decisions on two primary criteria: the Academic Index (AI) and the applicant's race. *Id.* AI, still in use today, predicts an applicant's freshman-year GPA based on her class rank and test scores. *Id.* Had UT considered only applicants' AI scores without regard to their race, the university would have had "unacceptably low diversity levels." *Id.* The pre-*Hopwood* system allowed UT to pursue a diverse class aggressively. For example, UT's 1996 entering class, the last to be admitted under this system, was 4.1% black and 14.7% Hispanic. *Id.* Even at that time, however, the university believes it did not have a critical mass of minority students. *The Univ. of Tex. at Austin Proposal To Consider Race & Ethnicity in Admissions*, at 23-14 (June 25, 2004) [hereinafter *2004 Proposal*].

B. Admissions Post-*Hopwood* and Pre-*Grutter*.

UT ended its affirmative action policy in response to the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932, 957 (5th Cir. 1996). *Fisher*, 645 F. Supp. 2d at 591. *Hopwood* held that student body diversity is not a compelling state interest. *Hopwood*, 78 F.3d at 957. Upon the advice of the Texas Attorney General, UT eliminated the use of race in admissions beginning with the entering class of 1997, causing the number of minority students at UT to plummet due to the surrounding publicity. *Fisher*, 645 F. Supp. 2d at 591-92.

UT tried to use facially race-neutral means to attract qualified minority applicants. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 223-24 (5th Cir. 2011). The university expanded

outreach efforts and created a new evaluation metric to complement the AI: the Personal Achievement Index (PAI). *Fisher*, 645 F. Supp. 2d at 591. The PAI incorporates several formally race-neutral criteria that disproportionately affect minority applicants, like an applicant's socio-economic status, whether a language other than English is spoken at home, and whether a student comes from a single-parent household. *Id.* at 591-92. Despite these new programs, the percentage of black and Hispanic applicants dropped by nearly twice as much as did the total percentage of applicants that year. *Fisher*, 631 F.3d at 223-24. Enrollment also dropped. Black student enrollment was nearly 40% lower in 1997 than in 1995, and Hispanic enrollment was nearly 5% lower. *Id.* Only 2.7% of the 1997 entering class, as opposed to 4.1% in 1996, was black, and only 12.6%, as opposed to 14.7%, was Hispanic. *Fisher*, 645 F. Supp. 2d at 592.

To mitigate *Hopwood*'s effect on minority enrollment and recruitment, the Texas state legislature passed H.B. 558, the "Top Ten Percent law," in 2007. Tex. Educ. Code § 51.803 (1997).[1] The law requires all Texas public universities to give automatic admission to all Texas high school students graduating in the top ten percent of their class. *Id.* Legislators hoped the law would ensure that "a large well qualified pool of minority students [is] admitted to Texas universities." *Fisher*, 645 F. Supp. 2d at 592. The law disproportionately affects minority students; 75% of black students and 76% of Hispanic students gained admission through the law in 2004, while 56% of admitted white students did. *Id.* at 593. The Ten Percent law helped increase minority enrollment at UT. In 2004, the last year before UT reinstated an explicit affirmative action program, 4.5% of the admitted class was black and 16.9% was Hispanic. *Fisher*, 631 F.3d at 224.

[1] The Top Ten Percent law was amended in 2010 to limit the number of students guaranteed admission to UT to 75% of the seats available to Texas residents. Tex. Educ. Code § 51.803(a–1) (2010). The cap was effective starting with the Fall 2011 entering class and is scheduled to end with the Fall 2015 entering class.

C. Admissions Post-*Grutter*.

UT once again began using race as a factor in admissions after this Court's decision in *Grutter*, which held that public universities have a compelling interest in student body diversity. *Fisher*, 645 F. Supp. 2d at 592-593. UT did so, however, only after a careful, year-long review. *Id.* The University of Texas Board of Regents passed a resolution in 2003 allowing each Texas public university to decide "whether to consider an applicant's race and ethnicity" in a manner consistent with *Grutter* when making admissions decisions. *Id.* at 593. UT conducted two studies to determine whether race-conscious measures were necessary to achieve a critical mass of minority students at the university. The first examined the presence of minority students in classes of five to twenty-four students, those small enough to involve substantial amounts of class participation. *Id.* UT focused on these classes, which constitute the majority of those offered, because they provide the most opportunity for classroom interaction. *Id.* The study found that in 2002, 90% of all classes of discussion size had zero or one black students, and 43% had zero or one Hispanic students. *Id.* In the second study, which examined undergraduate students' perceptions of diversity on campus and in class, minority students reported feeling isolated, and a majority of all students stated that they believed there was insufficient diversity in the classroom. *Id.* In response to these results, the university concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving a critical mass." *2004 Proposal* at 25. Achieving a critical mass, however, was essential to fulfilling UT's "mission and . . . flagship role" to "prepare its students to be the leaders of the State of Texas" and "to be able to lead a multicultural workforce and to communicate policy to a diverse electorate." *Id.* at 24.

UT consequently proposed a race-conscious admissions program, modeling it after the one approved in *Grutter*. *Id.* at 23-25. Although UT's program does not have a projected end date, the university conducts a formal review every five years to determine whether the use of race remains necessary. *Id.* at 32. UT also reviews its entire admissions procedure informally every year. *Id.* Since UT reintroduced the use of race into undergraduate admissions, the enrollment of underrepresented minority students has greatly increased, with one magazine ranking UT "sixth in the nation in producing undergraduate degrees for minority groups." *Fisher*, 645 F. Supp. 2d at 594 (quoting Victor M.H. Borden et al., *Top 100 Undergraduate Degree Producers: Interpreting the Data*, Diverse Issues in Higher Educ., May 31, 2007.) In 2008, 6% of the incoming freshman class was black, while 20% was Hispanic. *Id*. Underrepresented minorities are still more likely to be admitted under the Top Ten Percent plan than white students, with 85% of admitted Hispanic students and 80% of admitted black students receiving a spot through the plan in 2008, versus 67% of white students. *Id.*

II. The Challenged Program.

UT groups applicants into Texas residents, non-Texas domestic residents, and international students. *Id.* at 595. Applicants compete only with members of their group for admission. *Id*. Ninety percent of the available slots are reserved for Texas residents. *Id.* Texas residents are further divided into Top Ten Percent applicants, who represented 81% of the entering class and 92% of the slots for Texas residents in 2008, and non-Top Ten Percent applicants. *Id.* UT guarantees admission for Top Ten Percent applicants to the university itself, but not to students' chosen major. *Id.* Although many schools and majors grant automatic admission, some, like the School of Architecture, have portfolio or audition requirements. *Id.* In addition, certain "impacted majors" like the School of Business, which could fill 80% of their

slots with Top Ten applicants, can cap their Top Ten enrollment at 75%. *Id.* Top Ten applicants who do not receive admission to their first choice major compete for slots in their second choice. *Id.* at 596. If they also do not receive their second choice, they are admitted as undeclared liberal arts majors. *Id.* at 598.

