No. 11-345

IN THE

Supreme Court of the United States

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 PETITIONER

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QUESTION PRESENTED

Whether the University of Texas at Austin's use of race in undergraduate admissions decisions is lawful under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Abigail Noel Fisher.

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.

Plaintiff-Appellant below Rachel Multer Michalewicz is no longer involved in this case.

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 631 F.3d 213 and is reproduced in the appendix to the Petition for Certiorari ("App.") at 1a. The order of the United States Court of Appeals denying rehearing en banc and the opinion dissenting from the denial of rehearing en banc are reported at 644 F.3d 301 and are reproduced at App. 172a. The opinion of the United States District Court for the Western District of Texas is reported at 645 F. Supp. 2d 587 and is reproduced at App. 115a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its decision on January 18, 2011. Joint Appendix ("JA") 10a. A timely petition for rehearing en banc was denied on June 17, 2011. JA 14a. This Court granted a timely petition for certiorari on February 21, 2012. JA 15a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend XIV, § 1.

STATEMENT

Petitioner Abigail Fisher, a White female, applied for undergraduate admission to the University of Texas at Austin ("UT") in 2008. Petitioner was not entitled to automatic admission under Texas's Top Ten Percent Law ("Top 10% Law"). She instead competed for admission against other non-Top 10% in-state applicants under a system in which UT expressly considered race in order to increase enrollment of Hispanic and African-American applicants. Although Petitioner's academic credentials exceeded those of many admitted minority candidates, UT denied her application. Having "suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection," *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (quotation omitted), Petitioner filed this lawsuit challenging the constitutionality of UT's use of race in undergraduate admissions decisions. Affirming the district court, the Fifth Circuit rejected that legal challenge and denied en banc review by a vote of 9-7. This Court granted certiorari on February 21, 2012.

A. History Of UT's Admissions Program

UT is a "highly selective university, receiving applications from approximately four times more students each year than it can enroll in its freshman class." App. 119a. Because admission to UT does not guarantee admission to an applicant's preferred program of study, applicants also must compete for admission to their preferred school or major. App. 130a; JA 164a. The role of an applicant's race in this process has changed several times during the past two decades in response to judicial and legislative decisions. App. 14a.

Until 1996, "race was considered directly and was often a controlling factor in admissions" to UT and its programs of study. App. 16a. Admission was based on an applicant's Academic Index ("AI"), which was calculated from high school class rank and standardized test scores, and was then adjusted to assist "underrepresented" minorities. App. 15a. In 1996, the last year that UT employed this system, the enrolled freshman class was 18.6% African-American and Hispanic. App. 122a.

After UT was prohibited from using race in admissions following *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), UT added a new metric—a Personal Achievement Index ("PAI")—to its admissions calculus. The PAI was designed, at least in part, to increase minority enrollment through race-neutral means. App. 17-18a.[1] The PAI is a composite of scores received on two written essays that an applicant must submit and the applicant's "personal achievement score." App. 27a. The "personal achievement score" takes into account several "special circumstances," some of which "disproportionately affect minority candidates," such as "the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household." App. 121a.

Once an applicant's AI and PAI scores are calculated, UT plots them on a grid (AI on the horizontal axis, PAI on the vertical), which it uses to make its admissions decisions. App. 135a. This system, first used for the 1997

1. UT also "instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment [and] expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state." App. 122a.

entering class, then resulted in an enrolled class that was 15.3% African-American and Hispanic. App. 121a-122a.

That same year, also in response to *Hopwood*, the Texas legislature enacted the Top 10% Law, requiring UT to admit all Texas high school seniors ranking in the top 10% of their classes. H.B. 588, Tex. Educ. Code § 51.803 (1997). Starting with the incoming class in 1998, UT began implementing the Top 10% Law in conjunction with its extant admissions system. App. 19a. Thus, for in-state applicants who were not in the top 10% of their high school class nothing changed: AI and PAI scores determined admission to UT and to particular programs of study. App. 129a. For other in-state applicants, the Top 10% Law guaranteed admission to UT, but AI and PAI scores still determined whether the applicant would be admitted to a particular program of study. *Id.*[2]

The Top 10% Law had an immediate and positive effect on minority enrollment. App. 19a. UT announced that its 1999 "enrollment levels for African American and Hispanic freshman … returned to those of 1996, the year before the *Hopwood* decision." JA 343a. On top of that, "minority students earned higher grade point averages [in 1999] than in 1996 and ha[d] higher retention rates." *Id.* Thus, UT announced that the Top 10% Law had "enabled [UT] to diversify enrollment … with talented students who succeed." *Id.* Indeed, "[a]n impressive 94.9

2. Because of special portfolio, audition, and other requirements, the Top 10% Law does not apply to the School of Architecture, School of Fine Arts, or honors programs. App. 30a. Other programs, such as the School of Business, School of Nursing, School of Engineering, and College of Communications, cap the number of students they admit under the Top 10% Law. App. 130a.

percent of 1998 African American freshmen returned to enroll for their sophomore year in 1999." *Id.* Consequently, UT credited the Top 10% Law for producing "a more representative student body and ... students who perform well academically." *Id.*

This upward trend in minority enrollment continued in the years that followed. In 2003, UT declared that it had "effectively compensated for the loss of affirmative action." JA 346a. That year, UT "brought a higher number of freshman minority students—African Americans, Hispanics and Asian Americans—to the campus than were enrolled in 1996." JA 348a. The percentages continued to increase the next year. In 2004, the freshman class was 21.4% African American and Hispanic, and 17.9% Asian American. App. 20a.

Despite the success of its race-neutral admissions system in increasing minority enrollment, UT promised to restore race as a factor in admissions decisions on the very day that this Court decided *Grutter*. Mere hours after this Court issued its decision, then-UT President Dr. Larry Faulkner announced that UT would "modify its admissions procedures to ... combine the benefits of the Top 10 Percent Law with affirmative action programs that can produce even greater diversity." JA 356a-357a.

B. UT's Proposal To Consider Race In Admissions

Having already announced it would restore race in its admissions system, UT accepted the invitation of its Board of Regents to inquire "whether to consider an applicant's race and ethnicity … in accordance with the standards enunciated in" *Grutter*. App. 21a. UT produced two studies

primarily focused on diversity at the classroom level. The first study "surveyed undergraduates on their impressions of diversity on campus and in the classroom." App. 22a. A majority responded that they "felt there was insufficient minority representation in classrooms for the full benefits of diversity to occur." *Id.* The second study "examined minority representation in undergraduate classes," App. 21a, to determine whether UT had sufficient classroom diversity, which it defined as more than one African-American student, more than one Hispanic student, and more than one Asian-American student, Supplemental Joint Appendix ("SJA") 25a-26a. This study focused on "classes of 'participatory size,' which [UT] defined as between 5 and 24 students," App. 21a, thus requiring, in many cases, a majority of minority students to meet UT's classroom diversity definition. Unsurprisingly, UT found that the majority of small classes did not have "sufficient diversity." SJA 25a.

UT acknowledged that its purported lack of classroom diversity resulted in part from an increase in the number of small classes offered. SJA 70a. UT explained that because, over time, it had added class sections "(from 4,742 in 1996 to 5,631 in 2002)," minority students were "'spread out' in more classes, leaving many sections with little or no representation." *Id.* Indeed, while UT's minority enrollment steadily increased, the number of classes it deemed to have "sufficient diversity" actually decreased. SJA 71a, 73a.

Invoking these studies and "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population," UT proposed to its Regents that race be restored as a factor

in undergraduate admissions. SJA 24a. UT asserted that the campus survey, classroom study, and demographic imbalance between its freshman class and the Texas population proved that it had not "achiev[ed] a critical mass of racial diversity." SJA 24a-25a. It further claimed that racial preferences in admissions were needed because its existing race-neutral policies, including the Top 10% Law, while "very useful in producing a student body of strong academic ability," SJA 39a, "failed to improve diversity within the classroom," SJA 25a.

UT's proposal, which the Board of Regents accepted, maintained the same basic admissions criteria, but added race to the list of "special circumstances" that make up an applicant's personal achievement score. JA 432a-433a; SJA 29a. UT claimed that its use of race would be part of an individualized and holistic approach to admissions, which it considered "[t]he major requirement of [*Grutter*]." SJA 15a. UT decided that it would use race to benefit African-American and Hispanic applicants, groups that it considers "underrepresented." SJA 25a. Though there are fewer Asian Americans than Hispanics at UT, UT deems Asian Americans "overrepresented" because UT uses state racial demographics as its baseline for determining which minority groups should benefit from its use of race. In other words, although UT includes Asian Americans as minorities in its diversity statistics, marketing materials, and classroom analysis, it employs race in admissions decisions to the detriment of Asian Americans, thus subjecting them to the same inequality as White applicants. JA 305a.

