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No. 14-981

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 Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

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; Pedro Reyes, Executive Vice Chancellor for Academic Affairs in His Official Capacity; Daniel H. Sharphorn, Vice Chancellor and General Counsel in His Official Capacity; Gregory L. Fenves, 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; David J. Beck, as Member of the Board of Regents in His Official Capacity; Ernest Aliseda, as Member of the Board of Regents in His Official Capacity; Alex M. Cranberg, as Member of the Board of Regents in His Official Capacity; Brenda Pejovich, as Member of the Board of Regents in Her Official Capacity; Sara Martinez Tucker, as Member of the Board of Regents in His Official Capacity; Wallace L. Hall, Jr., as Member of the Board of Regents in His Official Capacity; Paul L. Foster, as Chair of the Board of Regents in His Official Capacity; Jeffery D. Hildebrand, as Member of the Board of Regents in His Official Capacity; Susan Kearns, Interim Director of Admissions in Her Official Capacity; William H. McRaven, Chancellor of the University of Texas System in His Official Capacity.

Plaintiff-Appellant below Rachel Multer Michalewicz is being served as a respondent herein.

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JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its decision on July 15, 2014. App. 91a. A timely petition for rehearing en banc was denied on November 12, 2014. App. 94a. This Court granted a timely petition for certiorari on June 29, 2015. Joint Appendix ("JA") 64a. This Court has jurisdiction under 28 U.S.C. § 1254(a).

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.

INTRODUCTION

After the Fifth Circuit struck down the use of racial preferences in undergraduate admissions at the University of Texas at Austin ("UT") in *Hopwood v. Texas*, 78 F.3d 932 (1996), Texas made the choice to seek diversity through race-neutral alternatives. The Texas legislature passed a statute requiring that all Texas students who graduate in the top ten percent of their high school classes be admitted to UT. And UT broadened its admissions policies to ensure a fair opportunity for qualified students who do not come from privileged backgrounds. The experiment was an important step toward "bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter v. Bollinger*, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting). The experiment also was a success, enabling UT to enhance educational opportunity and achieve "real diversity" without classifying applicants in a way the "Constitution abhors." App. 322a, 328a (Jones, J., dissenting from denial of rehearing en banc). Yet the day that *Grutter* issued, UT leapt at the opportunity to reintroduce racial preferences "whose utility is highly dubious in comparison with the effect of the Top Ten Percent Law." App. 330a.

Since then, UT's fundamental problem has been its inability to justify that unfortunate decision. UT tried in vain to avoid scrutiny altogether by making meritless

standing arguments that this Court has rejected. UT sought refuge behind a veil of deference that this Court's prior decision lifted. *See Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2012) ("*Fisher I*"). UT asserted interests in demographic parity and classroom diversity that it has since abandoned. And, now, UT invokes an interest in "intra-racial" (raised for the first time on appeal and lacking any record support) that only a court committed to deferential review could uphold. This post-hoc interest based on stereotypical assumptions about high-achieving minority students from poorer neighborhoods could never survive strict scrutiny.

The Court must bring this runaround to an end. *Fisher I* reiterated that the application of traditional strict scrutiny is a precondition to the use of racial preferences. Only strict scrutiny affords the judiciary "any authority to approve the use of race in pursuit of student diversity." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). First, it places the burden on the university to clearly specify an interest that purportedly justifies racial preferences. Second, it requires record evidence from the university that shows that the university articulated and substantiated that interest at the time the decision to use racial preferences was made. Third, it requires that the university prove that the use of race is necessary to achieve its articulated interest. Finally, it requires that the university's use of race be narrowly tailored to achieve that compelling interest. UT's claimed interest in "intra-racial diversity" does not satisfy any of these fundamental requirements.

That this case is straightforward should not obscure its importance. The country is engaged in "a dialogue

regarding this contested and complex policy question" of racial preferences. *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN),* 134 S. Ct. 1623, 1630 (2014). But that dialogue can continue in a constructive manner only if universities are convinced "the strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in the judgment). If UT benefits from its strategy of obfuscation, "[t]he unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). By holding that UT discriminated against Ms. Fisher and reversing the judgment below, the Court will not only vindicate her equal-protection rights, it will remind universities that the use of race in admissions must be a last resort—not the rule.

STATEMENT

A. UT's 2008 Admissions Program

UT's admissions process is the product of a series of judicial and policy decisions that culminated in the reintroduction of racial preferences following the Court's 2003 decision in *Grutter*.