Texas residents who do not fall under the Top Ten Percent plan and non-Texas residents are admitted on the basis of two indices: the Academic Index (AI) and the Personal Achievement Index (PAI). *Id.* at 596. The AI predicts a student's freshman GPA based on her high school class rank, completion of UT's required high school curriculum, whether she exceeded the curriculum, and test scores. *Id.* The PAI is composed of three scores, one for each of two required essays and the Personal Achievement Score, which is the result of a holistic evaluation of a student's application. *Id.* at 596-97. In determining a student's Personal Achievement Score, admissions officers examine several factors, including a student's leadership qualities, awards and honors, work experience, community or school service, and special circumstances. *Id.* at 597. Relevant special circumstances include the socio-economic status of an applicant's family, her school socio-economic status, her family responsibilities, whether she lives in a single-parent home, whether languages other than English are spoken at home, her test scores as compared to her school's average, and, as of 2004, her race. *Id.* To determine a student's PAI, admissions officers examine an applicant's entire file, including any supplemental materials that she has chosen to submit, such as a resume or supplemental essay. *Id.* No factor is considered alone or given a numerical value. *Id.* Furthermore, race can positively affect all applicants' scores, including non-minority students', or have no effect. *Id.*

After calculating an applicant's AI and PAI scores, admissions officers enter the information into matrices created for each major, with the highest cores falling in the upper left

corner and the lowest in the lower right. *Id.* at 598. Officials do not use identifying information other than the score at this point. *Id.* Each major creates its own cutoff line. *Id.* Applicants falling to the left of it are admitted, while those on the right are not. *Id.* Those who are not admitted to their first choice school or major are placed on the matrix for their second. *Id.* If they are not admitted to their second choice, they are considered for the liberal arts undeclared major. Non-Texas applicants who do not meet this cutoff are rejected. *Id.* Texas applicants who do not make the cutoff are offered a place in the summer program, which enrolls approximately 800 students who then join the freshman class in the fall, or in the Coordinated Admission Program, which allows students to matriculate at other University of Texas system campuses and, if they meet certain academic conditions in their first year, transfer automatically to UT (Austin). *Id.* at 598-99.

III. The Current Litigation.

Petitioner Abigail Fisher is a white Texas resident who applied to UT for the entering class of 2008. Amended Complaint for Declaratory, Injunctive and Other Relief at 3-4, Fisher v. University of Texas at Austin, 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009) (1:08-cv-00253-SS). She was rejected. *Fisher*, 645 F. Supp. 2d at 590. Fisher attended Stephen F. Austin High School in Sugar Land, Texas. Amended Complaint*, supra*, at 3-4. Fisher filed suit against multiple defendants, including the University of Texas at Austin, in the Western District of Texas in 2008. *Id.* at 1. She sought both declaratory and injunctive relief for alleged violations of her Fourteenth Amendment right to Equal Protection. *Id.* at 2.

The district court found for UT on August 17, 2009, holding that UT's plan was narrowly tailored to achieve a compelling interest in student body diversity. *Fisher*, 645 F. Supp. 2d. at 612-13. The court held that "it would be difficult for UT to construct an admissions policy that

more closely resembles the policy approved . . . in *Grutter*," and that "[n]othing in *Grutter* prohibits a university from using both race-neutral alternatives and race itself, provided such an effort is necessary to achieve . . . sufficient student body diversity." *Id.* at 612. The Fifth Circuit affirmed the district court on January 18, 2011, stating that UT's plan was "studied, serious, and of high purpose" and that it was consistent with *Grutter*. *Fisher*, 631 F.3d at 231, 247. The Fifth Circuit denied rehearing *en banc* on June 17, 2011. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301 (5th Cir. 2011) (denying rehearing *en banc*). This Court granted certiorari on February 21, 2012. 631 F.3d 213 (2012).

SUMMARY OF THE ARGUMENT

I. UT's affirmative action plan is valid under *Grutter* and the Fourteenth Amendment because it serves a compelling governmental interest: student body diversity. Student body diversity breaks down racial stereotypes, enriches classroom discussion, and promotes civic engagement amongst members of all racial groups. To achieve these benefits, public universities can implement race-conscious policies to achieve a "critical mass" of minority students, defined as a number sufficient to achieve the benefits of a diverse student body, without violating the Fourteenth Amendment.

UT's policy is designed to achieve student body diversity, not racial balance. After careful study, UT concluded that it lacked a critical mass of minority students. Because a large percentage of its classes lacked more than one black or Hispanic student, UT concluded that it could not offer students the vibrant classroom discussion and leadership training that *Grutter* identified as central to a university's educational mission. UT's judgment about how best to achieve this mission is entitled to the deference this Court has consistently granted to institutions of higher learning.

When implementing its post-*Grutter* program, UT stated that the new policy was intended to achieve critical mass. This Court presumes UT is acting in good faith, and Fisher cannot rebut that presumption. This Court has never placed a ceiling on the percentage of minority students that constitute critical mass, and UT's previous admissions program had failed to produce sufficient student body diversity.

II. UT's admissions policy is also narrowly tailored. According to *Grutter*, a narrowly tailored admissions plan must: 1) not impose a quota, 2) employ individual, holistic assessment of applicants, 3) not unduly burden non-minority applicants, 4) have a time limit, and 5) remain essential after race-neutral alternatives are considered in good faith. UT's plan meets all five criteria. UT does not seek to enroll a specific number of minority students, and it considers all applicants individually. Race is only considered as one factor among many, and the university never gives it a specific weight or determinative effect. Because UT engages in a holistic review of every student's application, taking all forms of diversity into account, non-minority applicants are not unduly burdened. Moreover, UT's use of race in admissions is time limited. The policy is formally reviewed every five years to determine whether a race-conscious plan is still necessary.

Lastly, UT seriously considered race-neutral alternatives. After *Grutter*, the university conducted a comprehensive study to determine whether race-neutral measures like the Top Ten Percent plan and outreach efforts were sufficient to attain a diverse student body. It concluded that they were not, a conclusion that is entitled to deference. Furthermore, the affirmative action plan is not under- or overinclusive. Not only does the diversity plan affect a significant number of minority applicants, but it is also essential to ensure that UT offers students a diverse classroom environment and remains visibly open to individuals of all ethnic and racial groups.

III. Fisher, perhaps implicitly acknowledging the lawfulness of UT's program under *Grutter*, asks in the alternative that this Court depart from the doctrine of *stare decisis* and invalidate diversity as a permissible interest for higher education. This argument is unavailing. *First*, the diversity rationale has endured for almost forty years without derogation by this Court and has proven eminently workable. Lower courts have applied *Grutter*'s holding correctly, upholding challenged admissions programs when they comport with its reasoning and refusing to extend that reasoning beyond its limited context. *Second*, substantial reliance interests exist: universities and students alike have built their approach to university admissions around the permissibility of the diversity interest for two generations. *Third*, *Grutter* was consonant with the legal background against which it was decided and coheres with the law as it has developed since; this Court relied upon its reasoning in *Parents Involved* to demonstrate the constitutional infirmity of the school districts' programs. *Finally*, experience has shown that this Court's factual assumptions are correct: universities cannot achieve sufficiently diverse populations without *Grutter*'s permission for race-consciousness in admissions.

Grutter established a narrow sphere of permission for universities to employ race as one criterion in diversity-oriented admissions programs. Some states and universities have chosen to forego that permission. But many continue to rely on this Court's consistent analysis since *Bakke* that they may be aware of an applicant's race without offending the Constitution. Fisher cannot argue that *Bakke* and *Grutter* were unworkable, that their holdings were irrelevant, that the growth of the law has discredited their reasoning, or that time has shown their assumptions in error. When all principles of *stare decisis* counsel for upholding a precedent, this Court should not do otherwise.

ARGUMENT

I. Under *Grutter*, UT Has a Compelling Interest in Student Body Diversity.

Government classifications based on race are subject to strict scrutiny. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). Consequently, UT's admissions policy is consistent with the Fourteenth Amendment only if it is narrowly tailored to achieve a compelling government interest. *See, e.g.*, *Adarand*, 515 U.S. at 227; *see also Shaw v. Hunt*, 517 U.S 899, 908 (1996) ("[W]e have recognized that, under certain circumstances, drawing racial distinctions is permissible where a governmental body is pursuing a 'compelling state interest.'"). Although all racial classifications are subject to strict scrutiny, "[n]ot every decision influenced by race is equally objectionable." *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). Strict scrutiny is not "strict in theory, but fatal in fact," *Adarand*, 512 U.S. at 237 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)). Rather, strict scrutiny "*does* take 'relevant differences' into account—indeed, that is [strict scrutiny's] fundamental purpose . . . to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." *Adarand*, 515 U.S. at 228. UT's use of race as one factor among many in its admissions decisions serves a compelling governmental interest: student body diversity.