In restoring race to its admissions system, UT declined to establish a "specific goal ... in terms of the numbers

of [underrepresented minority] students" that it would seek to admit. SJA 29a. Nor did UT identify a projected date at which it would cease using race in admissions decisions. SJA 32a. Rather, it stated that it would review its admissions policy "every five years" beginning in Fall 2009 in order "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." *Id.*

C. UT's Current Admissions System

UT's current system, which uses race as a factor both for admission and placement, was first employed during the 2005 admissions cycle. While the bulk of UT's in-state admissions (approximately 70% to 80% during the relevant period) are pursuant to the race-neutral Top 10% Law, access to particular programs of study is still determined by AI and PAI scores—with race now part of the PAI scoring. App. 30a-31a. Non-Top 10% law applicants, like Petitioner, are both admitted to UT and to particular programs of study based on their AI and race-affected PAI scores. App. 31a. Hence, race is a factor in admission, placement, or both for every in-state undergraduate applicant. *Id.*[3]

3. During the pendency of this litigation, the Texas legislature amended the Top 10% Law to cap the number of mandatory admissions at 75% of UT's overall freshman class. Tex. Educ. Code § 51.803(a-1). However, were a court ruling to prohibit UT from considering race in admissions decisions, the 75% cap on the Top 10% Law would be lifted. *Id.* § 51.803(k)(1).

Each applicant's race appears on the front of the application file and "reviewers are aware of it throughout the evaluation." App. 134a. UT does not record how race affects a specific PAI score or admissions decision, nor can it track or measure the impact that using race has had on enrollment. App. 32a-33a. But UT officials have confirmed that race "can make a difference" in individual admissions decisions. App. 33a.

Notwithstanding UT's failure to measure the impact of using race on its enrollment numbers, App. 104a, it is clear that impact is negligible, SJA 157a. By design, race can be determinative only for in-state underrepresented minority students not admitted under the Top 10% Law, a segment of the class that is dwarfed by the Top 10% enrollees. For example, in 2008, when Petitioner applied, 6,322 in-state students enrolled: 5,114 under the Top 10% Law and 1,208 under the race-affected AI/PAI regime. *Id.* Of the non-Top 10% enrollees, 216 were African American or Hispanic, representing only 3.4% of the enrolled in-state freshman class. *Id.*

Moreover, it is undisputed that many of the 216 non-Top 10% minority enrollees would have been admitted without regard to their race. Some were admitted based solely on high AI scores. App. 103a; JA 410a. Many more would have been admitted under an AI-PAI system unaffected by race. App. 104a. To illustrate, when race was not a factor in the PAI calculus, 15.2% of the non-Top 10% Texas enrollees in 2004 were African American or Hispanic; in 2008, when race was considered, 17.9% were African American or Hispanic. SJA 157a. Thus, even if the entirety of the increase between 2004 and 2008 is attributed to race, it would have been decisive for only

2.7% of the 1,208 non-Top Ten enrollees in 2008—or 33 African-American and Hispanic students combined. *Id.* If so, race would have accounted for 0.5% of the 6,322 in-state freshman class in 2008. In other words, UT's "use of race has had an infinitesimal impact on critical mass in the student body as a whole." App. 107a (Garza, J.).

At the same time, the Top 10% Law has continued to increase minority enrollment at UT. App. 127a. During the ten years from 1998 to 2008, the percentage of African-American and Hispanic students who enrolled in the incoming freshman class at UT increased from 16.2% to 25.5%, with most of the increase attributable to the Top 10% Law. SJA 156a. Indeed, over the same ten-year period, the percentage of African-American and Hispanic students enrolling through the Top 10% Law increased from about 44% to almost 86%. SJA 156a-157a. The trend has continued. As recently as 2010, UT officials credited "changes in the demographics of Texas" for its success in enrolling a majority-minority freshman class.[4] And, UT's President recently announced that "[f]ifty-two percent of our [2010] freshmen are minority students, including 23 percent who are Hispanic, reflecting the changing demographics of the state." 2010-2011 Impact Report at 6.[5] Provost Steven Leslie also noted the success, applauding the fact that "[t]he university's student population is beginning to truly reflect the demographics of the state of Texas." *Id.* at 4.

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4. *Class of First-Time Freshmen Not a White Majority This Fall Semester at [UT]* (Sept. 14, 2010), *available at* www.utexas.edu/news/2010/09/14/student_enrollment2010/ (last visited May 21, 2012).

5. *Available at* www.utexas.edu/diversity/pdf/DDCE_ImpactReport.pdf (last visited May 21, 2012).

Nevertheless, UT's reliance on race in admissions shows no signs of stopping. In fact, UT promised that "[a]lthough the university enrolled the most ethnically diverse freshman class in its history during fall 2007 (19.7 percent Hispanic students, 19.7 percent Asian American students and 5.8 percent African-American students) it [would] striv[e] to continue building a diverse student body, faculty and staff that truly reflect Texas and the entire country." SJA 176a. Indeed, in lobbying the legislature to repeal or cap the Top 10% Law, UT argued that it would offset any associated loss in minority enrollment by giving even greater consideration to race in its admissions decisions. JA 359a-360a. And, despite becoming a majority-minority university in 2010, UT continues to use race in admissions decisions to this day.

D. Proceedings Below

1. When Petitioner was denied admission to the entering class of 2008, she filed this action in the United States District Court for the Western District of Texas, challenging UT's use of race in admissions under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964. App. 3a. UT defended its use of race in undergraduate admissions as a narrowly tailored means of pursuing greater diversity, which it deemed essential to its mission as Texas's flagship institute of higher education. App. 144a-147a.

UT argued it had not attained a "critical mass" of "underrepresented" minorities because its percentage of African-American and Hispanic freshmen was below the percentage of African-Americans and Hispanics in the Texas population and because a significant number of its

small classes did not have two or more African Americans, Hispanics, and Asian Americans. App. 155a-157a. UT further argued that its use of race was "narrowly tailored" because it had integrated racial classifications into an individualized, holistic admissions process and planned to reconsider its need for racial preferences every five years. App. 161a-167a.

On cross-motions for summary judgment on liability, filed after the case had been bifurcated into liability and remedy phases, JA 32a, the district court found that the admissions system conformed to *Grutter* and granted summary judgment to UT. The district court held that UT's pursuit of demographically proportional African-American and Hispanic enrollment rates was within *Grutter*'s concept of "critical mass" and endorsed UT's reliance on "classroom diversity" statistics. App. 155a-157a. The district court also found UT's admissions system narrowly tailored as properly holistic and subject to periodic review. App. 158a-159a, 167a. The district court concluded that Petitioner could not prevail "as long as *Grutter* remains good law." App. 169a.

2. The Fifth Circuit affirmed. In an opinion written by Judge Higginbotham, it acknowledged that UT's admissions system discriminates between applicants on the basis of race and thus should be subject to strict-scrutiny review. App. 35a. However, the court employed a novel, relaxed standard of judicial review because UT's "educational judgment in developing diversity policies is due deference":

> Rather than second-guess the merits of the University's decision, a task we are ill-equipped to perform, we instead scrutinize

> the University's decision-making process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the University acted in good faith, a presumption Appellants are free to rebut.

App. 35a-36a.

The Fifth Circuit held that its deferential "good faith" standard applied comprehensively, including to the questions of "whether the university has attained critical mass of a racial group" and "whether race-conscious efforts are necessary" to do so. App. 37a. It also concluded that "the narrow tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment." *Id.* Acknowledging that this Court's application of strict scrutiny has been "more restrictive" in cases involving racial preferences in state employment and contracting, the Fifth Circuit determined that such cases have "little purchase" in the context of university admissions decisions. App. 38a-40a.

Applying its deferential "good faith" standard, the Fifth Circuit found that "the efforts of [UT] have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion." App. 34a. It thus concluded that UT's decision to "reintroduce race as a factor in admissions was made in good faith." App. 47a. Consideration of state demographics to decide whether UT had reached "critical mass" was constitutional, the court reasoned, because "attention to the community it serves"—not just to the university experience—is "consonant with the educational goals outlined in *Grutter*."

App. 48a. In the court's view, "[a]lthough a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account." App. 51a. Thus, the court found it proper to measure critical mass by looking to the racial composition of "the surrounding community." App. 50a.

The Fifth Circuit further deferred to "UT's considered, good faith conclusion that the University still has not reached a critical mass." App. 66a. It rejected UT's argument that the state-mandated Top 10% Law is "entirely irrelevant" to the analysis of critical mass, finding that UT could not simply "ignore a part of the [admissions] program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texas freshman." App. 55a. Thus, the court focused on whether it was constitutional for UT to "overlay" its system of racial preferences on "the Top Ten Percent Law" given the law's "substantial effect on aggregate minority enrollment at the University." App. 62a.[6]

Conceding that "UT's claim that it has not yet achieved critical mass is less convincing when viewed against the backdrop of the Top Ten Percent Law," the Fifth Circuit nonetheless held that Petitioner had not rebutted UT's "good faith conclusion" that it lacked a critical mass of African-American and Hispanic students. App. 67a. The court pointed to Hispanic enrollment numbers, which it found "low … considering the vast increases in the Hispanic population of Texas," and the classroom diversity

6. Although Judge Higginbotham was critical of the Top 10% Law, neither Judge King nor Judge Garza joined that aspect of his opinon. Judge King explained that "[n]o party challenged ... the validity or the wisdom of the Top Ten Percent Law." App. 72a.

study, which showed that "minority students remain[ed] clustered in certain programs"—a problem that "will only continue if additional minority representation is not achieved, as the University plans to increase its number of course offerings in future years." App. 56a, 65a-66a. Thus, it held that UT "properly concluded that race-conscious admissions measures would help" it achieve its vision of "critical mass." App. 68a.