Before 1997, UT's in-state admissions process considered only two factors: (1) an applicant's Academic Index ("AI"), which was computed from standardized test

scores and high school class rank; and (2) the applicant's race. Supplemental Joint Appendix ("SJA") 41a. Race "was often a controlling factor in admissions." App. 162a. The use of race in this system ended with the Fifth Circuit's decision in *Hopwood*.

UT responded by adjusting its criteria for admission in an effort to preserve the level of minority enrollment it had achieved pre-*Hopwood*. In 1996, the last pre-*Hopwood* admissions cycle, UT's freshman class was 18.6% African-American and Hispanic. *Fisher I*, 133 S. Ct. at 2416. In 1997, UT augmented its AI-based admissions calculus with a new Personal Achievement Index ("PAI"). The PAI was a weighted average of two written essays and a "personal achievement score." The PAI "measures a student's leadership and work experience, awards, extracurricular activities, community service," and "special circumstances." *Id.* at 2415. These special circumstances (including, *inter alia*, being raised in a single-parent, non-English speaking, or socioeconomically disadvantaged home environment or assuming significant family responsibilities) tended to "disproportionately affect minority candidates." *Id*. at 2416. UT's AI/PAI system produced an enrolled 1997 freshman class that was 15.3% African American and Hispanic. App. 267-68a.

Contemporaneous with UT's alteration and expansion of its admissions criteria, the Texas Legislature formulated its own response to *Hopwood*. It passed a law requiring UT to grant admission to any Texas high school student graduating in the top 10% of their class. H.B. 588, Tex. Educ. Code § 51.803 (1997) ("Top 10% Law). The Top 10% Law took effect for the 1998 admissions cycle. From that point forward, UT's AI/PAI system continued to

be used for two purposes. First, it was used to fill those seats in the entering class that were not taken by students admitted under the Top 10% Law. Second, it was used to determine program placement for all incoming freshmen, including those admitted under the Top 10% Law. *Fisher I*, 133 S. Ct. at 2416-17.

The combined effect of the Top 10% Law and the AI/PAI system was to steadily increase African-American and Hispanic admissions, "result[ing] in a more racially diverse environment at [UT]." *Id.* at 2416. In 1999, UT announced that its "enrollment levels for African American and Hispanic freshman … returned to those of 1996, the year before the *Hopwood* decision." JA 393a. Moreover, UT learned that "minority students earned higher grade point averages [in 1999] than in 1996" and that they had "higher retention rates." *Id.* UT proudly announced that the Top 10% Law "had enabled [it] to diversify enrollment … with talented students who succeed" and led to the enrollment of "a more representative student body and … students who perform well academically." *Id.*

This upward trend in minority enrollment continued unabated. In 2003, UT announced that it had "effectively compensated for the loss of affirmative action." JA 396a. 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 412a. By 2004, the combined system produced an entering class that was 21.4% African-American and Hispanic. *Fisher I*, 133 S. Ct. at 2416. This system also resulted in a steady increase in the admission of Asian-American students who constituted 17.9% of the 2004 class. App. 166a.

Nevertheless, on June 23, 2003—the very day *Grutter* was decided—UT announced it would "modify its admission procedures to ... combine the benefits of the Top 10% Law with affirmative action programs that can produce even greater diversity." JA 406a-07a. To that end, in 2004, UT presented a "Proposal to Consider Race and Ethnicity in Admissions" ("Proposal") to its Board of Regents for approval. SJA 1a-39a. The Proposal set forth two reasons for why racial preferences were needed at UT. First, they were needed to overcome "significant differences between the racial and ethnic makeup of [UT's] undergraduate population and the state's population." SJA 24a. Second, they were needed to achieve classroom diversity; that is, the presence of more minority students in smaller "classes of participatory size." SJA 24a-26a; *see* App. 167a, 169a.

UT's Proposal included a classroom diversity study. The study defined "classroom diversity" as being satisfied only in classrooms where at least two African-American, two Hispanic, and two Asian-American students were present. SJA 69a-70a; App. 291a. This study focused on "a subset of undergraduate classes containing between 5 and 24 students." *Fisher I*, 133 S. Ct. at 2416.[1] UT determined that many of these "participatory" classes did not meet its classroom-diversity standard. SJA 70a.

The Proposal asserted that the classroom-diversity study and the demographic imbalance between its freshman class and the Texas population together proved that UT had not "achiev[ed] a critical mass of racial diversity." App.