A. *Grutter* Recognized a Compelling State Interest in Student Body Diversity.

This Court held in *Grutter v. Bollinger* that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 324; *see also Parents Involved in Comt. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S 701, 722 (2007) ("The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education . . . ."); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978) (opinion of Powell, J) ("[T]he attainment of a diverse student body . . .

clearly is a constitutionally permissible goal for an institution of higher education."). Pursuant to this interest, public universities can permissibly seek to attain a "critical mass" of minority students, which is "defined by reference to the educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330. This Court has defined critical mass as "meaningful numbers," "meaningful representation," a number sufficient to encourage minority students to participate in the classroom, and a number sufficient that minority students do not feel isolated or forced to serve as spokespersons for their race. *Id* at 318.

B. This Court Should Defer to UT's Judgment That Critical Mass Requires Significant Interactions Among Different Racial Groups in the Classroom.

Many of the benefits that stem from a diverse student body, and that this Court recognized in *Grutter*, are only realized inside of the classroom. These include robust classroom debate and showcasing the complexity of the minority experience. 539 U.S. at 330. Critical mass, in consequence, must be defined so that "the undergraduate experience for each student . . . include[s] *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds." *2004 Proposal* at 24. UT believes it cannot reap the benefits that a diverse student body offers if there are "large numbers of classes in which there are no students—or only a single student—of a given underrepresented race or ethnicity." *Id.* at 25.

The university is entitled to deference for its conclusion that an absence of significant classroom contact between students of different racial backgrounds indicates a lack of a critical mass. In *Grutter*, this Court stated that a university's judgment that student body diversity "is essential to its educational mission is one to which we defer," *Grutter*, 539 U.S. at 328, because "universities occupy a special niche in our constitutional tradition." *Id.* at 329. This role stems from the importance of public education, *see Plyler v. Doe*, 457 U.S. 202, 221 (1982) (describing education as essential to "sustaining our political and cultural heritage"); *Brown v. Bd. of Educ.*,

347 U.S. 483, 493 (1954) ("[E]ducation . . . is the very foundation of good citizenship."), and "the expansive freedoms of speech . . . associated with the university environment," *Grutter*, 539 U.S. at 329; *see also Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.) ("The freedom of a university to make its own judgment as to education includes the selection of its student body."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident."); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1966) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value . . . ."). Decisions about student body composition are the result of "complex educational judgments in an area that lies primarily within the expertise of the university." *Grutter*, 539 U.S. at 328. UT's decision to increase diversity in the classroom, therefore, should receive deference.

C. UT's Admissions Policies Are Intended To Achieve a Diverse Student Body, Not Racial Balance.

UT's uses race as a factor in undergraduate admissions to achieve student body diversity, not to ensure that the demographics of the university match those of Texas. While student body diversity is a compelling government interest, "[r]acial balance is not to be achieved for its own sake," *Freeman v. Pitts*, 503 U.S. 467, 494 (1992), as pure racial balancing is "patently unconstitutional," *Grutter*, 539 U.S. at 330. Because the prohibition on racial balancing is "one of substance," "working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under . . . existing precedent." *Parents Involved*, 551 U.S. at 729, 733.

In its 2004 proposal to reintroduce race into admissions, the university made clear that "the proposal . . . is not an exercise in racial balancing but an acknowledgement that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." *2004 Proposal* at 24. UT's statement that its affirmative action program is intended to achieve student body diversity, not racial balance, is entitled to a presumption of "good faith" absent a "showing to the contrary." *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 318-19 (opinion of Powell, J.)). Fisher cannot make such a showing because: 1) UT had not previously achieved a critical mass of minority students; 2) this Court has never held that critical mass is the same in all contexts; and 3) the actual operation of UT's plan is inconsistent with racial balancing.

1. UT Could Not Achieve a Critical Mass of Minority Students Without Race-Conscious Measures.

The university had not achieved a critical mass before implementing its affirmative action program. UT could not realize the educational benefits produced by student body diversity when 79% of all classes, and 90% of small classes, had zero or one black students, or when 30% of all classes, and 43% of discussion size, had zero or one Hispanic students. *Fisher*, 645 F. Supp. 2d at 593, 607. Clearly, UT could not achieve a critical mass of minority students in every class without exerting unprecedented control over students' schedules, and the university does not assert a compelling interest in diversity in every classroom. *Id.* at 607. However, the absence of members of particular minority groups from a significant percentage of UT's classes prevents the university from fully realizing the benefits offered by a diverse student body. It also increases the likelihood that minority students will face the principal problems this Court identified in *Grutter*: feeling isolated or like spokespersons for their race. This problem is a real one—in UT's 2003 study, minority students reported that they felt isolated, and a majority of all undergraduates

believed that UT was insufficiently diverse. *Id.* at 593. These feelings of isolation combined with the absence of significant classroom contact between members of different racial groups demonstrates that UT had not yet achieved a critical mass of minority students when it began taking race into account in its admissions process.

2. What Constitutes a Critical Mass Is Highly Context-Dependent.

When courts evaluate universities' affirmative action plans, "[c]ontext matters." *Grutter*, 539 U.S. at 327. This Court has not and should not now place a ceiling on the minimum number of students that can be considered a critical mass; what constitutes a critical mass in one context is insufficient in another. The University of Michigan Law School, for example, was a national institution. *See id.* at 313-15. Furthermore, it was small enough that its classroom dynamics likely modeled the demographics of the law school overall. UT, by contrast, is a large state university. It is training its students to be leaders of Texas, and the percentage of minority students overall is a poor proxy for the amount of classroom contact among members of different racial groups. *See 2004 Proposal* at 26 tbl. 8. What constitutes a critical mass at UT, therefore, is different than at the University of Michigan Law School, given the institutions' different sizes and missions.

Schools are entitled to take societal demographics into account when determining whether they have achieved a critical mass. Indeed, as the district court stated, "the mere concept of an 'underrepresented' minority group, adopted and endorsed by the Supreme Court in *Grutter* . . . necessarily involves the comparison of a minority group's representation at a university to its representation in society." *Fisher*, 645 F. Supp. 2d at 606-607. As this Court recognized in *Grutter*, "'some attention to numbers,' without more," does not render an admissions policy unconstitutional. *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323 (opinion of Powell,

J.)). The *Grutter* Court could have easily accepted the dissent's suggestion that critical mass must be the same for all minority groups, regardless of social demographics. *Id.* at 380-82 (Rehnquist, J., dissenting). It did not. Instead, it listed several benefits of a diverse student body that depend on a school's ability to consider relevant differences among ethnic and racial groups. *Id.* at 330. Two of these benefits include ensuring that the path to leadership is visibly open to all races, and training effective leaders of and participants in a diverse society. *Id.* at 330-32. For example, as the Hispanic population of Texas grows larger, the number of Hispanic students at the university may need to increase before students can be trained in a realistic environment. *See 2004 Proposal* at 24-25 ("In short, from a racial, ethnic, and cultural standpoint, students at the University are currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow."). If the number of Hispanics admitted to the state's flagship institution does *not* increase as the population of Hispanics in Texas grows, UT will in effect tell Hispanic Texans that their path to leadership has narrowed.

