In the Supreme Court of the United States

ABIGAIL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, RESPONDENT

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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RESPONDENT'S OPENING BRIEF

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MAIA LEE
NEETA RAO

TABLE OF CITED AUTHORITIES

STATEMENT OF ARGUMENT

The University of Texas at Austin's race-based affirmative action admission policy is indeed constitutional, as it is both narrowly tailored and promotes the compelling state interest of diversity.

Congressional legislation since the nineteenth century, concerning the establishment of the Freedmen's Bureau, has identified the disadvantage African Americans and other minorities have in educational and employment opportunities because of the lasting impact of racial segregation in the United States. Additionally, diversity in places of higher education increases the quality of all students' learning, as argued by Justice O'Connor in *Grutter v. Bollinger* and Justice Powell in *Regents of the University of California v. Bakke*.

While many argue that the University of Texas's admissions policies fail to be narrowly tailored, legislative acts such as California's Proposition 209 and Washington's Initiative 200

prove that race-neutral alternatives for college admissions fail to achieve an ideal diverse, multicultural student body that a school needs to thrive. Furthermore, seeking an "alternative" for a race-based system does not eliminate race as a criteria because any system which holds diversity as its end goal is by nature race-conscious.

The University of Texas's admissions policy, involving both a race-neutral and raced-based processes, thus fulfills the strict scrutiny requirements as required by the court. The arguments below present the importance of affirmative action in college admissions, and the validity of the University of Texas' consideration of race as part of the admissions process.

ARGUMENT

I. CONGRESSIONAL AND EXECUTIVE LEGISLATION EMPHASIZES IMPORTANCE OF AFFIRMATIVE ACTION IN ADMISSIONS FOR PUBLIC UNIVERSITIES

A. Reconstruction era legislation displays past discrimination and the need for affirmative action

1. Cong. Globe, 38th Cong., 1st Sess. 2799 (1865)
    a) At the 1st session of the 38th Congress, General Banks of Louisiana laid out the foundation for what would later become the Freedmen's Bureau. He explained that although freedmen want and need employment, they could not find work because they were so constrained by racial segregation and thus are "alone, friendless, and uninformed. The curse of slavery [was] still upon them." Banks further stated that the system required to correct this curse of slavery was extremely complicated and must be reserved for the federal government (Cong. Globe, 38th Cong., 1st Sess. 2799 (1865)). Over a hundred and fifty years later, American society continues to struggle with the remnants of racial discrimination from the nineteenth century. Affirmative action policies in higher education therefore do not violate the Equal Protection Clause of the 14th Amendment because they serve as a means of equalization to provide equal opportunities for all minorities who may otherwise be at a disadvantage, often from discrimination rooted in the 19th century.
2. Act of March 3, 1865, ch. 90, § 1, 1866 Stat. 508
    a) The Freedmen's Bureau, established by Lincoln following the Civil War, assisted freedmen in many areas of life, including healthcare, legal actions, financial transactions, and employment. The Bureau was also extremely successful in educating recently freed slaves, building schools and colleges specifically to give freedmen more opportunities. This process is continued even

today in affirmative action as universities use race-based admissions policies to aid minorities.

3. Act of June 21, 1866, ch. 130, § 2, 1866 Stat. 69
    a) The Southern Homestead Acts were passed on June 21, 1866. In order to escape the cycle of sharecropping and tenant farming, Alabama, Arkansas, Louisiana, Florida, and Mississippi sold land at very low prices so that more people could afford it. However, many southerner bureaucrats refused to comply with the bill, limiting scope and effectiveness. Nevertheless, 1,000 blacks laid claims and received homesteads through this act. The lack of access to adequate land is one of many examples of the long-term economic or political disenfranchisement of African Americans.
4. Cong. globe, 39th Cong., 1st Sess. 240 (1866)
    a) At the first session of the 39th Congress in 1886, after the Freedmen's Bureau had been established, Congress noted that the Freedmen's Bureau truly helped newly freed blacks earn the respect from their previous white superiors and enjoy the rights of many American citizens. Places that lacked the influence of the Freedmen's Bureau, however, suffered from "injustice and cruelty...whippings and scourgings and murders that darken the continent" (Cong. globe, 39th Cong., 1st Sess. 240 (1866)). In the same way that the Freedmen's Bureau attempted to open more doors and encourage equality for newly freed blacks, affirmative action policies today continue to encourage racial diversity in places such as higher education and the workplace. The University of Texas's policy thus is the continuation of the longstanding mission of the Reconstruction Congress from more than a century ago as our country hopes to achieve a more diverse society while also providing more opportunities for less fortunate and underrepresented minorities.