1. UT excluded international students from its "classroom diversity" analysis. SJA 70a.

25a; *Fisher I*, 133 S. Ct. at 2416.[2] The Proposal further claimed that although existing race-neutral admissions policies (including the Top 10% Law) were "very useful in producing a student body of strong academic ability," SJA 39a, they had "failed to improve diversity within the classroom," SJA 25a. The Proposal did not analyze the background, life experiences, extracurricular activities, personal attributes, or other individual characteristics of the minority students admitted to UT.

The Regents accepted the Proposal. SJA 152a; App. 103a. In 2004, UT reintroduced racial preferences by adding "race" to the list of "special circumstances" that make up a key component of the PAI. SJA 152a, 174a, 280a. UT elected to employ racial preferences to benefit African Americans and Hispanics, groups it deemed "underrepresented." SJA 25a. Though the study revealed a far more significant "classroom diversity" problem with Asian Americans, SJA 26a, UT deemed Asian Americans "overrepresented" based on state demographics, App. 301a. At the same time, UT continued to recognize Asian Americans as a minority in its diversity statistics, marketing materials, and classroom-diversity study. JA 370a-71a, 398a-99a; SJA 176a.

In reintroducing race to admissions decisions, UT did not identify a "specific goal … in terms of the number of [additional African-American and Hispanic] students" it would admit, nor did it include any specific or approximate level of minority admissions that would constitute a "critical mass." SJA 29a. UT also did not project the date at which it would abandon the use of race in admissions

2. UT has also cited a student survey collecting "anecdotal" reports of classroom interaction. JA 482a.

decisions. Instead, UT committed to review its policy in five years. SJA 6a, 15a, JA 448a. No review has been published in the intervening eleven years.

Since 2004, then, an applicant's race appears on the front of every application file and "reviewers are aware of it throughout the evaluation." App. 280a. Every applicant must be identified by race because UT's AI/PAI scoring determines both admission for non-Top 10% Law applicants and program placement for all admitted students. Yet UT keeps no record of how race affects specific PAI scores or admissions decisions. UT also has not assessed the effect of its racial preferences on minority enrollment and has instead disclaimed any ability to determine its effect. *See* JA 337a; App. 250a. UT has also made no attempt to assess the individual characteristics of students admitted because of racial preferences or in spite of them. UT's position is that it suffices that race "can make a difference" in individual admission decisions, App. 281a, and that race is being used as part of an admissions system that it views as holistic, "[t]he major requirement of [*Grutter*]" according to UT. SJA 15a.

Although UT has never measured the effect of using race on its overall enrollment, it clearly is negligible. First, race can be determinative only for in-state underrepresented minority applicants not admitted under the Top 10% Law, which is a small segment of the freshman class. In 2008, for example, 6,322 in-state students enrolled at UT: 5,114 through the Top 10% Law and 1,208 through the race-affected AI/PAI regime. App. 247a-48a. Of the non-Top 10% enrollees, 216 were African American or Hispanic, representing only 3.4% of the enrolled in-state freshman class. App. 249a.

Second, a number 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. 173a; JA 418a. Many others would have been admitted under an AI/PAI system unaffected by race. 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 reintroduced, 17.9% were African American or Hispanic. SJA 157a. Even if the entirety of the increase between 2004 and 2008 were attributable to race, it would have been decisive for only 2.7% of the 1,208 non-Top Ten enrollees in 2008—or 33 African Americans and Hispanics combined. *Id.* If so, racial preferences would have accounted for 0.5% of the 6,322 in-state freshman class in 2008.

The dramatic increase in African-American and Hispanic enrollment at UT was mostly attributable instead to the Top 10% Law. During the period from 1998 to 2008, the percentage of African-American and Hispanic students who enrolled in the incoming freshman class increased from 16.2% to 25.5%. SJA 156a. Nearly 86% of the African-American and Hispanic students who enrolled in the 2008 incoming freshman class were admitted via the Top 10% Law. SJA 157a. The Top 10% Law continued to drive increases in the enrollment of African-American and Hispanic students at UT,[3] in spite of the fact that the Texas Legislature eventually capped admission under

3. Because of the Top 10% Law's success, UT became a majority-minority campus in 2010. *See Class of First-Time Freshmen Not a White Majority This Fall Semester* (Sept. 14, 2010), *available at* www.utexas.edu/news/2010/09/14/student_enrollment2010/.

the Top 10% Law to 75% of the class. Tex. Educ. Code § 51.803(a-1). Lifting this cap, as Texas law requires if the decision below is reversed, *see id.* § 51.803(k)(1), would further increase UT's enrollment of African-American and Hispanic students.