Finally, the Fifth Circuit rejected the argument that, under *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), UT's use of race was not justified because the existing race-neutral admissions system worked about as well in achieving student-body diversity as the post-*Grutter* race-based admissions program. App. 69a. The court found that "*Parents Involved* does not support the cost-benefit analysis that Appellants seek to invoke" because that decision turned on the "'extreme approach'" used by the school districts in that case. *Id.* (quoting *Parents Involved*, 551 U.S. at 735). The court further reasoned that *Parents Involved* "did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small." *Id.*

3. Judge Garza specially concurred, characterizing the panel's decision as "a faithful, if unfortunate, application of" *Grutter*'s erroneous "digression in the course of constitutional law." App. 72a. Judge Garza saw *Grutter* as "abandon[ing] [strict scrutiny] and substitut[ing] in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades." App. 109a. He warned that the court's "decision ratifies the University's

reliance on race at the departmental and classroom levels, and will, in practice, allow for race-based preferences in seeming perpetuity," awaiting a time that "educators can certif[y] that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom." App. 87a. Judge Garza could not "accept that the Fourteenth Amendment permits this level of granularity to justify dividing students along racial lines." *Id.*

Judge Garza was particularly troubled by the fact that UT's decision to classify every applicant by race "has had an infinitesimal impact on critical mass in the student body as a whole." App. 107a. From an applicant pool totaling 29,501 students in 2008, he estimated that the number of enrolled underrepresented minority students ultimately admitted because of race could amount to no more than 1% of the freshman class, or about 55 students. App. 101a, 105a. Judge Garza therefore concluded that UT's use of race has been "completely ineffectual in accomplishing its claimed compelling interest" in filling its classrooms with minority students. App. 106a. Judge Garza could not "find that [UT]'s use of race is narrowly tailored where the University's highly suspect use of race provides no discernible educational impact," but concluded that, post-*Grutter*, "narrow tailoring in the university admissions context is not about balancing constitutional costs and benefits any longer," but is solely about "good faith." App. 108a. He added that, "[l]ike the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles." App. 114a.

4. The Fifth Circuit, by a vote of 9 to 7, denied rehearing en banc. App. 173a. Writing for five of the dissenting judges, Chief Judge Jones lamented that the panel had "extend[ed] *Grutter* in three ways" and, in so doing, "abdicate[d] judicial review of a race-conscious admissions program for undergraduate [UT] students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." App. 174a. In her view, the decision "in effect gives a green light to all public higher institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires." App. 175a.

Chief Judge Jones criticized the panel for deferring to UT both on the necessity of using race as a factor in admissions and on whether UT's use of race was narrowly tailored. As she explained, "*Grutter* does not countenance 'deference' to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications." App. 178a. She found it objectionable that the "panel's 'serious, good-faith consideration' standard distorts narrow tailoring into a rote exercise in judicial deference" and that "*Grutter* nowhere countenances this radical dilution of the narrow tailoring standard." App. 180a.

Chief Judge Jones also found that only "wholesale deference" to UT could result in a conclusion that the admissions system is narrowly tailored as it led to the admission of "no more than a couple hundred out of more than six thousand new students." App. 180a-181a. "Contrary to the panel's exercise of deference, the

Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment." App. 182a (citing *Parents Involved*, 551 U.S. at 734-35). Here, the "additional diversity contribution of the University's race-conscious admissions program is tiny, and far from 'indispensible.'" *Id.* She thus disagreed with the panel's decision "to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." *Id.*

Last, Chief Judge Jones rejected classroom diversity as a constitutional justification for racial preferences. App. 182a-184a. "The panel opinion opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be 'underrepresented.' It offers no stopping point for racial preferences despite the logical absurdity of touting 'diversity' as relevant to every subject taught" at UT and it "offers no ground for serious judicial review of a terminus of the racial preference policy." App. 183a. She found that UT's classroom-diversity rationale is "without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs." App. 184a.

SUMMARY OF ARGUMENT

If any state action should respect racial equality, it is university admission. Selecting those who will benefit from the limited places available at universities has enormous consequences for the future of American students and the perceived fairness of government action. Strict scrutiny thus remains the rule, not the exception, when universities use race as a factor in admissions decisions. Strict scrutiny requires that UT demonstrate both that its

use of race in admissions decisions is "necessary to further a compelling government interest" and that "the means chosen to accomplish the government's asserted purpose" are "specifically and narrowly framed to accomplish that purpose." *Grutter*, 539 U.S. at 327, 333. Because UT cannot bear that heavy burden, its use of race in denying admission to Petitioner was unconstitutional.

Neither of UT's justifications for restoring race to its admissions system is a constitutionally compelling state interest. UT's acknowledged goal of using race in admissions to mirror the demographics of Texas is nothing more than "racial balancing, which is patently unconstitutional." *Id.* at 330. UT's goal is not racial diversity to enhance the educational dialogue and exchange of ideas by keeping minority students from feeling "isolated or like spokespersons for their race." *Id.* at 319. Instead, it is purely representational. It is only by using Texas's racial demographics as the benchmark for diversity that UT could consider Hispanics underrepresented and Asian Americans overrepresented when "the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT." App. 154a. UT simply is not pursuing the educationally-based diversity interest that *Grutter* deemed to be compelling.

UT's asserted interest in classroom diversity also is not a compelling interest. The proper base for measuring "critical mass" is the "student body," not the classroom. *Grutter*, 539 U.S. at 325. As noted above, the point of *Grutter* was to permit universities to create a "critical mass" of minority students on the campus to foster exchange of ideas and experiences. But *Grutter* nowhere suggests that every classroom must have a "critical mass" of minority students. Endorsing the classroom as the

new benchmark for critical mass would promote the use of race in perpetuity. The Court should not acknowledge an interest that would justify racial engineering at every stage of the university experience "until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom." App. 87a (Garza, J.).

Because UT is not using racial classifications to pursue a compelling state interest, that should be the end of the matter. In any event, UT has not provided a "strong basis in evidence," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 276, 277 (1986), that its use of race is "necessary" to enroll any "critical mass" of minority students, *Grutter*, 539 U.S. at 327. UT has not even attempted to articulate an educational concept of critical mass. Even if it had, UT could not have set forth a strong factual basis that the university was not already enrolling that critical mass of minority students. As UT's own public statements show, largely because of the Top 10% Law, UT was one of the most diverse public universities in the nation prior to its 2004 restoration of race into its admissions system. UT should not be permitted to employ "gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." App. 182a (Jones, C.J.).

But even assuming UT was pursuing a compelling interest and had produced strong evidence that it was necessary to use race in admissions to meet that interest, neither of which is the case, its system of racial preferences still is not narrowly tailored. Foremost, the "minimal effect" of UT's admission plan is antithetical to

narrow tailoring. *Parents Involved*, 551 U.S. at 733. UT "was able to obtain approximately 96% of the African-American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means." App. 107a (Garza, J.). The limited results of UT's racial preferences shows that race-neutral "means would be effective" and thus "casts doubt on the necessity of using racial classifications." *Parents Involved*, 551 U.S. at 733-34. UT has subjected tens of thousands of applicants to "disparate treatment based solely on the color of their skin," *id.* at 734, even though it "has had an infinitesimal impact on critical mass in the student body as a whole," App. 107a (Garza, J.), and even though existing race-neutral measures were working "about as well," *Wygant*, 476 U.S. at 280 n.6.

UT's use of race in admissions also lacks narrow tailoring in several other respects. Among them, UT's admissions system could never achieve "classroom diversity" through constitutional means. UT has set the bar for classroom diversity so high that it considers data showing that 63% of its classes with 10 to 24 students included 2 or more Hispanic students to be insufficient evidence of critical mass in the classroom. App. 22a. The only way UT could even approach the level of classroom diversity it desires would be to institute a fixed curriculum, make each student's race a dominant criterion in the selection of a major, or make race so dominant an admissions factor that there would be no way for every small classroom not to include several minority students. UT has shown no interest in the first option and the second two are plainly unconstitutional. App. 87a (Garza, J.); App. 183a (Jones, C.J.). Accordingly, no "means" available to UT could be narrowly tailored to the "end" of classroom

diversity. UT likewise could never pursue a demographic representational goal through constitutional means because such a goal would necessarily involve different targets for each minority group and thus degenerate into multiple minority-group quotas.