3. The Actual Operation of UT's Plan Is Inconsistent with Racial Balancing.

Lastly, the way UT's admissions system works in practice demonstrates that it is not designed to achieve racial balance. The number of students of each race admitted to UT does not match the overall demographics of Texas. As the Fifth Circuit noted, "[t]he percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas' African-American population, while Asian-American enrollment is more than five times the percentage of Texan Asian-Americans." *Fisher*, 631 F.3d at 235. Most importantly, the university does not even monitor the number of students of each race that it has admitted during the admissions process, let alone attempt to balance them. *Fisher*, 645 F. Supp. 2d at 598.

II. UT's Affirmative Action Plan Satisfies *Grutter*'s Narrow Tailoring Requirement.

In addition to advancing a compelling interest, a race-conscious admissions plan must be narrowly tailored. Under *Grutter*, narrowly tailored admissions plans: 1) may not impose a quota; 2) must consider each applicant individually with race serving only as a plus factor; 3) may not unduly burden non-minority applicants; 4) must function on a limited time frame; and 5) may be instituted only after race-neutral alternatives were considered in good faith. UT's plan meets all of these requirements.

A. UT's Plan Is Not a Quota

Grutter held that "[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)). A quota is a program "in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Id.* at 335 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (plurality)). Whereas quotas "impose a fixed number or percentage which must be attained, or which cannot be exceeded," a "permissible goal . . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself." *Grutter*, 539 U.S. at 335 (quoting *Local 28*, *Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 495 (1986)). Furthermore, because there is "some relationship between numbers and achieving the benefits to be derived from a diverse student body . . . " *Bakke*, 438 U.S. at 323 (opinion of Powell, J.), "'[s]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota," *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323 (opinion of Powell, J.)).

Like the University of Michigan Law School's plan, UT's is not a quota. Like the law school, UT does not reserve a fixed number of spots for members of particular racial groups. Under both plans, minority students' applications are considered alongside non-minority students' applications. UT could not enforce a quota even if it wanted to—it can hardly ensure a specific racial makeup of its class without tracking the ethnicity of admitted students.

B. UT's Plan Includes Flexible, Holistic Review.

UT's plan also satisfies *Grutter*'s second requirement: each applicant, whatever her race, is evaluated holistically. While *Grutter* forbids universities from establishing quotas for minority students, it allows them to "consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." *Id.* at 334. A public university's evaluation must be "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" *Id.* at 337 (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)). Furthermore, a plan cannot award automatic bonuses based solely on an applicant's race. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). Rather, "each characteristic of a particular applicant [is] to be considered in assessing the applicant's entire application," and no "single characteristic [can] automatically ensure[] a specific and identifiable contribution to a university's diversity." *Id.* at 271.

UT's plan is consistent with *Grutter* because it uses race only "as part of a 'highly individualized, holistic review.'" *Parents Involved*, 551 U.S. at 23 (quoting *Grutter*, 539 U.S. at 337). Race is only a "a factor of a factor of a factor of a factor" in UT's decisionmaking. *Fisher*, 645 F. Supp. 2d at 608. It is one of several special circumstances that can affect a student's Achievement Score, which is one of three factors affecting his or her Personal Achievement

Index, which is one of two scores that determine whether an applicant is admitted. *Id.* In contrast to the automatic twenty-point bonus struck down in *Gratz*, race is never assigned a separate numerical score. *Id.* at 608-609. Nor is race is considered individually at any point in the process. *Id.* Furthermore, unlike the programs struck down in *Parents Involved*, which assigned children to particular school districts based solely on their race, *Parents Involved*, 551 U.S. at 719, under UT's policy, "the consideration of race, within the full context of the entire application, may be beneficial to *any* UT Austin applicant." *Fisher*, 645 F. Supp. 2d at 606. Just as in *Grutter*, any applicant can submit supplemental information highlighting his or her contributions to student body diversity. *See Fisher*, 631 F.3d at 236. Thus, a white student at a majority black school may be found to contribute more to student body diversity than a black student from a majority black school.

C. The UT Plan Does Not Unduly Burden Non-Minority Applicants

UT's individualized, holistic review ensures that it does not unduly burden white applicants. Narrow tailoring forbids an affirmative action plan from placing a heavy burden on members of the non-preferred race. *See Grutter*, 539 U.S. at 341; *Bakke*, 438 U.S. at 308 (opinion of Powell, J.); *see also United States v. Paradise*, 480 U.S. 149, 182 (1987) ("The one-for-one requirement did not impose an unacceptable burden on innocent third parties."). Although UT's plan may negatively affect some non-minority applicants, it does not place an impermissible burden on them. As Justice Powell found in *Bakke*, students who are not admitted to a university that considers race as a part of a holistic review "have no basis to complain of unequal treatment under the Fourteenth Amendment" because the applicant "who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat." *Bakke*, 438 U.S. at 318.

(opinion of Powell, J.). Similarly, Fisher has not been unduly burdened. Her qualifications were "weighed fairly and competitively." *Id.* at 318 (opinion of Powell, J.).

Furthermore, denial of admission to a university is less burdensome than losing a spot after having already enrolled; being denied a benefit is less onerous than losing a benefit already attained. This Court has held, for example, that hiring goals partially based on race place less of a burden on members of non-preferred groups than layoffs. *See Paradise*, 480 U.S. at 182 ("The one-for-one requirement does not require the layoff and discharge of white employees and therefore does not impose [undue] burdens . . . ."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282 (1986) (plurality) ("Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose."). Similarly, being denied admission to a university is much less of a burden than being asked to leave after completing one's freshman year. Innocent members of the non-preferred race cannot be *unduly* burdened, but "innocent persons may be called upon to bear *some* of the burden." *Id.* at 280-81 (plurality) (emphasis added). Although UT's program does call on innocent persons to bear some of the burden, this Court's precedent holds that the burden they bear is not too great.

D. UT's Plan Is Limited in Time

UT's plan also satisfies *Grutter*'s time-limit requirement. Under *Grutter*, race-conscious admissions plans "must be limited in time," so that race-conscious measures are "employed no more broadly than the interest demands." *Grutter*, 539 U.S. at 342. Public universities' affirmative action plans, therefore, must either have sunset provisions or undergo "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* The time requirement "'assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the

service of the goal of equality itself.'" *Id.* (quoting *Croson*, 488 U.S. at 510 (plurality)). The UT program satisfies this requirement. Like the University of Michigan Law School's policy, UT's has no specified end date. However, UT undertakes an informal review of all of its admissions polices, including the use of race, annually. *Fisher,* 645 F. Supp. 2d at 594. The university also requires a formal review every five years specifically to determine whether the use of race in admissions remains necessary or whether race-neutral alternatives would be sufficient. *Id.*

E. UT Considered Race-Neutral Alternatives in Good Faith.

Lastly, UT's admissions policy is narrowly tailored because the university considered race-neutral alternatives—including the Top Ten Percent law and outreach efforts—before implementing a race-conscious admissions plan. In *Grutter*, this Court stated that narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. However, narrow tailoring does not require "exhaustion of every conceivable race-neutral alternative. Nor does it 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." *Id*; *see also Wygant*, 476 U.S. at 280 n.6 (stating that race-neutral alternatives must advance the government's interest "about as well" as race-conscious measures).

UT adopted a race-conscious plan only after the results of its year-long study demonstrated that race-neutral measures would not allow the university to attain a diverse student body. Although it had used race-neutral measures since the Texas Supreme Court's 1996 decision in *Hopwood*, the university still had not achieved a critical mass of minority students by 2004. *2004 Proposal* at 24. As discussed *supra*, a majority of all students felt that the university lacked sufficient diversity, and members of underrepresented minority groups felt isolated.