B. History of the Litigation

After being denied admission to UT in 2008, Ms. Fisher filed suit in the Western District of Texas for injunctive relief and damages to challenge 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 as a narrowly tailored means of pursuing racial diversity, which it deemed essential to its mission.

UT contended that it needed to boost minority admissions, especially at the classroom level, because it had not attained a "critical mass" of "underrepresented" minorities. Relying on the 2004 Proposal, UT claimed that: (1) its enrollment of African Americans and Hispanics lagged behind each group's segment of Texas's population and (2) a significant number of its small classes did not have at least two African Americans, two Hispanics, and two Asian Americans. App. 290a-93a. UT further argued that its use of race was "narrowly tailored" to advance these interests because its program was holistic, was not a quota, and included a plan to review the need for racial preferences every five years. App. 307a-08a, 313a-14a.

The parties engaged in months of discovery, which included, among other things, document production,

interrogatories, requests for admission, and depositions of several UT admissions officials. *See, e.g.*, Appendix to Pl.'s Mot. for Summ. J., *Fisher v. Univ. of Texas at Austin*, No. 08-263 (W.D. Tex.) (Doc. 94-3). UT also submitted numerous affidavits of admissions officials and personnel. *Id.* At the close of discovery, and after the case was bifurcated to reserve remedies issues for a later phase, both parties moved for summary judgment on liability. The parties agreed on the material facts and that summary judgment was appropriate. *See* Defs.' Reply Mem. in Supp. of Cross-Mot. for Summ. J. at 1, *Fisher v. Univ. of Texas at Austin*, No. 08-263 (W.D. Tex.) (Doc. 102). At no point in this process did UT assert an interest in diversity within racial groups or offer any evidence concerning the background or individual characteristics of applicants for admission or enrolled students.

The district court granted UT summary judgment. The court endorsed UT's reliance on "classroom diversity" statistics and held that UT's pursuit of demographically proportional African-American and Hispanic enrollment rates was permissible under *Grutter*. App. 301a-03a. The court also found that UT's admissions system was narrowly tailored because it was holistic and subject to periodic review. App. 307a-08a, 313a-14a.

The Fifth Circuit affirmed. The court acknowledged that UT's use of race should be subject to strict scrutiny review. App. 181a. But the court employed a deferential standard that limited the judicial inquiry to whether UT's "decision to reintroduce race as a factor in admissions was made in good faith." App. 193a. Under this standard, the Fifth Circuit "presume[d]" that UT had "acted in good faith" and required Ms. Fisher to rebut that presumption. App. 182a.

The Fifth Circuit acknowledged that "UT's claim that it has not yet achieved critical mass was less convincing when viewed against the backdrop of the Top Ten Percent Law," a law Judge Higginbotham believed was potentially unconstitutional, but nonetheless deferred to UT's "good faith conclusion" that it lacked a critical mass of African-American and Hispanic students. App. 213a, 212a. The court endorsed UT's focus on state demographics, specifically pointing to Hispanic enrollment numbers, which it found "low … considering the vast increases in the Hispanic population of Texas." App. 211a. The Fifth Circuit also endorsed UT's pursuit of classroom diversity, crediting UT's study that purported to show "minority students remain[ed] clustered in certain programs." App. 202a. The Court rejected the argument that the negligible number of underrepresented-minority students admitted through racial preferences rendered the use of race unconstitutional under *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). App. 213-14a. It held instead that UT had "properly concluded that race-conscious admissions measures would help" it achieve its vision of "critical mass." App. 214a. Judge Higginbotham faulted the Top 10% Law for UT's supposed deficiences with regard to diversity. App. 202a.

Judge King concurred to disassociate herself from Judge Higginbotham's attack on the Top 10% Law. App. 218a. It was not an issue in the case because "[n]o party challenged ... the validity or the wisdom of the Top Ten Percent Law." *Id.*

Judge Garza specially concurred. App. 218a-60a. In his view, *Grutter* was wrongly decided but nonetheless required deference to UT. Absent deference, Judge Garza

saw no constitutional justification for UT's program, which classified every applicant by race, yet "had an infinitesimal impact on critical mass in the student body as a whole." App. 253a. Judge Garza 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. 251a. As a result, race had been "completely ineffectual in accomplishing [UT's] claimed [classroom-diversity] interest." App. 252a.