All of these pieces of legislation show that the desire to promote equality in society continues today.

II. THE PROMOTION OF DIVERSITY IS A COMPELLING GOVERNMENTAL INTEREST

A. Diversity Increases the Quality of Higher Education

The educational benefits of racial diversity are vast. Students engaging in a cross-racial conversation can enhance the classroom environment, as held in Grutter v. Bollinger. The court held that the Law School's admission policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." *Grutter v. Bollinger* App. to Pet. for Cert. 246a.

Justice O'Connor reiterated this in her opinion, stating that "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Grutter v. Bollinger* 539 US 306 (2003). These educational benefits create a *compelling interest* for universities, as their goal is to prepare their students for success in the global marketplace.

The University of Texas also seeks to continuously improve the quality of its education by increasing diversity and creating inclusive and open discussion channels across racial boundaries, something that cannot be accomplished without considering race as a factor in the school's admissions process.

B. Affirmative Action As a Means of Equalization From Past Discrimination

Historically, efforts to increase racial diversity not simply in higher education but in other public aspects of life, such as employment, have been ruled as constitutional. In 1986, District Judge Frank Johnson expressed support of a promotion policy of Alabama's Department of Public Safety. Just as with Alabama's extensive history of racial segregation and the state's need to combat such discrimination, Texas also has a history of racial segregation in its schools. Prior to 1950, Texas had a separate law school just for blacks that the Supreme Court overturned. *Sweatt v. Painter*, 339 US 629 (1950). In the Texas 1994 disparity study by the General Services Commission, it was found that "African American and Hispanic businesses are the most disadvantaged in seeking State business." This racial discrimination is paralleled in many other areas of society. In the university sphere, minority graduates have faced blant and continuous discrimination for many years. In the fall of 2000, 62.7% of the students at the University of Texas were white, although only 51.5% of Texas' public high school graduates were white.

The case *United Steelworkers of America v. Weber* ruled that affirmative action was constitutional in situations similar to the University of Texas. In Justice Brennan's opinion, he holds that "The Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation." *United Steelworkers of America v. Weber* 443 US 193 (1979). The University of Texas's affirmative action plan, its mission similar to that of Alabama's Department of Public Safety in *United States v. Paradise* (*United States v. Paradise*, 480 US 149 (1987)), does not a racial gap in violation of the Equal Protection Clause, but rather uses diversity as a compelling state interest to consider raise as a "plus factor" in admissions policies.

C. *University of California v. Bakke* Emphasizes the Importance of Diversity for Success and Learning in Higher Education

Previous legal precedents have long established Increasing diversity in a place of higher education as a compelling state interest for public universities. At the University of California Medical School at Davis, for example, the medical school reserved sixteen

out of one hundred openings for minorities in an effort to increase racial diversity. Although the Supreme Court ruled the university's quota system unconstitutional, it upheld the school's claim that racial diversity was indeed a compelling state interest. In his majority opinion, Justice Powell articulates:

> An otherwise qualified medical student with a particular background -- whether it be ethnic, geographic, culturally advantaged or disadvantaged -- may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Regents of the University of California v. Bakke, 438 US 265 (1978), upheld in many others, including *Grutter v. Bollinger*, 539 US 306 (2003). Justice Powell's opinion also reflects the needs of the Texas school's admissions program, for students of vastly different races, cultures, and socioeconomic backgrounds bring a wide range of perspectives to the learning environment not simply at a university, but at any educational place. The University of Texas's admissions process utilizing a race-based affirmative action system therefore demonstrates a compelling state interest because of the school's aim towards diversity.