In addition, even assuming that UT were pursuing the type of educational interest endorsed in *Grutter*, UT's classification of Hispanics as an "underrepresented minority" shows that UT's use of race is more expansive than necessary to meet any legitimate "critical mass" goal. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989). Given the high rates of Hispanic enrollment at UT and its noted success in graduating Hispanic students, it cannot reasonably be concluded, and UT could not establish, that Hispanic students are isolated on its campus, unable to offer their perspectives, or mere "spokespersons for their race." *Grutter*, 539 U.S. at 319.

The Fifth Circuit avoided these massive constitutional problems by substituting a good-faith, process-oriented review standard for the strict scrutiny constitutionally required when racial preferences foist unequal treatment on non-preferred applicants. Whether or not UT acted in "good faith," it must bear the burden of demonstrating that its use of race is necessary to further a compelling interest and that its means of pursuing that interest were narrowly tailored. Neither *Grutter* nor any other decision condones unlimited deference to university administrators. *Grutter* affords universities a measure of deference in claiming an unsatisfied educational interest in student-body diversity. But *Grutter* explicitly excluded racial balancing from that interest and afforded no deference on whether racial preference is necessary to further a diversity goal or on

the means by which diversity is pursued. Under *Grutter*, UT may be entitled to deference on its "decision that it has a compelling interest in achieving racial and other student diversity. But that is about as far as deference should go." App. 178a (Jones, C.J.).

Indeed, even if UT were entitled to more deference than *Grutter* suggests, the Fifth Circuit erred by "distort[ing] narrow tailoring into a rote exercise in judicial deference." App. 180a (Jones, C.J.). If anything is clear, an individual suffering discrimination should not shoulder the heavy burden of proving that the government's use of race is *not* narrowly tailored. "[T]he government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests." *Johnson v. California*, 543 U.S. 499, 505 (2005). Once deference applies to narrow tailoring, strict scrutiny becomes "total deference to University administrators," App. 178a (Jones, C.J.), so long as they have articulated a rational basis for the use of race. There is no authority supporting deference to UT's subjective judgment that its use of race in admissions is narrowly tailored.

If the Fifth Circuit's reading of *Grutter* is permissible, however, that decision should be clarified or reconsidered to restore the integrity of the Fourteenth Amendment's guarantee of equal protection. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231-35 (1995). The strict scrutiny label is meaningless if its "review … is nothing short of perfunctory [and] accepts [a university's] assurances that its admissions process meets with constitutional requirements." *Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting). In fact, "[i]f strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the

Court lacks authority to approve the use of race even in [a] modest, limited way." *Id.* at 387 (Kennedy, J., dissenting). Accordingly, if the choice is between affirming the Fifth Circuit or correcting *Grutter* to the extent that decision effectively abandons strict scrutiny, the Constitution requires the latter.

ARGUMENT

I. UT's Use Of Race In Admissions Decisions Violates The Equal Protection Clause.

In applying for undergraduate admission to UT, Petitioner was handicapped by her race in derogation of the "central mandate" of equal protection: "racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Regardless of the race of those "burdened or benefited by a particular classification," any government classification based on race is subject to "the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224. To survive strict-scrutiny review, a racial classification must be "'necessary to further a compelling governmental interest'" and must be "narrowly tailored to that end." *Johnson*, 543 U.S. at 514 (quoting *Grutter*, 539 U.S. at 539). For the reasons set forth below, UT's use of race in admissions fails strict scrutiny.

A. UT's Use Of Race In Admissions Decisions Is Subject To Strict Scrutiny.

It is indisputable that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227; *Parents Involved*, 551

U.S. at 741; *Johnson*, 543 U.S. at 505; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Grutter*, 539 U.S. at 326. Strict scrutiny requires a "detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed," as race is "a group classification long recognized as in most circumstances irrelevant and therefore prohibited." *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in judgment) ("[A]ny racial preference must face the most rigorous scrutiny by the courts."). Strict scrutiny imposes a heavy burden on any government using the "highly suspect tool" of race, *Grutter*, 539 U.S. at 326, and judicial "scrutiny" of racial classifications is "no less strict" in the educational setting, *id.* at 328; *see also Parents Involved*, 551 U.S. at 741-42; *Gratz*, 539 U.S. at 270; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-91 (1978) (Powell, J.).

Strict scrutiny requires a "detailed examination, both as to ends and as to means." *Adarand*, 515 U.S. at 236. First, the end must be compelling—not merely legitimate or important—because racial classifications are "inherently suspect." *Bakke*, 438 U.S. at 291 (Powell, J.). Second, the state must have a "strong basis in evidence" that a racial classification is "necessary" to further the compelling end because "the mere recitation of a benign or legitimate purpose" is not "an automatic shield which protects against any inquiry" into the necessity of race-based action. *Croson*, 488 U.S. at 495, 500 (citations and quotations omitted). Last, "the means chosen" must "fit" the unmet compelling interest "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.* at 493 (citations and quotations omitted); *see also Grutter*, 539

U.S. at 342 ("[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."). Strict scrutiny "forbids the use even of narrowly drawn racial classifications except as a last resort." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment).

B. UT's Use Of Race In Admissions Decisions Fails Strict Scrutiny.

1. UT's asserted interest in using race in admissions decisions is not compelling.

Although "government may treat people differently because of their race only for the most compelling reasons," *Adarand*, 515 U.S. at 227, this Court has held that universities have "a compelling interest in obtaining the educational benefits that flow from a diverse student body," *Grutter*, 539 U.S. at 343. *Grutter* thus permits race to be used as a factor in admissions decisions to obtain a "critical mass" of otherwise underrepresented minority students for educational reasons. *Id* at 333. As the Court explained, "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id.* at 330. Accordingly, a university's "interest is not simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Id.* at 330. *Grutter* instead endorses an inward-facing concept of diversity focused on enhancing the university experience—not an outward-facing concept of diversity focused on achieving a level of minority enrollment that is in proportion to the general population.

Neither of UT's asserted interests falls within the educational interest in student-body diversity endorsed in *Grutter*. UT first asserts a need to use race in admissions to bring UT's student-body demographics in line with the racial demographics of the state. App. 47a-51a. In UT's view, "significant differences between the racial and ethnic makeup of [its] undergraduate population and the state's population prevent the University from fully achieving its mission." App. 23a. But UT has produced "no evidence that the level of racial diversity necessary to achieve the asserted educational benefits [of diversity] happens to coincide with the racial demographics" of Texas. *Parents Involved*, 551 U.S. at 727. "This 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." *Id.* at 729.

UT thus has not shown that it is seeking increased racial diversity in order to enhance the educational value of campus exchanges by keeping minority students from feeling "isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. Instead, UT's goal is "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Id.* at 329. That UT's targets are demographic rather than purely arbitrary does not save its decision to classify each applicant by race—it confirms the decision's unconstitutionality. UT's demographic proportionality objective is nothing more than "outright racial balancing," which this Court has held "patently unconstitutional." *Id.* at 330. "[P]roportional representation" can never be a constitutional "rationale for programs of preferential treatment." *Id.* at 343.

UT's differing treatment of Asian Americans and other minorities based on each group's proportion of Texas's population illustrates why demographic balancing is constitutionally illegitimate. *See Parents Involved*, 551 U.S. at 731 ("The validity of our concern that racial balancing has no logical stopping point is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics."). As noted above, UT gives no admissions preference to Asian Americans even though "the gross number of Hispanic students attending UT "exceeds the gross number of Asian-American students attending UT." App. 154a. This differing treatment of racial minorities based solely on demographics provides clear evidence that UT's conception of critical mass is not tethered to the "educational benefits of a diverse student body." *Grutter*, 539 U.S. at 333. UT has not (and indeed cannot) offer any coherent explanation for why fewer Asian Americans than Hispanics are needed to achieve the educational benefits of diversity.[7]

The Fifth Circuit attempted to salvage UT's reliance on demographics by suggesting that it merely represented "measured attention to the community [UT] serves" in order to "send[] a message" to that community "that people of all stripes can succeed at UT" and graduate as part of "an infrastructure of leaders in an increasingly

7. Recognizing representational diversity as a compelling state interest might allow universities in racially homogenous states to employ race to the detriment of qualified minority applicants in order to maintain a student body that mirrors the state population. Indeed, that is precisely the problem facing Asian-American students in Texas, as they are "over-represented" demographically but highly qualified academically.

pluralistic society." App. 48a, 50a, 51a. But this Court has always rejected the use of race to advance the general welfare of society. *Croson*, 488 U.S. at 499-50; *Wygant*, 476 U.S. at 276; *Bakke*, 438 U.S. at 288-89 (Powell, J.). A generalized societal interest has "no logical stopping point" and is far "too amorphous a basis for imposing a racially classified remedy." *Wygant*, 476 U.S. at 276; *see also Croson*, 488 U.S. at 499-50.