The Fifth Circuit denied en banc review by a vote of 9-7. In her dissent, then-Chief Judge Jones objected to deferential review and concluded that UT's system could not be sustained under traditional strict scrutiny. App. 320a-30a. UT's use of race was "gratuitous" as it produced only a "tiny" increase in minority admissions. App. 328a. Judge Jones also concluded that the classroom diversity rationale was "without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs." App. 330a.

This Court granted review. JA 64a. Before this Court, UT fundamentally changed its legal strategy. In its merits brief and at oral argument, UT: (1) conceded that deference does not apply to narrow tailoring; and (2) abandoned reliance on state demographic and classroom diversity as compelling interests. Regarding demographics, UT took the position that it "does not use its admissions process to work backwards toward any demographic target—or, indeed, any target at all." Brief of Respondents 20, *Fisher v. Univ. of Texas at Austin*, No. 11-345 (U.S. Aug. 6, 2012) ("*Fisher I* Resp. Br."); *see also id.* at 28-29. Regarding classroom diversity, UT claimed to

have "never asserted a compelling interest in any specific diversity in every single classroom." Transcript of Oral Argument ("Oral Arg. Tr.") at 34:20-22; *see also Fisher I* Resp. Br. 39 ("UT's objective was far broader than the interest in 'classroom diversity' attacked by petitioner.").

In their place, UT asserted an entirely new interest in "diversity *within* racial groups." *Fisher I* Resp. Br. 33. For the first time, UT argued it needs racial preferences to enroll minorities with uniquely desirable individual traits. *Id.* 33-34. For example, UT argued that the use of racial preferences would allow it to select minority students from "integrated high school[s]" and more affluent socio-economic backgrounds over those who are the "first in their families to attend college." *Id.* Doing so would "dispel stereotypical assumptions" instead of "reinforc[ing]" them. *Id.* 34. Petitioner objected to UT's reliance on this new interest for the first time in this Court as too late and as invalid under strict scrutiny in any event. Reply Brief of Petitioner 12-14, *Fisher v. Univ. of Texas at Austin*, No. 11-345 (U.S. Sept. 5, 2012).

This Court vacated the Fifth Circuit's decision, flatly rejecting deferential review. *Fisher I*, 133 S. Ct. 2411. Having done so the Court remanded, instructing the Fifth Circuit to review the summary judgment record under traditional strict scrutiny. *See id.* at 2421. That, in turn, required a determination of "whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Id.* The Fifth Circuit was instructed, in sum, to look to "the record—and not 'simple ... assurances of good intention.'" *Id.* (quoting *Croson*, 488 U.S. at 500).

The Court further explained that "[s]trict scrutiny is a searching examination" and UT "bears the burden to prove 'that the reasons for any racial classification are clearly identified and unquestionably legitimate.'" *Id.* at 2419 (quoting *Croson*, 488 U.S. at 505). "Strict scrutiny" therefore requires UT "to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary … to the accomplishment of that purpose." *Id.* at 2418. That means that deference to UT is confined to the setting of educational goals, racial balancing is forbidden, *id.* at 2419, and "the reviewing court [must] verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity," *id.* at 2420. In the end, "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." *Id.*

C. Proceedings on Remand

On remand, the Fifth Circuit again affirmed the grant of summary judgment to UT. As it had before this Court, UT defended its use race on remand exclusively under the new "diversity within diversity" or "intra-racial diversity" rationale.[4] Indeed, UT went so far as to say that the "objectives" of "demographic parity" and "classroom diversity" had been "concocted by Fisher." Supplemental Br. for Appellees 39, *Fisher v. Univ. of Tex. at Austin*, No. 09-50822 (5th Cir. Oct. 25, 2013). The Fifth Circuit accepted UT's new interest in "intra-racial diversity,"

4. UT also raised the same standing argument it had raised before this Court. *Fisher I* Resp. Br. 16-17 n.6. The majority held the mandate rule foreclosed the argument. App. 8a-10a. Judge Garza rejected the argument on the merits. App. 57a-60a.

allowing UT to put aside the interests it had set forth in the Proposal and at prior stages of the case.