III. NO OTHER RACE-NEUTRAL ALTERNATIVE FOR ACHIEVING DIVERSITY EXISTS

A. Using Race-Neutral Proxies Can Negatively Impact Overall Student Success at Universities

The implementation of race-neutral alternatives to affirmative action would decrease the overall quality of the university, according to University of Washington professor Mark Long. Professor Long's study shows that:

> While such a system can be used to restore minority's share of admitted students, doing so can result in a class that has modestly lower predicted likelihood of collegiate academic success. Furthermore, utilizing such a proxy-based admission system is inefficient; in the simulation, I find that it required the university to place over four times as much weight on predicted minority status as the weight it previously placed directly on actual minority status, resulting in non-minority applicants being admitted who would not have been otherwise admitted. Long, M. C., *Is There a "Workable" Race-Neutral Alternative to Affirmative Action in College Admissions?* J. Pol. Anal. Manage., 34: 162–183 (2015)

Such a system, in a university's eyes, is unworkable. The goal of universities is to provide the best education it can for its students, and Professor Long's study proves that using race-neutral proxies to maintain or increase diversity actually decreases the predicted GPA of college students.

The University of Texas cannot afford to risk student success by using these purportedly race-neutral alternatives. Doing this would not be in the best interest of students or the university, thus deeming it unworkable.

In addition, any of these race-neutral proxies can hardly be termed race-neutral if their goal is to increase diversity. Professor Long states in his article that "there is an inherent tension in the terms 'race-neutral' and 'alternative' – if one seeks an 'alternative' policy to race-based affirmative action that serves the same goal, then such a policy cannot be deemed 'race-neutral.'" The court has ruled in *University of California v. Bakke* that diversity is a compelling governmental interest, and any attempt to promote this interest must by nature be race-conscious.

Therefore, the current affirmative action in the University of Texas, which considers race as one of many factors in admission, is the only workable method for promoting diversity.

B. Striking Down Affirmative Action in the Past Has Had a Detrimental Effect on Diversity

The California Civil Rights Initiative (CCRI), or Proposition 209, struck down affirmative action policies in California schools beginning in 1996. Led by University of California Regent Ward Connerly, the proposition emphasized that "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Striking down affirmative action in all Californian public universities, however, has led to a largely disproportionate number of Asians and caucasians. Prior to Proposition 209, UC Berkeley's 1993 student body was 29.5% Asian American, 33.3% white, and 5.5% African American. In the fall of 2015, however, 42.9% of UC Berkeley's freshman class was Asian American, in contrast to 24.3% caucasians and a mere 2.8% African Americans ("Statistical"). UC Berkeley's recent admissions statistics demonstrate how a lack of affirmative action inevitably leads to a lack of student racial diversity, which certainly hampers the school's mission to educate a well-rounded and diverse student body.

Additionally, Initiative 200 also promoted by Ward Connerly, who led the affirmative action ban in California, has since eradicated affirmative action in the state of Washington:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Although the initiative, passed in 1998, promotes racial equality and equal treatment of all races, it has had a negative effect on the amount of minority groups receiving higher education. According to a recent article, "The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College," published by Susan K. Brown of University of California Irvine and Charles Hirschman of the University of Washington, between 1998 and 1999, the percentage of minority freshmen in Washington colleges dropped significantly. For all four-year colleges, the percentage of

black freshmen dropped 13 percent, hispanics dropped 9 percent, and American Indians dropped 18.9 percent (Brown and Hirschman).

Students in California have also taken issue with Proposition 209. In 199, a group of minority high school students alleged that the University of California admissions program is discriminatory towards minority groups because of its reliance on AP and honors courses. These courses are much less accessible to minority-serving high schools, and therefore create a disenfranchising impact. *Castenda, et al. v. The Regents of the University of California*, U.S. District Court, N.D. CA, Case No. CV-99-0525 SI

California's Proposition 209 and Washington's Initiative 200 therefore both demonstrate that eliminating affirmative action has led to a decrease in diversity and representation of minority students. Race-neutral alternatives to affirmative action that preserve the compelling state interest of diversity thus cannot be fulfilled and the University of Texas's system of affirmative action is in fact narrowly tailored.