Aside from demographic proportionality, the only other interest UT asserts is the need for greater classroom diversity. App. 23a. "Although the aggregate number of underrepresented minorities may be large," UT argues that it must use race in admissions because its student-body diversity is not "translating into adequate diversity in the classroom." App. 68a. But ensuring diversity in every small classroom goes far beyond the interest endorsed as compelling in *Grutter*.

This Court could not have been clearer that critical mass should be measured against the enrolled "student body" and not the number of minority students in each individual class. The Court framed the "question" in *Grutter* as whether it should "recognize, in the context of higher education, a compelling state interest in student body diversity." *Grutter*, 539 U.S. at 328; *see also id.* at 380 (Rehnquist, C.J., dissenting) (explaining that "'critical mass' relates to the size of the student body"). Indeed, the majority repeatedly referenced "student body" diversity as the relevant interest throughout its opinion. *See id.* at 318, 325, 328, 329, 343.

Under *Grutter*, one educational benefit possibly attributable to student-body diversity may be additional

participation of underrepresented minority students "in the classroom." *Id.* at 318. But each asserted consequence of overall student-body diversity is not itself a compelling interest or a legal benchmark for critical mass. *Grutter* instead recognized that the overall comfort of a racially diverse campus should encourage increased minority participation in all educational settings—whether large or small, curricular or extra-curricular—because minority students will "not feel isolated" on campus or like "spokespersons for their race." *Id.* at 318-19. *Grutter* did not even suggest—let alone hold—that a university has a compelling interest in using race in admissions until every small class has some minimum number of minority students.

Indeed, the *Grutter* Court hesitated before even recognizing student-body diversity as a compelling government interest because of the "serious problems of justice connected with the idea of preference itself." *Id.* at 341 (citation and quotations omitted); *see also id.* at 388 (Kennedy, J., dissenting) ("Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."). Given these concerns, it is untenable to read the decision to allow UT administrators to go several steps further and employ racial classifications not only at the admissions stage but also in major and course selection. The Court should resist UT's effort to break constitutional ground and create an unprecedented classroom-diversity interest. Classroom diversity has no foundation in this Court's decisions and could never be implemented in a narrowly tailored way. *See infra* at 43-44.

2. UT cannot establish a strong basis in evidence that its use of race is necessary to further a compelling interest in student-body diversity.

a. Requiring UT to establish a strong basis in evidence is essential to strict-scrutiny review in the educational setting.

UT also must demonstrate that its use of race in admissions is "necessary to further" an unmet compelling government interest. *Adarand*, 515 U.S. at 237. This demonstration of necessity requires a "strong basis in evidence." *Wygant*, 476 U.S. at 277; *Croson*, 488 U.S. at 500; *Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting) ("Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, *when supported by empirical evidence*.") (emphasis added).[8] UT thus needed a strong factual basis that the student body did not already include the "meaningful number" of minority students needed to meet an educational goal in student-body diversity before restoring race into its admissions system. *Grutter*, 539 U.S. at 318.

The Fifth Circuit refused to hold UT to a strong-basis-in-evidence obligation. App. 38a-42a. In the court's

8. The Court also has applied the strong-basis-in-evidence standard to resolve equal-protection challenges to aspects of Title VII, *see Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 2675-81 (2009), and the Voting Rights Act, *see, e.g.*, *Bush v. Vera*, 517 U.S. 952, 977-82 (1996); *Shaw v. Hunt*, 517 U.S. 899, 908-15 (1996); *Shaw v. Reno*, 509 U.S. 630, 656-58 (1993).

view, "[t]he high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration." App. 40a. The court added that "*Wygant* and *Croson* both involved explicit quotas; in *Ricci*, the Court was concerned that the city's use of race threatened to devolve into a *de facto* quota." *Id.*

The Fifth Circuit's cursory attempt to distinguish this Court's precedent is fatally flawed. In the educational setting, the Court has expressly relied on decisions such as *Wygant*, *Croson*, and *Adarand* for its analytical framework. *See, e.g.*, *Grutter*, 539 U.S. at 326-34; *Parents Involved,* 551 U.S. at 729-32; *Gratz*, 539 U.S. at 270. Although the particular attributes of any race-based program may bear on whether it is narrowly tailored, *compare Grutter*, 539 U.S. at 334-43, *with Gratz*, 539 U.S. at 270-75, they do not bear on the question whether it is "necessary" to invoke racial preferences in the first place. Ignoring these bedrock equal-protection decisions "fails to apply the avowed continuity in the principle of the Court's decisions." App. 180a (Jones, C.J.). In the context of university admissions, as in other settings, the government must prove that race-based measures are necessary before they can be used.

This case illustrates why the "strong basis in evidence" standard is essential to strict-scrutiny review. The Fifth Circuit accepted on faith UT's assertion that pervasive racial admissions preferences were needed on a campus that has already reached award-winning levels of diversity. Yet to meet strict scrutiny, a university must

"define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510. Without precision in identifying the critical problem that the race-based measure will address, there will be "no logical stopping point" for the disfavored use of race. *Id.* at 498 (quoting *Wygant*, 476 U.S. at 275). In other words, if UT may sustain a race-based preference through its own opinion of necessity, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Id.* at 504. "[C]lassifications based on race are potentially so harmful to the entire body politic" that "the reasons for any such classification [must] be clearly identified and unquestionably legitimate." *Id.* at 505 (citations and quotations omitted). Subjective assessments of need, like those advanced by UT and accepted by the Fifth Circuit, are not enough.

Finally, the strong basis in evidence standard "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.* at 510. If government cannot marshal a strong evidentiary basis for disparate treatment of its citizens because of their race, there is a very real "danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics." *Id.* Strict scrutiny "smoke[s] out" just such "illegitimate uses of race." *Id.* at 493. In other words, demanding a strong factual basis before allowing race-based governmental action ensures that "[s]trict scrutiny remains … strict." *Bush v. Vera*, 517 U.S. 952, 978 (1996).

b. UT cannot meet the strong basis in evidence standard.

For several reasons, UT cannot come close to meeting its evidentiary burden of proving that racial classifications were needed to meet an educational interest in student body diversity. Foremost, UT announced its intention to reintroduce race into admissions before it gathered any factual evidence. In fact, UT announced its decision on the very same day that this Court issued *Grutter*. *See supra* at 5. For this reason alone, UT has failed to provide a strong evidentiary foundation for its conclusion that minority enrollment fell short of "critical mass."

Even if the Court were to allow UT to rely on its later-conducted study, however, the university still "has made no effort to define a percentage of its student body that must be filled by underrepresented minorities in order to achieve critical mass." App. 148a; JA 265a. UT never even purported to study the level of minority enrollment needed to enhance campus dialogue, interracial understanding, graduation rate, or any other educational benchmark for critical mass. And, although it promised periodic review, any such review could only measure minority admission levels against demographics and classroom diversity levels. Without an educationally based target for "critical mass," UT has left its use of race unbounded—it can neither tailor its means to fit a compelling end, nor accumulate evidence to support the necessity of using race in admission decisions to reach that end, nor meaningfully measure its progress in any periodic review it might conduct.

Moreover, even if UT had shown an interest in pursuing educationally-based "critical mass," it still lacked a strong basis in evidence that using race in admissions

was necessary to meet that goal. In *Grutter*, the Court found that it was necessary for the University of Michigan Law School ("UMLS") to use race in admissions to boost minority enrollment from 4% to 14%. 539 U.S. at 320. By contrast, the record here establishes that UT's pre-*Grutter* admissions system was generating substantial and growing levels of Hispanic and African-American enrollment. In 2004, the last year in which UT used that system, African-American (4.5%) and Hispanic (16.9%) students were 21.4% of the incoming freshman class. App. 20a. By the time Petitioner applied, their enrollment levels were even higher, thus eliminating any possible need to continue using race during her admissions cycle. The year prior, the combined percentage of Hispanic and African-American enrollees had risen to 25.5%, with racial preferences having only a negligible effect on this figure. *See infra* at 38-42. Including Asian-American minority students, UT's minority enrollment was well over 40% before Petitioner applied to UT. *See supra* at 11.

With the Top 10% Law in operation then, UT was one of the most diverse public universities in the nation both when it restored race to its admissions system in 2004 and later used race to deny Petitioner admission in 2008. Neither *Grutter* nor any of this Court's other decisions authorizes "gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." App. 182a (Jones, C.J.).[9]

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9. Importantly, unlike in *Grutter*, Petitioners are not attempting to force a percentage plan upon Respondents. *See* 539 U.S. at 340. Here, the Texas legislature had already made the policy choice to adopt the Top 10% Law. Thus, "[i]n evaluating the constitutionality of an admissions program, [a court] cannot ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texas freshman." App. 55a.

UT's own public statements suggest that UT knew that it had already achieved educational critical mass as early as 2000 and certainly no later than 2003. In 2000, while proclaiming the success of the Top 10% Law, UT reported that its race-neutral program had restored minority enrollment levels "to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies." JA 343a. UT also announced that its program was enrolling minority students that performed better than ever before, and applauded the Top 10% Law for "helping to create a more representative student body and enroll students who perform well academically." *Id.* In 2003, UT proudly announced that it had "effectively compensated for the loss of affirmative action." JA 346a. UT thus had every reason to avoid identifying, or attempting to support with evidence, some educationally related point or even a general range within which it would conclude that it had enrolled a "critical mass" of minority students.