Fisher, 645 F. Supp. 2d at 592-593. 90% of classes of discussion size had zero or one black students in 2002, while 43% had zero or one Hispanic students. *Id.*

UT's continued use of the Top Ten Percent plan alongside its race-conscious measures is irrelevant to this Court's analysis. *Grutter* held that universities do not have to adopt percentage plans in lieu of race-conscious policies. *Grutter*, 539 U.S. at 340. Such plans can increase the number of minority students attending a particular university, but they also "preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along the qualities valued by the university." *Id.* While individualized review allows UT to consider many aspects of student body diversity, a Top Ten Percent plan focuses on geographic diversity alone. Furthermore, Top Ten Percent plans may force universities to sacrifice their reputation for academic excellence, a tradeoff that the *Grutter* Court protected universities from having to make. *Id.* at 339. UT, therefore, could have constitutionally ended its reliance on a Top Ten Percent plan and made much greater use of race than it does today. This Court should not use UT's attempt to use race in the most limited way possible against it.

Even if this Court considers the effects of the Top Ten Percent law, UT's plan survives constitutional scrutiny: UT cannot attain a diverse student body through the law alone. While the Top Ten Percent law increased overall racial diversity, minority students are overwhelmingly clustered in certain programs. UT's School of Social Work, for example, is nearly 25% Hispanic and more than 10% black. *Fisher*, 631 F.3d at 240. However, the College of Business Administration is only 14.5% Hispanic and 3.4% black. *Id.* Using race-conscious admissions for the Non-Top Ten Percent applicants allows the university to consider whether minority students are interested in programs that typically lack enough racial diversity to ensure meaningful

classroom interaction. This use of race-conscious measures is particularly important given the large number of classes that lack one or more Hispanic or black students.

Moreover, the use of a Top Ten Percent law alone would unduly disadvantage minority students in the second decile of their high school class. Because so many students are admitted under the Top Ten Percent law, UT has only 1,216 remaining slots, for which nearly 16,000 applicants compete. *Fisher*, 631 F.3d at 241. As a result, non-Top Ten Percent admitted students have even higher standardized test scores on average than those admitted under the Top Ten Percent law. *Id.* at 224. Minority students at competitive high schools, therefore, may be disproportionately excluded from UT, particularly since minority students often have lower standardized test scores than their peers. *Id.* These students have a different perspective than the top students at less competitive high schools and contribute to overall student body diversity in a different way. Allowing admissions officers to consider race when evaluating these remaining applicants is crucial to ensure that UT can benefit from their experiences.

Even should *Parents Involved* apply to higher education, this case is factually distinct. In *Parents Involved*, the affirmative action plans at issue made such a small contribution to diversity that race-neutral measures, which were never considered, likely could have worked about as well. *Parents Involved*, 551 U.S. at 733 ("The minimal effect these classifications have on student assignments, however, suggests that other means would be effective."). Here, even though race-conscious policies applied to only 18% of students admitted in 2008, they affected a significant percentage of UT's minority applicants: 20% of black students and 15% of Hispanic students were admitted under the race-conscious plan. The Univ. of Tex. at Austin Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 558)* at 9 tbl. 2 (2010). While it is impossible to know which of those students would have been admitted

without the consideration of race, the district court found that race often is a "meaningful factor" in students' applications. *Fisher*, 645 F. Supp. 2d at 598.

The plans in *Parents Involved*, in contrast, were racial quotas, granting student transfer requests based solely on whether the student's skin was the correct color. *Parents Involved*, 551 U.S. at 723. It was this blunt use of binary categories that Justice Kennedy identified as the Court's main concern. *Id.* at 790 (Kennedy, J. concurring). Justice Kennedy suggested that the small impact of the decisions made using these measures suggested that the schools could have instead undertaken just the type of individualized review that UT has implemented here. *Id.* ("[I]n the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means. These include . . . a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter* . . . .") (Kennedy, J., concurring). Unlike the plans at issue in *Parents Involved*, UT's affirmative action policy is entirely consistent with *Grutter* in all significant ways, and this Court should uphold it.

III. Regardless of the Lawfulness of UT's Admissions Program, *Grutter* Remains Valid And Should Not Be Overruled.

Fisher seeks to overturn an enduring line of workable, effective precedent in this Court's jurisprudence, upset the settled expectations of universities and applicants alike, and call into question the reliability of this Court's judgments. The principles of *stare decisis,* however, dictate that *Grutter* should be affirmed. This Court's reluctance to overrule itself is "essential to the respect accorded to the judgments of the Court and to the stability of the law." *Arizona v. Gant*, 556 U.S. 332, 348 (2009). Though "the rule of *stare decisis* is not an inexorable command," it is nonetheless "indispensable . . . [to] the very concept of the rule of law*." Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992). Anyone seeking the

invalidation of a prior precedent "bear[s] a heavy burden." *Gant*, 556 U.S. at 354 (Scalia, J., concurring).

Fisher cannot meet that burden. *Grutter* satisfies all of the tests traditionally and consistently employed in *stare decisis* analysis: whether the rule has "def[ied] practical workability"; whether the standard has created reliance interests that would "add inequity to the cost of repudiation"; whether the development of the law has left the rule "no more than a remnant of abandoned doctrine"; and whether the factual setting has changed so drastically "as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854-855. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (noting that the relevance of precedent depends on whether "decisions are unworkable or badly reasoned"); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 699-700 (1978) (examining the strength of reliance interests occasioned by a prior decision); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 232 (1995) (overruling a prior decision because it "collid[ed] with an accepted and established doctrine"); *Pearson v. Callahan*, 129 S.Ct. 808, 816 (2009) (asking whether "experience has pointed up the precedent's shortcomings").

Grutter satisfies all four of these factors. The decision has proven workable. It has created substantial reliance interests among universities and students. It remains consistent with this Court's equal protection jurisprudence. Its assumptions have been validated by events since it was decided. Indeed, no factor counsels against the application of *stare decisis* to *Grutter*. This Court should not reconsider its decision.

A. *Grutter* Has Proven Workable.

The permissive sphere that *Grutter* erected in Equal Protection Clause jurisprudence for diversity-based university admissions programs has proven sound and straightforward. The

workability analysis in *Planned Parenthood v. Casey*, 505 U.S. at 855, is instructive. *Casey* held that *Roe v. Wade's* "limitation beyond which a state law is unenforceable" easily satisfied the workability criterion. *Casey*, 505 U.S. at 855. Despite the regularity with which the lower courts are obliged to examine abortion regulations passed by individual states, the determinations *Roe* requires "fall within judicial competence." *Id.*

Grutter presents courts with an even simpler analysis: unlike *Roe*, which routinely requires courts to strike down democratically enacted laws, *Grutter* permits states and universities alike to adopt their own approach to the use of diversity in admissions. Indeed, a number of states have chosen by constitutional amendment, statute, or executive order to foreclose such considerations; those decisions by elected state governments are unimpaired by *Grutter*'s holding. *See* discussion *infra* II.B. Lower courts have consistently and easily applied this Court's reasoning both to uphold acceptable admissions plans and to avoid extending the *Grutter* rule into inappropriate new contexts. *Grutter*'s reasoning remains sound and straightforward.

First, circuit courts have applied *Grutter*'s holding permitting the use of diversity in university admissions consistently and successfully. *Grutter* articulates clear standards by which universities and courts can assess specific affirmative action programs. When in pursuit of "the educational benefits that diversity is designed to produce," *Grutter*, 539 U.S. at 330, reviewers may permissibly take note of an applicant's race so long as the program does not "use a quota system," *id.* at 334, and evaluates each applicant "as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," *id.* at 337. Acceptable admissions programs must ensure that "all factors that may contribute to . . . diversity are meaningfully considered alongside race," *id.* at 337, including "diversity factors besides

race," *id.* at 338, and only adopt race-conscious measures after "serious, good-faith consideration of workable race-neutral alternatives," *id.* at 339.