The Fifth Circuit framed UT's new diversity interest as one in enrolling a sufficient number of minorities from "integrated" high schools with superior socio-economic backgrounds. App. 31a-40a. The court acknowledged that UT's prior race-neutral AI/PAI system, combined with the Top 10% Law, had produced a substantial enrollment of underrepresented minority students and could achieve any critical-mass goal defined by numbers. App. 41a. The court did not address the *Parents Involved* problem raised by the negligible effect the use of racial preferences had on minority enrollment. Instead, the court found that UT's new interest "is not a further search for numbers but a search for students of unique talents and backgrounds," App. 40a, and that critical mass "goes astray when it drifts to numerical metrics," *id.*

The Fifth Circuit endorsed UT's claimed need to enroll underrepresented minority students from high-performing, majority-white high schools who "bring a perspective not captured by" students admitted through the Top 10% Law. App. 39a; *see also* App. 47a (asserting a need for "minorities with the experience of attending an integrated school with better educational resources"). The court found race-neutral alternatives unworkable because the Top 10% Law tends to admit "large numbers of [minority] students from highly segregated, underfunded, and underperforming schools." App. 38a.

The majority was critical of the Top 10% Law for "draw[ing] heavily from the population concentrations of the three major metropolitan areas of Texas—San

Antonio, Houston, and Dallas/Fort Worth," App. 35a, emphasizing that many of the school districts in those regions are comprised of "economically disadvantaged" African-American and Hispanic students, App. 36a, 38a. While not meaning "to demean the potential of Top Ten admittees," the court accepted UT's assumption that students from those communities, as a group, lacked the "unique talents and backgrounds [that] can enrich the diversity of the student body in distinct ways." App. 39a-40a.

To substantiate these group-based conclusions, the court conducted its own research, mostly from Internet sources. Based on its independent research, the Fifth Circuit concluded that students admitted under the Top 10% Law do not have the "unique talents and higher scores," App. 48a, required to "enrich the diversity of the student body," App. 40a. It further found that their admission is "measured solely by class rank in largely segregated schools," App. 49a, that do not offer "the quality of education available to students at integrated high schools," App. 35a.

With respect to narrow tailoring, the Fifth Circuit rejected all of Petitioner's arguments. The court found that the Top 10% Law was not a workable alternative because of its qualitative shortcomings. App. 41a. As to the argument that reliance on socioeconomic factors was an alternative, it concluded that courts "are ill-equipped to sort out race, class, and economic structures" and that race must be the criteria for admission until "skin color is no longer an index of prejudice." App. 46a. Ultimately, the court held that UT's system is narrowly tailored because it does not operate as a quota and is used as a part of a holistic admissions system. App. 51a.

Judge Garza dissented. App. 57a-90a. In his view, the Fifth Circuit had again "defer[red] impermissibly to [UT's] claims" and, absent deference, UT could not prevail. App. 57a. For several reasons, Judge Garza rejected UT's new claim that racial preferences are required to "promot[e] the *quality* of minority enrollment—in short, diversity within diversity" by identifying "the most 'talented, academically promising, and well-rounded' minority students." App. 73a.

First, Judge Garza found that UT did not establish that such an interest is compelling. The "stated ends are too imprecise to permit the requisite strict scrutiny analysis," App. 74a, because there is simply no way for a court "to determine when, if ever, [this] goal (which remains undefined) for qualitative diversity will be reached," App. 78a.

Second, Judge Garza faulted the majority for failing to require evidence from UT that racial preferences are needed to further that interest, even if it were cognizable. UT did not investigate, evaluate, or "assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity ... before deploying racial classifications to fill the remaining seats." App. 74a. Instead, UT created a litigation position that requires the court "to assume that minorities admitted under the Top Ten Percent Law ... are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." App. 75a. That assumption alone is "alarming" as it "embrace[s] the very ill that the Equal Protection Clause seeks to banish" by stereotyping students solely because they reside in "majority-minority communities." App. 76a. It also was unsupported by any

"evidence in the record," which strict scrutiny requires. App. 75a.

The Fifth Circuit denied rehearing en banc by a vote of 10-5. App. 95a. Joined by four dissenting judges, Judge Garza reiterated the objections to UT's program that he detailed in his panel dissent. App. 97a-98a. This Court granted review on June 29, 2015.

SUMMARY OF ARGUMENT

The question presented is straightforward: whether UT's use of race in admissions is "narrowly tailored to further compelling governmental interests." *Fisher I*, 133 S. Ct. at 2419. UT's use of race in admissions must fall under this standard. As a threshold matter, in order to use race to favor some applicants over others, like Abigail Fisher, UT needed to meet certain preconditions. UT failed to meet any of them.