At bottom, UT's use of race in admissions is flawed in all the ways that the strong–basis–in–evidence standard is designed to root out as hallmarks of an unconstitutional program. UT asks this Court to take it at its word that it will cease using race in admissions at some unspecified time in the future when it achieves some unspecified critical mass. JA 265a. That explanation falls far short of the precision needed to assure that the use of race has a logical stopping point. Accepting these assurances in the absence of an evidentiary foundation is all the more problematic given, as UT publicly acknowledged, that its preexisting race-neutral system was enrolling a large group of minority students. In the absence of any evidentiary basis for UT's decision to restore race to its admissions system, let alone a strong one, there is no

way for the Court to dispel the concern that the decision to racially classify every applicant for admission is "the product of unthinking stereotypes or a form of racial politics." *Croson*, 488 U.S. at 510.

3. UT's use of race in admissions decisions is not narrowly tailored.

To survive strict scrutiny, UT's use of race in admissions also must be narrowly tailored. *See Grutter*, 539 U.S. at 333 ("Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still constrained in how it may pursue that end.") (citation and quotations omitted). Strict scrutiny requires that "the means chosen to accomplish the [government's] asserted purpose … be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal quotation marks and citation omitted).

UT attempts to short-circuit the narrow tailoring requirement by arguing that race is only a "factor of a factor of a factor of a factor" in admissions decisions for a limited group of non-10 Top 10% Law in-state applicants. App. 159a-160a. In UT's view, so long as consideration of an applicant's race is a small part of a larger so-called holistic review process, its use of race in admissions is narrowly tailored. *See id.* As noted above, UT's narrow tailoring justification is fatally flawed *ab initio* as it is not "tailored" to meet any legitimate compelling educational interest. *See supra* at 26-30.

As explained below, even leaving aside the absence of any constitutionally valid interest to which UT's use of race could be tailored, it is not narrowly tailored

for additional reasons. Given the success of UT's prior race-neutral admissions system in increasing minority enrollment, primarily through the Top 10% Law, and the minimal contribution racial preferences make to student body diversity, there can be no question that "a nonracial approach ... could promote the substantial interest about as well and at tolerable administrative expense." *Wygant*, 476 U.S. at 280 n.6. Additionally, even if increased classroom diversity or demographic representation were a sufficient basis for using race, neither could possibly be implemented in a narrowly tailored way. Finally, UT's treatment of Hispanics as "underrepresented" renders its use of race overinclusive because the high level of Hispanic enrollment at UT demonstrate that Hispanic students are not underrepresented on campus in any educational sense.

a. That UT's use of race is generating only minimal additional minority enrollment demonstrates that race-neutral means would have worked about as well.

Among other things, narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. And where racial classifications have only a "minimal impact" in pursuing a compelling interest, it "casts doubt on the necessity of using racial classifications" in the first instance and demonstrates that race-neutral alternatives would have worked about as well. *Parents Involved*, 551 U.S. at 734; *see also id.* at 790 (Kennedy, J., concurring).

That is precisely the case here. UT is unable to identify any students who were "ultimately offered admission due

to their race who would not have otherwise been offered admission." App. 33a. Its admissions statistics confirm that its decision to classify each of the tens of thousands of applicants by race has "had an infinitesimal impact on critical mass in the student body as a whole." App. 107a (Garza, J.). This "infinitesimal impact" demonstrates that the continued use of UT's pre-2005 race-neutral admissions system would have worked "about as well." *Wygant*, 476 U.S. at 280 n.6.

In 2008, for example, after classifying 29,501 applicants by race, UT enrolled 216 African-American and Hispanic students through use of the race-affected AI/PAI analysis. App. 101a-103a. Even assuming that race was a decisive factor for each student admitted outside the operation of the Top 10% Law, UT's use of race still could only have added, at most, 58 African-American and 158 Hispanic students to an in-state class of 6,322. On a campus as large as UT's, with significant student-body diversity already in place, it strains credulity to conclude that the addition of students representing "0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman class" made a constitutionally meaningful impact on student body diversity. App. 104a (Garza, J.).

However, the applicant's race was not decisive for many of the 216 "underrepresented" minority students. Some of the students were admitted based solely on their high AI scores, and others would have been admitted irrespective of race. App. 103a-104a. As a comparison, in 2004, when race was not a factor in admissions, 15.2% of non-Top 10% Texas enrollees were African American or Hispanic; in 2008, 17.9% of all enrollees were African American or Hispanic. SJA 157a. It stands to reason

that at least the same percentage of "underrepresented" minority students would have been admitted in 2008 as were admitted in 2004 on a race-neutral basis. If so, race could only have determined the admission of the 2.7% difference between the two years—or 33 additional students. Classifying every applicant by race in order to add only 33 students, representing 0.5% of an enrolled in-state class of 6,322, where the class already has a nearly 40% minority enrollment rate, is the type of gratuitous racial preference that narrow tailoring forbids.

"[T]he necessity of using racial classifications" is doubtful when racial classifications have a "minimal impact … on school enrollment." *Parents Involved*, 551 U.S. at 734. Small gains suggest that UT "could have achieved [its] stated ends through [nonracial] means." *Id.* at 790 (Kennedy, J., concurring). That is not speculation in this instance. As explained above, UT's prior race-neutral plan, including the reliably high level of minority enrollment produced by the Top 10% Law, already has, in fact, resulted in an "ever-increasing number of minorities gaining admission" to UT. App. 2a (Jones, C.J.).

Narrow tailoring clearly prevents UT from using the "extreme measure" of racial classifications to obtain trivial gains in minority enrollment, especially in light of the meaningful impact of existing race-neutral measures on UT's student-body diversity. *Parents Involved*, 551 U.S. at 728. Of course, it is not that "greater use of race would be preferable." *Id.* at 734. Rather, narrow tailoring recognizes that racial preferences, which "are by their very nature odious to a free people," *id.* at 746 (quoting *Adarand*, 505 U.S. at 214), cannot be deployed unless their benefits far outweigh their heavy cost, *id.* at 735. In

Parents Involved, therefore, the Court squarely rejected the use of race where, as here, it operated in "subtle and indirect ways" and benefited only a "small number" of students. *Id.* at 733-34. Racial preferences at UMLS, in contrast, were "indispensable in more than tripling minority representation at the law school—from 4 to 14.5 percent." *Id.* at 734-35 (citing *Grutter*, 539 U.S. at 320).

Thus, contrary to the Fifth Circuit's conclusion, the constitutionally significant difference between the use of race in *Grutter* and *Parents Involved* was not the ages of students affected or the types of "racial categories" employed. App. 69a-70a. The critical difference was the necessity and effectiveness of the program. Unlike in *Grutter*, where the Court concluded that the benefits of achieving "critical mass" warranted the heavy cost of using racial classifications, the Court concluded in *Parents Involved* that a minimal increase in diversity simply could not "justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis." 551 U.S. at 745.

Thus, contrary to the Fifth Circuit's assertion, App. 69a-70a, a reviewing court cannot myopically credit "small gains" in minority enrollment without comparing those alleged benefits to the "undeniable" costs that the use of race imposes at all levels of education. *Parents Involved*, 551 U.S. at 745. As this Court has repeatedly recognized, "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Id.* at 746 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). Racial classifications "carry a danger of stigmatic harm" and may "promote notions

of racial inferiority." *Croson*, 488 U.S. at 493. Because a racial preference "inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race," they can inflict the most harm on their "supposed beneficiaries." *Adarand*, 515 U.S. at 229 (citations omitted).

Here, UT's use of race in admissions "exacts a cost disproportionate to its benefit." App. 105a (Garza, J.). UT has not attempted to quantify any tangible benefit from its pervasive racial classifications and, even if it had, it would be minimal at best. UT thus has failed to establish any benefit from its use of racial classifications that could justify reliance on this "highly suspect tool." *Grutter*, 539 U.S. at 326. In order to enroll a few additional "underrepresented" minority students each year, UT makes the educational future of all its students depend, in part, on "irrelevant factors [such] as a human being's race," *Croson*, 488 U.S. at 495, and places an unwarranted badge of inferiority on the thousands of Hispanic and African-American applicants who are admitted to UT each year based on merit and achievement. In sum, UT cannot satisfy its "burden of proving [its] marginal changes … outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin." *Parents Involved*, 551 U.S. at 734.[10]

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10. Even were UT able to demonstrate a compelling educational interest in increasing the number of African-American and Hispanic enrollments by a few dozen students in 2008, UT failed to consider readily available alternatives to reach that goal. *See Grutter*, 539 U.S. at 339. First, of the 2,800 African-American and Hispanic students admitted under the Top 10% Law, 1,331 of them chose not to enroll at UT. By intensifying its

b. UT's claimed interest in classroom diversity could never be implemented in a narrowly tailored way.