The Fifth Circuit faithfully applied this pronouncement to UT's program in this case. Nor have other courts struggled to employ *Grutter*'s analysis. The Ninth Circuit, for example, found the *Grutter* factors easy to apply in the immediate aftermath of this Court's decision. *See Smith v. Univ. of Wash.*, 392 F.3d 367 (9th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005). In *Smith*, the Ninth Circuit found that, like Michigan Law, the University of Washington Law School's admissions program satisfied the Equal Protection Clauses' dictates. The Washington Law program "did not establish quotas, targets or goals for admission or enrollment of minorities." *Id.* at 375. It conducted a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment" beyond race and ethnicity. *Id.* (quoting *Grutter*, 539 U.S. at 337).

In *Smith,* the *Grutter* factors also provided a straightforward analytical framework for considering practices that were not precise analogues to those at issue in *Grutter*. For example, *Smith* presented the question of whether the Law School's practice of seeking additional information about minority applicants, such as what languages were spoken at home, invalidated its program. *Id.* at 377-378. The Ninth Circuit held that this practice comported with *Grutter*, as the additional information enabled the school to recognize applicants "whose race had impacted their views and experiences rather than giving preference . . . based on their race alone." *Id.* at 377 (quoting *Smith v. Univ. of Wash.*, No. 2:97-cv-00335-TSZ, slip op. at 33 (W.D. Wash. June 5, 2002)). This request, the Ninth Circuit concluded, was an application of the kind of "individualized, holistic review" this Court had commended. *Grutter*, 539 U.S. at 337.

Second, courts have easily found appropriate limits to this Court's holding in *Grutter*. In *Lomack v. City of Newark*, 463 F.3d 303 (3d Cir. 2006), the Third Circuit considered Newark's effort to integrate its firefighting companies by ordering some transfers and forbidding others based solely on firefighters' race. *Id.* at 306-307. The City invoked *Grutter* in defending its policy, arguing that "integration in the workplace is no less important than in an education setting." *Id.* at 309 (citation omitted). The Third Circuit, however, recognized that *Grutter*'s authorization of diversity as a compelling state interest is relevant only for "an institution whose mission is to educate." *Id.* at 310. Based on its correct understanding of *Grutter*'s "quite narrow[]" holding, the Third Circuit rejected Newark's effort to transfer the diversity interest into the workplace context. *Id.* at 309-310. It remained obedient to this Court's instruction that "context matters." *Id.* at 308. *See also Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006), *cert. dismissed*, 550 U.S. 931 (2007) (refusing to extend *Grutter* to apply to a private K-12 academy because *Grutter* applies only to public higher education).

Third, though plaintiffs have cited *Grutter* in attempts to overturn individual state actions prohibiting universities from considering race in admissions, courts have accurately concluded that *Grutter* extends *permission* for such practices without *mandating* them. *See, e.g.*, *Coal. To Defend Affirmative Action v. Brown*, No. 11-15100, 2012 WL 1072235 at *5-6 (9th Cir. Apr. 2, 2012); *Coal. To Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 957 (E.D. Mich. 2008), *awaiting en banc review*, No. 08-1387, (6th Cir. Sept. 9, 2011) (order granting *en banc* review and vacating panel decision). *Grutter* poses no risk of inconsistent or erratic application, and courts have correctly applied its holding in appropriate contexts without expansion. *Grutter* remains workable.

B. Substantial Reliance Interests Exist.

Over forty years of race-conscious admissions have induced reliance on *Grutter* throughout higher education. The diversity rationale that *Grutter* recognized as compelling was first announced in Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-314 (1978) (opinion of Powell, J.). After discussing the importance of universities in American life and acknowledging that academic freedom "includes the selection of [a university's] student body," *id.* at 312, Justice Powell concluded that promoting a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education," *id.* at 311-312.

The 2003 decision in *Grutter* established beyond doubt that Justice Powell's opinion granted constitutional permission for the diversity rationale in university admissions. In the nearly forty years since *Bakke*, universities nationwide have relied on this Court's consistent pronouncements that diversity provides a compelling state interest to examine the race of an applicant. Though six states have banned affirmative action—California, Michigan, Arizona, Nebraska, Florida, and Washington[2] —with at least one pending referendum to do the same in Oklahoma,[3] the great majority of states continue to permit race-conscious admissions policies in accordance with *Grutter*. Universities have used this freedom to develop a wide variety of admissions systems along a complex spectrum of individual institutional choices. *See generally* Lauren S. Foley, *From Comparing Plus Factors to Context Review: The Future of Affirmative Action in Higher Education*, 39 J.L. & Educ. 183 (2010) (discussing the evolution of affirmative-action program design since *Grutter*). Indeed, many universities have elected to shift their race-conscious approach towards non-admissions-based initiatives like expanded recruitment and retention programs. *See, e.g.*, Ellison S. Ward, Note, *Toward Constitutional Minority*

[2] *See* Cal. Const. art. I, § 31; Mich. Const. art. I, § 26; Ariz. Const. art. II, § 36; Nebr. Const. art. I, § 30; Exec. Order No. 99-281 (Fla. Nov. 9, 1999) Wash. Rev. Code Ann. § 49.60.400 (West 2011).
[3] Legislative Referendum No. 359, S.J.R. 15, 53d Leg., 1st Sess. (Okla. 2011)

Recruitment and Retention: A Narrowly Tailored Approach, 84 N.Y.U. L. Rev. 609 (2009) (discussing an increasing emphasis on diversity-oriented recruitment and retention initiatives in higher education). Others have foregone the use of race entirely. Peter Schmidt, *From "Minority" to "Diversity,"* 22 Chron. of Higher Educ., Feb. 3, 2006, http://www.chronicle.com/article/From-Minority-to-Diversity/2985/ ("[I]nstitutions have been abandoning the use of race-exclusive eligibility criteria in determining who can be awarded scholarships and fellowships . . . ."). And many major public universities continue to follow this Court's guidance in *Grutter* that they may permissibly employ race as one factor in pursuing a diverse student body, including Miami University of Ohio, Ohio State University, and the University of Wisconsin, to name only a few.[4]

These programs have developed over decades to ensure that each university can achieve its goal of a diverse student body in accordance with *Grutter* and, before it, with *Bakke*. As this Court noted in *Grutter*, numerous *amici* in that case discussed how many colleges, universities, and graduate schools had "modeled their admissions policies" on Justice Powell's reasoning in *Bakke*. 539 U.S. at 323. This trend only increased after this Court's unambiguous reaffirmation in *Grutter* of the permissibility of the diversity rationale. The generation that was preparing to go to college when *Bakke* first established the permissible use of diversity in university admissions could now have grandchildren preparing to begin their own higher education. Over these decades, universities have designed their recruitment schemes, their advertising materials, their scholarship criteria, their faculty hiring initiatives, their student life programs, their student

[4] *See* Linda Chavez, *Racial Preferences in Wisconsin*, Center for Equal Opportunity (Sept. 16, 2011), *available at* http://www.ceousa.org/affirmative-action/affirmative-action-news/education/494-racial-preferences-in-wisconsin (last visited Apr. 7, 2012) (summarizing study results on data relating to admissions at the University of Wisconsin-Madison and the University of Wisconsin School of Law); Althea K. Nagai, *Racial and Ethnic Preferences in Undergraduate Admissions at Two Ohio Public Universities*, Center for Equal Opportunity (Feb. 14, 2011), *available at* http://www.ceousa.org/affirmative-action/affirmative-action-news/education/559-racial-and-ethnic-preferences-in-undergraduate-admissions-at-two-ohio-public-universities (last visited Apr. 7, 2012) (summarizing study results on data relating to admissions at Miami University of Ohio and Ohio State University).

retention systems, and their fundamental educational mission around the acceptability of diversity as an important goal. *See* Ward, *supra*, at 613-622. At no time in that period has this Court suggested that diversity is no longer an acceptable rationale in admissions programs. This Court has permitted reliance interests to grow up around its consistent acceptance of diversity in university admissions; it should not now incur the cost of repudiating that rule.