First, a university must articulate a compelling interest in educational diversity with clarity. A reviewing court cannot perform strict scrutiny if it does not know the precise reasons why a university believes the use of race is necessary. Only a clear articulation of the precise goal permits a reviewing court to ensure the stated purpose is "both constitutionally permissible and substantial." *Fisher I*, 133 S. Ct. at 2418 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J.)). Here, UT has *never* been clear about precisely why it needs to use racial preferences. That was certainly true of the previous interests in demographic parity and classroom diversity. And it is equally true, as Judge Garza trenchantly explained, of UT's new "intra-racial diversity" rationale.

Such a vague and untestable reason could never survive strict-scrutiny review.

Second, a university must set forth its clearly-articulated reason at the time it makes the decision to use racial preferences—not nine years after the policy change and four years into litigation. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982). A shift in rationale is a telling concession that the prior goal (or the program implementing it) could not pass constitutional muster. Here, "intra-racial" diversity was *never even mentioned* in the Proposal—let alone as the basis for the decision to reintroduce race. It did not appear in this case until UT's merits brief in *Fisher I*. Allowing UT to rely on this post-hoc rationale for its use of race would violate a bedrock rule of strict scrutiny.

Third, a university must have evidence sufficient to show that the reason given for using race is compelling, that it is necessary to use race to achieve that interest, and that the chosen means are narrowly tailored. Actual evidence, rather than overbroad generalizations about the value of favored or disfavored groups, is necessary to ensure that the alleged interest was substantial enough to justify the use of race. *Fisher I*, 133 S. Ct. at 2418. Given that it did not invent the "intra-racial diversity" rationale until mid-litigation, UT has *no* evidence to support it. UT had every opportunity to bring forth evidence to support its use of race. Its failure to do so dooms its policy under strict scrutiny.

On this point, the Fifth Circuit's resort to its own factfinding to justify UT's policy is telling, if not decisive. Without any competent evidence in the record to support

UT's invented "intra-racial diversity" rationale, the *only* way to sustain UT's program was to engage in appellate factfinding based on the court's own Internet research. Even in ordinary cases, that would be inappropriate. It is inexcusable when the case involves the government's use of racial classifications.

Even if UT's "intra-racial diversity" interest could meet all these requirements, however, it still cannot survive strict-scrutiny review. To begin, this alleged interest relies on nothing more than a naked assumption that, as a group, minority students admitted via the Top 10% Law are less able to contribute to diversity than their non-Top-10% counterparts simply because they tend to come from poorer communities and majority-minority schools. UT never provided any support for its pernicious assumption that only those minority students from well-funded, mostly white high schools possess the talents and backgrounds necessary for UT to achieve a diverse student body. Nor could it; this kind of simplistic stereotyping about certain "groups" has long been recognized as incompatible with the Constitution's equal-protection guarantee.

Assuming *arguendo* that UT's assumptions could constitute a compelling interest, UT failed to show that race-neutral means could not achieve this supposed interest. Specifically, UT failed to show that its pre-existing race-neutral admissions program could not achieve the desired level of diversity. Indeed, UT administrators make *no* qualitative assessment of the minority students admitted in the Top 10%, and thus have no idea whether that race-neutral plan is capable of generating the "intra-racial diversity" that UT claims is essential. Given UT's failure to make even this most basic

inquiry, it cannot meet its burden of demonstrating the lack of race-neutral alternatives.

In fact, the evidence that is available on this question suggests that African-American and Hispanic students admitted under the Top 10% Law fare *better* when it comes to admission to highly competitive degree programs at UT. But even if UT sincerely believed that the African-American and Hispanic students admitted under the Top 10% Law were not, as a group, sufficiently diverse, it could take other steps to admit more students from affluent high schools before turning to the use of race. UT, for example, could have eliminated socio-economic and other preferences it uses to give a boost to poorer students. Or it could have awarded a preference to students from high-performing schools or to students with higher SATs. UT's failure to deploy these options before turning to race is fatal on strict-scrutiny review.

UT's claim for the need to achieve "diversity within diversity" is also a far cry from Justice Powell's limited endorsement of racial preferences in *Bakke*. UT's "holistic" admissions process is not using race to make head-to-head, comparative decisions between qualified applicants when there are only "a few places left to fill" in an entering class. *Bakke*, 438 U.S. at 324 (Appendix to opinion of Powell, J.). UT is deploying race as a universal factor affecting the score of every applicant. UT's invocation of *Bakke* thus cannot excuse its across-the-board deployment of race in the application process.