Even if UT has a compelling interest in classroom diversity, which it does not, *see supra* at 29-30, UT has no plan to achieve it within the constraints imposed by the narrow tailoring requirement. UT's definition of classroom diversity—a classroom with at least two African-American, two Hispanic and two Asian American students—is virtually guaranteed never to be satisfied. Attainment is literally impossible in classes of five and UT disclaims satisfaction in the 63% of classes with two or more Hispanic students. *See* App. 22a. Moreover, the results of UT's study indicate that "classroom diversity" is more lacking for Asian Americans than for Hispanics. *Id.* But UT's use of race in admissions discriminates against Asian Americans and, if anything, exacerbates the classroom diversity problem. *See supra* at 28. Such a system is not narrowly tailored to resolve any alleged classroom diversity deficiency. Realistically, UT has created a classroom diversity metric that will function as an endless justification for using racial preference in admissions.

For the same reason, UT's pursuit of classroom diversity lacks a meaningful termination point. "[R]eliance on race at the departmental and classroom levels … will,

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outreach to this already-admitted group, UT would have easily matched the effect of its use of race even if it increased its yield rate among this group by only 1 or 2%. Moreover, allowing the Top 10% Law to achieve its full potential, *see supra* at 8 n.3, would increase minority enrollment as much or more than the use of racial classifications in admissions decisions.

in practice, allow for race-based preferences in seeming perpetuity." App. 87a (Garza, J.). As Chief Judge Jones queried, "Will the University accept this 'goal' as carte blanche to add minorities until a 'critical mass' chooses nuclear physics as a major?" App. 183a. "If this is so, a university's asserted interest in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom." App. 87a. (Garza, J.). Given these concerns, the Court should not break new ground and recognize a compelling government interest in classroom diversity. *See supra* at 29-30. Nor should it find that classroom diversity levels are an appropriate measuring stick for a university's attainment of "critical mass."

As UT's experience demonstrates, a university can have a sizable minority enrollment but, due to factors outside the control of the admissions office, still have many individual classes with fewer minority students than it desires. But if UT seriously attempted to produce classroom diversity, it would need to either (1) institute a fixed curriculum to ensure that each classroom mirrored the racial makeup of the overall class, (2) require some students to enroll (or prevent others from enrolling) in specific schools or majors, or (3) make race so dominant in admissions decisions that it floods the system with enough minority students to solve the problem. UT has not expressed any interest in the first option and the other two are patently unconstitutional. Accordingly, there are no "means" available to UT that can be narrowly tailored to the "end" of classroom diversity.

c. UT's claimed interest in demographic representation could never be implemented in a narrowly tailored way.

Even if UT has a compelling interest in proportional a representation based on Texas demographics, which it does not, *see supra* at 27-29, such a goal could not possibly be implemented in a narrowly tailored way. Pursuing a representational interest would necessarily involve setting different enrollment targets for each minority group (presumably commensurate with their respective pro rata shares of the state population) and thus inevitably lead to discrimination between and among the various minority groups, including those minority groups already receiving an admissions preference. Indeed, even the process of creating each minority "group" category and then determining which one a particular applicant belongs to for purposes of granting an admission preference to some minorities but not others is itself problematic. App. 175a (Jones, C.J.) ("Texas today is increasingly diverse in ways that transcend the crude White/Black/Hispanic calculus that is the measure of the University's race conscious admissions program.").

In any event, among the problems with pitting one minority group against another is that "preferring black to Hispanic applicants, for instance, does nothing to further the interest" in student-body diversity. *Grutter*, 539 U.S. at 375 (Thomas, J., concurring in part and dissenting in part). By focusing on "underrepresented minority students" as a group, 539 U.S. at 316, 318, 319, 320, 335, 336, 338, 341, and defining critical mass in terms of "underrepresented minorities," *id.* at 333,

the Court was ensuring that a university would not be allowed to discriminate in admissions between "similarly situated" ethnic or racial groups, *id.* at 374-75 (Thomas, J., concurring in part and dissenting in part). ("[T]he Law School maintains that it does not ... discriminat[e] among the groups the Law School prefers.")

This is precisely the situation that exists here. There are slightly more Hispanic students than Asian-American students enrolled at UT, SJA 156a, yet UT discriminates between the two by using race in admissions decisions to benefit the former but not the latter, App. 154a. Because this discrimination between minority groups is the necessary result of pursuing a representational goal, such a goal never could be implemented in a narrowly tailored manner.

d. UT's use of race is not narrowly tailored because it is overinclusive.

Even assuming that UT is pursuing the type of interest endorsed in *Grutter*, UT's classification of Hispanics as an "underrepresented minority" and thus an intended beneficiary of racial preference renders its admissions system overinclusive. *See, e.g., Croson*, 488 U.S. at 506 (citing *Wygant*, 476 U.S. at 284 n.13). It thus runs afoul of the narrow-tailoring requirement, the very purpose of which "is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter*, 539 U.S. at 333.

It is quite a stretch to argue that Hispanic students at UT are underrepresented or feel "isolated or like spokespersons for their race," *id.* at 319, when UT has been recognized as one of the nation's "top producers of undergraduates for Hispanics" by *Diverse Issues in Higher Education* magazine, JA 320a, and one of the nation's "Best Schools for Hispanics" by *Hispanic Business Magazine*, JA 325a. Given the educational success of its Hispanic students, UT's use of race clearly is purely representational and thus over-inclusive.

II. The Fifth Circuit's Comprehensive Deference To UT Under A Novel "Good Faith" Standard Cannot Be Sustained.

Because searching judicial review of UT's racial preferences under traditional strict scrutiny would have doomed them, the Fifth Circuit was only able to uphold UT's admissions system by replacing such review with a novel good faith, process-oriented review standard, which it termed "*Grutter*'s 'serious, good faith consideration' standard." App. 41a. This effective abandonment of strict scrutiny should be rejected. Once it is, every one of the reasons that the Fifth Circuit gave for sustaining UT's admissions program dissipates.

Grutter reiterated—no fewer than eleven times—that strict scrutiny remains the governing standard in higher education. *See* 539 U.S. at 326-28, 334. The Court's subsequent decisions likewise confirm that strict scrutiny remains the rule "in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies." *Johnson*, 543 U.S. at 505 (citing *Grutter*, 539 U.S. at 326). In *Parents Involved*, this

Court found it "well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." 551 U.S. at 720. No decision of this Court before or since suggests that any more deferential standard applies here.

To reach a contrary conclusion, the Fifth Circuit ripped the phrase "serious, good faith consideration" out of its *Grutter* context. Strict scrutiny includes an inquiry into UT's "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 735 (quoting *Grutter*, 539 U.S. at 339). But it does so only in the context of the narrow-tailoring prong of the strict scrutiny analysis; that is, UT cannot establish that its use of race in admissions decisions is narrowly tailored simply by engaging in "a rote exercise in dismissing race-neutral alternatives." App. 180a (Jones, C.J.). For all other aspects of the strict scrutiny test, UT's "good faith" is plainly insufficient. "More than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification system." *Adarand*, 515 U.S. at 226. Were it otherwise, "[t]he mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially … insulate any racial classification from judicial scrutiny." *Croson*, 488 U.S. at 490; *see, e.g.*, *Parents Involved*, 551 U.S. at 743.

The Fifth Circuit's application of its newly minted deferential standard shows how far it departed from strict scrutiny. First, the court characterized its role as one of merely "scrutiniz[ing] the University's decisionmaking process." App. 36a. Simple process-oriented review is entirely incompatible with *Grutter*'s reaffirmation of

strict scrutiny and its reliance on *Croson* to emphasize the importance of a "'searching judicial inquiry into the justification for such race-based measures.'" 539 U.S. at 326 (quoting *Croson*, 488 U.S. at 493). *Croson* makes clear that the entire point of strict scrutiny is to "'smoke out' illegitimate uses of race by assuring that the [governmental] body is pursuing a goal important enough to warrant use of a highly suspect tool." 488 U.S. at 493. The only way to accomplish this task is through "an examination of the factual basis for [the racial classification at issue] and the nexus between its scope and that factual basis." *Id.* at 494-95. Endorsing the Fifth Circuit's process-oriented review would thus defeat the fundamental purpose of strict scrutiny and allow evidence of good intentions and rote recitals of diversity goals to trump the close scrutiny "as to ends and as to means" that the Constitution requires. *See Adarand*, 515 U.S. at 236.

Second, the court deferred to UT administrators at every step of its "strict scrutiny" analysis. It found that "due deference" validated UT's conclusions that racial diversity is "'essential to its educational mission,'" App. 34a-35a (quoting *Grutter*, 539 U.S. at 328), that the levels of minority enrollment arising from UT's pre-existing race-neutral admission program were insufficient to meet its legitimate diversity goals, App. 66a, and that UT's use of racial preferences was narrowly-tailored to pursue that interest, App. 71a. But neither *Grutter* nor any other decision condones such unlimited deference.