Justice Brandeis famously observed in *New State Ice Co. v. Liebmann* that "one of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *Grutter*'s limited deference to universities in selecting their own students has allowed that experimentation to continue in a great flowering of institutional design, permitting each school to select its own criteria for maximally effective education. That opportunity has yielded great benefits, and many more remain to be realized. *See* Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 Mich. J. of Race & L. 63, 73-86 (2011) (surveying legal and empirical research on diversity, context, and interaction in legal education). Students and university officials have relied on this Court's consistent declarations in *Bakke* and *Grutter*. This Court should not upend that reliance.

C. *Grutter* Does Not Conflict With Any Prior Or Subsequent Ruling Of This Court.

In *Casey*, this Court wrote that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were [at its decision]. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking." *Casey*, 505 U.S. at 857. The same can emphatically be said of *Grutter*.

This Court established the state of equal protection jurisprudence in the years before *Grutter* in *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995). *Adarand* examined a federal program that offered incentives to general contractors on government projects to hire subcontractors based in part on race. *Id.* at 205. This Court concluded that its equal protection cases had "established three general propositions with respect to governmental racial classifications," *id.* at 223: a skeptical attitude towards the propriety of governmental race-conscious programs, *Wygant*, 476 U.S. at 273 (plurality); the need for consistent application of the Equal Protection Clause regardless of the targeted race and the law's intention to burden or benefit, *J.A. Croson Co.*, 488 U.S. at 494 (plurality); and congruence between state and federal obligations under the Equal Protection Clause, *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). *Adarand* synthesized these three principles into a conclusive pronouncement that strict scrutiny applies to *any* racial classification by a state actor, regardless of its nature. 515 U.S. at 235. This holding represents the conclusion of "a line of cases stretching back over 50 years," which embodied "important principles of this Court's equal protection jurisprudence." *Id.* at 231.

The *Adarand* Court was forced to grapple with a decision only five years earlier in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled by Adarand*, 515 U.S. at 227, which had come to precisely the opposite conclusion: that the Court should examine "benign" racial classifications made by the federal government under the more permissive standard of intermediate scrutiny. This Court overruled its recent prior decision in *Adarand* for two reasons: *Metro Broadcasting* "turned its back" on prior explanations that only strict scrutiny could ensure that "'the motive for the classification was illegitimate racial prejudice or stereotype,'" *Adarand*, 515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493 (plurality)); and it "squarely rejected one . . . [and] undermined the other two" propositions central to this Court's equal protection

jurisprudence, *id.* In short, *stare decisis* counseled *for* overruling the precedent: *Metro Broadcasting* "collid[ed] with an accepted and established doctrine," *id.* at 232, and "departed from . . . prior cases—and did so quite recently," *id.* at 233.

In contrast, *Grutter* neither collided with nor departed from prior decisions of this Court. *Grutter*'s analysis of both prongs of the strict scrutiny test carefully relied on and applied *Adarand*. *First, Grutter*'s compelling-interest analysis did not depart from *Adarand*'s rule. *Grutter* did no more than establish the propriety of Justice Powell's ruling in *Bakke* that diversity is a compelling interest. *Bakke* itself long predated *Adarand* and played an important role in the majority's reasoning. *Adarand,* 515 U.S. at 218. The *Adarand* Court treated *Bakke* as a pivotal decision in the "line of cases" on which it relied. *Id.* at 231. At no point did the *Adarand* majority implicitly or explicitly question Justice Powell's reasoning: the Court endorsed it repeatedly and gave it pride of place. For *Adarand* and *Grutter* to conflict would be a contradiction in terms. *Adarand* was built on *Bakke*. *Grutter*'s reiteration of *Bakke*'s reasoning comports with *Adarand.*

Adarand announced that strict scrutiny is not "strict in theory, but fatal in fact . . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." 515 U.S. at 237. Few laws have survived the application of strict scrutiny, but *Adarand* provides an explicit guarantee that not *all* laws must fail. *Grutter* concluded that "*Adarand* . . . made clear that strict scrutiny must take 'relevant differences into account' [when] examining the importance and sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 228). And *Adarand*'s approving reliance on Justice Powell's reasoning in

Bakke indicates that university admissions represent one rare circumstance in which a particular government interest is sufficiently compelling to permit a well-tailored consciousness of race.

Second, *Grutter*'s treatment of narrow tailoring is also consistent with *Adarand*. *Adarand* identified a "basic principle" underlying equal protection jurisprudence: "that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*." *Adarand*, 515 U.S. at 227. *Grutter* carefully applied that principle to a university's pursuit of a diverse student body. Recognition of the centrality of *individual* rights to equal protection law drove the *Grutter* Court's rejection of quota systems, 539 U.S. at 334, its insistence on "an individualized, holistic review of each applicant's file," *id.* at 337, and its requirement that review give "serious consideration to all the ways an applicant might contribute to a diverse educational environment" without making "an applicant's race or ethnicity the defining feature of his or her application," *id. Grutter*'s narrow tailoring analysis was motivated throughout by *Adarand*'s insistence on the privileged place of the individual in the Equal Protection Clause. Each step in *Grutter*'s consideration of Michigan Law's admissions program—and the Fifth Circuit's examination of UT's similar program—asked, in effect, whether the state was examining an applicant as a *person* or as one of a set. Each time, this Court—and the Fifth Circuit—concluded that a policy could endure only when it comports with *Adarand*'s demands. No conflict exists between *Grutter* and any prior decisions of this Court.

Nor has the "development of constitutional law since the case was decided . . . implicitly or explicitly left" *Grutter* as a "mere survivor" of abandoned doctrine. *Casey*, 505 U.S. at 857. After *Grutter*, this Court returned to the issues of race and equal protection in *Parents Involved in Comt. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S 701 (2007). *Parents Involved* neither undermined nor called into doubt *Grutter*'s endorsement of the diversity rationale. *Parents*

Involved considered district programs to integrate schools in the face of racially identifiable housing patterns and their inevitable impact on geography-based school assignments. *Id.* at 712. The school districts relied on this Court's ruling in *Grutter* to defend their plan, arguing that the compelling interest in diversity should extend beyond higher education into elementary and secondary schools. *Id.* at 724. This Court flatly rejected that claim and easily distinguished *Grutter* on its own language. As the *Grutter* Court reiterated, "context matters." *Parents Involved*, 551 U.S. at 725 (quoting *Grutter*, 539 U.S. at 327). This Court held that the diversity interest accepted in *Grutter* "relied upon considerations unique to institutions of higher education," which "'occupy a special niche in our constitutional tradition.'" *Id.* (quoting *Grutter*, 539 U.S. at 329). At no point did *Parents Involved* question the appropriateness of *Grutter*'s holding subject to the "express[] . . . key limitations" constraining that holding to the narrow context of higher education. *Id.* at 725.

Separately, the school districts argued that *Grutter* authorized their policies because, unlike the University of Michigan, they sought only racial diversity, not a "broader diversity." *Id.* at 725-726. Consequently, they argued, they could pursue their goal through only one criterion: race. *Id.* This Court rejected that argument as a flat appeal to racial balancing. *Id.* at 726. It sharply differentiated between this impermissible goal and the "'meaningful number'" that the University of Michigan sought in *Grutter*, noting that the University of Michigan's goal of a "genuinely diverse student body" was not related to a mechanical, count-back system designed to achieve proportional representation of individual racial groups. *Id.* at 729 (citing *Grutter*, 539 U.S. at 316). This difference saved the challenged plan in *Grutter* and invalidated the ostensible compelling interest in *Parents Involved*; *Grutter* itself observed that "'outright racial balancing'

is 'patently unconstitutional.'" *Parents Involved*, 551 U.S. at 730 (quoting *Grutter*, 539 U.S. at 330).