C. University of Texas's Race-Based Admissions Plan Complies With the Quota and "Critical Mass" Standards Set in *Grutter v. Bollinger*

In the case *Grutter v. Bollinger,* 539 US 306 (2003), the court held that in a holistic admissions review, race as one factor of many is constitutional so long as a distinct set of quotas is not used to fulfill a certain number of spots for minority applicants. Supreme Court Justice Sandra Day O'Connor wrote in the majority opinion, referencing *Richmond* v. *J. A. Croson Co., supra*, at 496 (plurality opinion):

> Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." *Richmond* v. *J. A. Croson Co., supra*, at 496 (plurality opinion). Quotas " 'impose a fixed number or percentage which must be attained, or which cannot be exceeded,' "

The *Grutter* majority opinion also "permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'compete[s] with all other qualified applicants,' *Johnson* v. *Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 638 (1987)." In *Fisher v. Texas*, the University of Texas's affirmative action plan does not involve any quotas that must be fulfilled when reviewing minority applicants other than to "develop a more equitable educational landscape for all Texans by creating a successful pathway for first-generation and underrepresented students" (University of Texas at Austin website).

Furthermore, the *Grutter* decision indicated that "race-conscious admissions policies must be limited in time." *Grutter v. Bollinger,* 539 US 306 (2003). Although opponents of affirmative action and the University of Texas would argue that the school fails to have a time limit on its admissions policies other than until the student body's minority population reaches a "critical mass." The *Grutter* decision, however, defined a "critical mass of minorities" to be enough to "ensure that these minority students do not feel isolated or like spokespersons for their race; … provide adequate opportunities for

the type of interaction upon which the educational benefits of diversity depend; and … challenge all students to think critically and reexamine stereotypes." *Grutter v. Bollinger,* 539 US 306 (2003). According to the University of Texas's 2015 demographics for the 2014-2015 school year, only 4% of the student body was black, less than 1% were American Indian, and 4% were "foreign." These incredibly low percentages, representative of over 50,000 students total, demonstrate that minorities are certainly not yet represented well enough to avoid being seen as "spokespersons of their race" at the university. The University of Texas therefore has not achieved a critical mass of minority students, as defined in *Grutter*, showing the necessity of its race-based acceptance policy.

D. The 10 percent plan alone is not capable of creating a diverse student body

The 10% plan was developed in 1997, in order to create racial diversity in the University of Texas using a race-neutral policy. The university used only this method for seven years. However, in the fall of 2002, 52 percent of all classes with five or more students had no African Americans and 79 percent had one or none. This lack of diversity even after seven years of the 10% plan prompted the university to include race as a factor in the admissions process. Dr. Bruce Walker, the director of admissions said:

> Majority students cannot reap the educational benefits of diversity when a high percentage of their classes have no or little minority representation. It is our expectation that the use of a race conscious policy, in conjunction with the race neutral policies we have been using, will increase the critical mass of minority students in our classrooms. ("The University of Texas at Austin proposes inclusion of race as a factor in admissions process")

After the implementation of race as one of 15 factors in admission, the minority attendance rates have increased significantly. The number of African Americans has increased by 46.8% since 2000, and the number of Hispanics by 75.0% *University of Texas at Austin Accountability Report* (2016). This increase is an indication of the effectiveness of the program.

CONCLUSION

The affirmative action policies used by the University of Texas are constitutional under strict scrutiny, as they are non-quota, limited in scope, and of a compelling interest. The racial precedent set during the reconstruction era creates a compelling governmental interest to promote diversity, in addition to the enhancement to education that diversity creates. The University of Texas has deemed that there is no race-neutral alternative to their policies, and has chosen to include race as one of fifteen factors in admissions, which follows court precedent. For all of the reasons stated above, this Court should uphold the judgement of the Fifth Circuit Court of Appeals.