In *Grutter*, this Court deferred to the "academic decision[]" that student body diversity "is essential to [a university's] educational mission." 539 U.S. at 328. It did not suggest—let alone endorse—that courts should also

defer to a university's assertions that racial classifications are necessary to further that compelling government interest and narrowly tailored to that end. Instead, "scrutiny of the interest asserted by [UMLS] [was] no less strict for taking into account complex education judgments in an area that lies primarily within the expertise of the university." *Id.* Additionally, the Court scrutinized "the means chosen to accomplish the [government's] asserted purpose" to ascertain whether they were "specifically and narrowly framed to accomplish that purpose." *Id.* at 333. Under *Grutter*, UT is entitled to deference on an educational "decision that it has a compelling interest in achieving racial and other student diversity. But that is about as far as deference should go." App. 178a.

Third, the Fifth Circuit's deference to UT was so sweeping that it entirely inverted the strict scrutiny standard and placed the burden on Petitioner to prove that that UT's actions were *not* taken in good faith. App. 36a ("We presume the University acted in good faith, a presumption Appellants are free to rebut."). This is the antithesis of strict scrutiny. It is "the government"—not Ms. Fisher—that "has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests." *Johnson*, 543 U.S. at 505 (quotation omitted).

Fourth, the Fifth Circuit refused to take "'relevant [factual] differences' into account." *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 228). Instead, the court concluded that because "[t]he admissions procedures that UT adopted [were] modeled after the plan approved by the Supreme Court in *Grutter*, [they] are narrowly tailored[.]" App. 71a. It thereby ignored the "important

factual distinction[s] between this case and *Grutter*," App. 180a-181a, contrary to the instruction of *Grutter* itself. The "fundamental purpose" of strict scrutiny is "to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race *in that particular context*." *Grutter*, 539 U.S. at 328 (emphasis added).

Fifth, and perhaps most troubling, the Fifth Circuit deferred to UT's subjective assertion that its use of race was narrowly tailored. The court refused to "second-guess the merits of the University's decision" that race-neutral measures were an insufficient alternative to its restoration of racial classifications in admissions decisions. App. 36a. Rather than restrict UT's ability to broadly use race as an admissions factor, the court conducted the "narrow-tailoring inquiry … with a degree of deference to the University's constitutionally protected, presumably expert academic judgment." App. 37a. Under the court's standard, provided a "university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system," its system will always be narrowly tailored. App. 41a.

Even if UT were entitled to greater deference on the compelling government interest side of the strict-scrutiny analysis than any of this Court's decisions have suggested, it certainly is not entitled to deference as to whether its pursuit is narrowly tailored. Narrow tailoring reviewed through a deferential lens is effectively meaningless. The entire point of narrow tailoring is to ensure that benign motives do not replace absolute necessity as the touchstone for the permissible use of race. Narrow tailoring ensures

that racial classifications are used only as "a last resort to achieve a compelling interest," *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring); *see also Croson*, 488 U.S. at 519 (Kennedy, J., concurring). Thus, "[f]ar from diluting narrow tailoring in order to defer to university administrators," *Grutter*'s discussion of narrow tailoring "was meant to challenge the university." App. 177a (Jones, C.J.).

The Fifth Circuit's deferential review effectively transformed strict scrutiny into rational basis review—"the lowest level of permissible equal protection scrutiny." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982); *see Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (holding that rational basis review "is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."). Indeed, rational basis review "is not a difficult standard for a State to meet when it is attempting to act sensibly and in good faith." *Logan*, 455 U.S. at 439.

This Court has rejected deferential rational-basis review when it comes to racial classifications. *Adarand*, 515 U.S. at 227. It should not change course now. *Croson*, 488 U.S. at 519 (Kennedy, J., concurring); *Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring). Judging "the ultimate validity of any particular [racial classification] … is the job of the court applying strict scrutiny." *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 230). Thus, UT's use of race in admission decisions cannot be sustained by deference or presumed good faith.

III. *Grutter* Should Be Clarified Or Overruled To The Extent It Can Be Read To Permit The Fifth Circuit's Effective Abandonment Of Strict Scrutiny.

The history of this case illustrates the difficulty inherent in *Grutter*. The District Court interpreted *Grutter* as a mechanistic formula for racial preference—a claimed "holistic" review coupled with avoidance of express quota or point systems suffices to satisfy strict scrutiny. App. 158a-162a. The Fifth Circuit thought *Grutter* preserved the form of strict scrutiny but replaced its substance with deference to the academy at every stage of the judicial inquiry. App. 36a-37a. In contrast, the five Judges joining in Chief Judge Jones' dissent from rehearing en banc agreed with Petitioner that, apart from deference on an educational diversity goal, rigorous strict scrutiny was required and fatal to UT's use of racial classifications in admissions. App. 176a-184a.

The potential for these interpretive difficulties was noticed by the dissenting Justices in *Grutter*. *See, e.g.*, 539 U.S. at 380 (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 388 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal."). As Judge Garza noted, "[w]henever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed." App. 72a. The Court should expressly clarify or overrule *Grutter* to the extent needed to bring clarity to the law and restore the integrity of strict scrutiny review in the higher educational setting. *See, e.g.*, *Adarand*, 515

U.S. at 231-35 (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)).

By corrupting the "unitary formulation" of strict-scrutiny review, the Court "undermines both the test and its own controlling precedents." *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). It undermines that judicial test to suggest that strict scrutiny allows lower courts to "abdicate judicial review of a race-conscious admissions program for undergraduate students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." App. 174a (Jones, C.J.). It would undermine precedent to abandon "this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years," *Adarand*, 515 U.S. at 231-35, which affirmed "the absolute necessity of strict scrutiny when the State uses race as an operative category," *Grutter*, 549 U.S. at 388 (Kennedy, J., dissenting). Strict scrutiny cannot serve its important purpose if "review that is nothing short of perfunctory [and] accepts [a university's] … assurances that its admissions process meets with constitutional requirements." *Id.* at 388-89.

"Constant and rigorous judicial review forces" university officials, furthermore, "to undertake their responsibilities as state employees in the most sensitive of areas with utmost fidelity to the Constitution." *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). In other words, "[b]ecause even University administrators can lose sight of the constitutional forest for the academic trees, it is the duty of the courts to scrutinize closely their 'benign' use of race in admissions." App. 176a (Jones, C.J.). For example, universities can be "'breathtakingly cynical' in deciding

who [will] qualify as a member of underrepresented minorities." *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (citation omitted). UT's overt discrimination against Asian-American applicants here reinforces the point. *See supra* at 28. "It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decision-making. Prospective students, the courts, and the public can demand that [universities] prove their process is fair and constitutional in every phase of implementation." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

Moreover, failing to restore the integrity of strict-scrutiny review either by clarifying or overturning *Grutter* would leave in place a regime that has "proved to be unworkable in practice." *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965). An opinion that produces the amount of discord and confusion merely as to the applicable standard of review shown here exposes "litigants and courts alike [to] the perpetuation of an unworkable rule." *Id.*[11]

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11. *Grutter* has not created reliance interests that would warrant its retention. *See Adarand*, 515 U.S. at 233-34. Racial preferences, by their nature, do not produce weighty reliance interests. No university was required to employ racial preferences following *Grutter*. "[A]ny State … is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program." *Bakke*, 438 U.S. at 379 (Brennan, J.). Indeed, the Texas legislature has already made a contingency plan in the event that Petitioner prevails in this challenge. *See supra* at 8 n.3. Moreover, the limited racial preferences authorized by *Grutter* are by definition temporary, given that the decision itself announces that their termination is certain. *See Grutter*, 539 U.S. at 342.

Retention of an unworkable rule would not only harm courts and litigants. Another "unhappy consequence" would be "to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539, U.S. at 394 (Kennedy, J., dissenting). "Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives." *Id.* Indeed, despite the substantial number of minorities being admitted to UT under its prior race-neutral system, the university announced it would return to a race-based admissions system on the very day *Grutter* was decided. *See supra* at 5. As this case illustrates, then, when "universities are given the latitude to administer programs that are tantamount to quotas," they will discard race-neutral "programs … more effective in bringing about harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter*, 539 U.S. at 394-95.

In the end, "[i]f strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks *authority* to approve the use of race even in [a] modest, limited way." *Id.* at 387 (Kennedy, J., dissenting) (emphasis added). "The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review." *Id.* at 395. And "as between the principle and its later misapplications, the principle must prevail." *Adarand*, 515 U.S. at 235. Thus, the Court should, as Chief Judge Jones suggested, clarify that *Grutter* imposes rigorous strict-scrutiny review, or, as Judge Garza suggested, overrule *Grutter* to the extent it abandons this essential aspect of equal-protection doctrine. In either case, the watered-down

version of judicial scrutiny that allowed the Fifth Circuit to invoke *Grutter* to uphold UT's blatantly unconstitutional restoration of race as a factor in admissions decisions must be corrected.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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