Parents Involved also left undisturbed *Grutter*'s treatment of the narrow-tailoring analysis, dismissing the school districts' effort to shield their mechanical, determinative, and binary treatment of race behind *Grutter*. In the programs at bar in *Parents Involved*, "when race [came] into play, it [was] decisive by itself . . . . Even when it comes to race, the plans . . . employ[ed] only a limited notion of diversity, viewing race exclusively in white/nonwhite terms . . . ." *Id.* at 723. This Court illustrated the failures of the districts' programs by pointing to the example of the admissions program challenged in *Grutter*. The Michigan Law program survived, this Court noted, because it "focused on each applicant as an individual, and not simply as a member of a particular racial group." *Id.* at 722. This "highly individualized, holistic review," *Grutter*, 539 U.S. at 337, was essential because it ensured "that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance . . . ." *Parents Involved*, 551 U.S. at 723.

In short, *Parents Involved* supports the ongoing validity of *Grutter*'s analysis and conclusion. *Parents Involved* has no explicit bearing on *Grutter*, focused as it is on a very different factual setting: elementary and secondary schools that sought to pursue simple racial balancing instead of a comprehensive, individualized emphasis on diversity in all its forms. Indeed, in his concurrence, Justice Kennedy called the schools' effort to rely on *Grutter* "simply baffling." *Id.* at 792 (Kennedy, J., concurring in part and concurring in the judgment). While the challenged Seattle plans "reli[ed] upon a mechanical formula that has denied hundreds of students their preferred schools on the basis of three rigid criteria: placement of siblings, distance from schools, and race," the system sustained in *Grutter* "was flexible enough to take into

account 'all pertinent elements of diversity' and considered race as only one factor among many." *Id.* at 793 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Grutter*, 539 U.S. at 341). Justice Kennedy concluded that, had the district plans more closely resembled the flexible, individualized, diversity program approved in *Grutter*, they may have survived. *Id.*

Grutter was a straightforward and correct application of the precedents that governed this Court's equal protection analysis. The development of the law since its decision has not contradicted or undermined its conclusions: *Grutter* remains a relevant and organic component of this Court's equal protection jurisprudence. Traditional principles of *stare decisis* counsel for leaving it undisturbed.

D. *Grutter*'s Factual Assumptions Remain Accurate.

Casey makes clear that the *stare decisis* analysis should ask whether "time has overtaken some of [the] factual assumptions" and whether those "divergences from the factual premises of [the decision]" have undermined "the validity of [its] central holding." *Casey*, 505 U.S. at 860. *Grutter*'s factual underpinning remains intact, and this Court should not reconsider its holding.

In concluding that institutions of higher education have a compelling interest in a diverse student body, the *Grutter* Court concluded that a diverse student body creates "real," "substantial" educational benefits. *Grutter*, 539 U.S. at 330-331. Diversity "promotes learning outcomes" and allows students to develop "the skills needed in today's increasingly global marketplace." *Id.* at 330. The role universities play in preparing business executives, military officers, and cultural and political leaders, *Grutter* concluded, requires a diverse student body "if the dream of one Nation, indivisible, is to be realized." *Id.* at 330-332. Surveying the empirical battle fought among the unprecedented number of *amici* in *Grutter* and *Gratz*, this

Court correctly concluded that universities could not realize these benefits without the ability to pursue "all pertinent elements of diversity." *Grutter*, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 317). *See, e.g.*, Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From* Regents v. Bakke *to the University of Michigan Cases*, 90 Cornell L. Rev. 463, 487-492 (2005) (discussing the impact on *Grutter* of an expert study demonstrating the benefits of diversity).

The facts that informed that conclusion in 2003 remain the same today. Minority viewpoints and backgrounds are significantly underrepresented at leading universities nationwide. Diversity programs remain a critical and indispensible way of remedying that lack. Nor have factual developments called into question *Grutter*'s conclusion that the elimination of diversity programs in admissions would have a "'very dramatic,' negative effect on underrepresented minority admissions." *Grutter*, 539 U.S. at 320 (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 839 (E.D. Mich. 2001), *rev'd by* 288 F.3d 732 (2002)). Unlike *Parents Involved*, where this Court held that "the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications," 551 U.S. at 734, the course of events since *Grutter* has demonstrated that diversity programs in higher education remain vital.

The very flexibility of the *Grutter* decision, which allows individual states and universities to act as laboratories by choosing whether and how to employ race-conscious measures, has illustrated the effect of diversity programs—or their absence—in higher education. California, for example, amended its constitution in 1996 to forbid either discrimination or "preferential treatment" on the basis of protected criteria in public employment, public education, or public contracting. Cal. Const. art I., § 31. The amendment was the subject of

profound controversy before and after the election. *See* Eryn Hadley, *Did the Sky Really Fall?: Ten Years After California's Proposition 209*, 20 B.Y.U. J. Pub. L. 103, 104 (2005) (discussing public debate prior to the amendment).[5] The following years showed the serious consequences of ending diversity programs in higher education. At the University of California at Berkeley, for example, one of the country's leading public universities, minority freshman enrollment fell by 65%. Melvin Butch Hollowell, *In the Wake of Proposal 2: The Challenge to Equality of Opportunity in Michigan*, 34 T. Marshall L. Rev. 203, 225 (2008). Boalt Hall, Berkeley's law school, enrolled a single black student the year after the amendment passed. Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 544 (2002). And at the University of California-Los Angeles, the admission of minority students fell by 45%. Hadley, *supra*, at 128 n.176. By 2006, UCLA saw the lowest rate of enrollment of black students since 1973: 2% of its entering class. *See* Steve Padilla, *A Call To Increase Black Enrollment at UCLA*, L.A. Times, Oct. 30, 2006, at B4.

Washington State provides another illustration of the need for diversity programs in higher education. Washington's Ballot Initiative 200 statutorily bans the granting of "preferential treatment" based on "race, sex, color, ethnicity, or national origin." Wash. Rev. Code Ann. § 49.60.400 (West 2011). As in California, this prohibition specifically applied to higher education. *Id.* And as in California, it has had profound and lasting effect on the makeup of public universities' entering classes. Demonstratively, black enrollment in the University of Washington's graduate programs fell by 2.5% after Initiative 200 passed, and Hispanic enrollment fell by 40%. Justin P. Walsh, *Swept Under the Rug: Integrating Critical Race Theory into the Legal Debate on the Use of Race*, 6 Seattle J. for Soc. Just. 673, 682 n.87 (2008).

[5] Litigation over Proposition 209's constitutionality continues through 2012. *Coal. To Defend Affirmative Action v. Brown*, No. 11-15100, 2012 WL 1072235, at *5-6 (9th Cir. Apr. 2, 2012).

These examples make clear what the Court concluded based on expert evidence provided in *Grutter*: that the absence of diversity programs has serious, perhaps irredeemable, consequences for diversity in higher education. The effects are substantial and lasting, more than satisfying *Parents Involved*'s criterion that race-consciousness must be justified by a more than "minimal impact" on actual enrollment figures. 551 U.S. at 734. The national experience has not undermined *Grutter*'s factual assumptions. If anything, events have confirmed that this Court's holding was correct. Diversity programs are essential for institutions of higher education to satisfy their mission of "preparing students for work and citizenship." *Grutter*, 539 U.S. at 331.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APRIL 2012