Finally, UT has abandoned its previously-asserted interests in state demographics and classroom diversity. As a consequence, they are not before the Court. Moreover,

UT was wise to let them go. Neither state demographics nor classroom diversity is a compelling interest. And, UT's interest in classroom diversity could never be implemented in a narrowly tailored way. Enrollment in most individual classes at UT is voluntary. Short of assigning all students a fixed course of study—an option in which UT has never expressed interest—there is simply no constitutional way to ensure that UT's preferred level of classroom diversity would be achieved.

Nor could UT justify using the purported lack of classroom diversity as a "red flag" to show it lacked diversity in its student body. Because of the Top 10% Law, UT is one of the most diverse public universities in the country. Once that level of diversity was achieved, the "minimal impact" of racial preferences on minority enrollment necessarily "casts doubt on the necessity of using such classifications," especially where race-neutral alternatives would have worked about as well. *Parents Involved*, 551 U.S. at 734. UT could have achieved similar gains through a number of race-neutral means, such as expanded outreach, uncapping the Top 10% Law, or making greater use of socioeconomic preferences.

In the end, the Fifth Circuit applied strict scrutiny in name only. This was directly contrary to this Court's clear instructions in *Fisher I*. Strategically vague policies, shifting rationales, and stereotypical assumptions about the quality of high-achieving students in majority-minority or poor high schools should not be permitted to defeat Ms. Fisher's individual right to equal protection. That should have been clear from *Fisher I*. But the Fifth Circuit's decision proves that a definitive resolution is needed. This Court thus should enter judgment for Ms. Fisher—

not only because the Court's decisions and the record require it, but also to counteract the evident reluctance of university admissions officers and lower courts to heed this Court's warnings that "racial classifications ... be subjected to the 'most rigid scrutiny.'" *Fisher I*, 133 S. Ct. at 2419 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).

ARGUMENT

I. UT's Rationale For The Use Of Race Lacks The Requisite Clarity To Survive The Application Of Strict Scrutiny.

Since *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954), it has been settled that "distinctions between citizens solely because of their ancestry are by their nature odious to a free people," *Fisher I*, 133 S. Ct. at 2418 (citation and quotations omitted). "Because racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications … be subjected to the most rigid scrutiny." *Id.* (citations and quotations omitted). Thus, "when government decisions 'touch upon an individual's race or ethnic background,'" as here, she "'is entitled to a judicial determination that the burden [s]he is asked to bear on that basis is precisely tailored to serve a compelling government interest.'" *Id.* at 2417 (quoting *Bakke*, 438 U.S. at 299 (Powell, J.)).

At the same time, the Court has held that "the interest in the educational benefits that flow from a diverse student body" permit a university to use racial preferences under limited circumstances. *Id.* This narrow exception to the Equal Protection Clause's "moral imperative of

racial neutrality," *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment), is permissible only so long as strict scrutiny remains capable of safeguarding the personal right to equal protection. That is, "meaningful" judicial review is a "precondition" to the recognition of this interest. *Id.*; *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). "Structural protections may be necessities" if the courts are unable to rigorously scrutinize "each racial preference that is enacted." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment).

Meaningful review is not possible, though, if the reviewing court does not understand the nature and scope of both the university's asserted educational interest and the deficiency that the use of race is intended to remedy. For that reason, the Court demands that the university "demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary … to the accomplishment of its purpose." *Fisher I*, 133 S. Ct. at 2418-19 (citations and quotations omitted). Only then can a court: (1) "'smoke out' illegitimate uses of race by assuring that [the university] is pursuing a goal important enough to warrant [such] a highly suspect tool," *Croson*, 488 U.S. at 493; (2) assess whether "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 stereotype," *id.*; and (3) ensure that the use of race is "a last resort," *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment).

UT has failed at every stage of this case to meet this important obligation to clearly describe and support

the basis for its decision to use racial preferences. UT's Proposal, which set forth the "actual purpose[s]" for reintroducing racial preferences, *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996), offered two justifications for its policy change: (1) aligning the racial makeup of its student body with the racial demographics of the State; and (2) achieving so-called "classroom diversity." *See supra* at 7-8. But even with respect to these articulated goals, UT was far from clear about what its precise interest was and when it would be met.

For instance, while the Proposal clearly asserted an interest in demographic parity, UT's description of that interest changed as the litigation progressed. UT first claimed that demographic parity is itself a compelling interest and acknowledged that it used demographics as the benchmark to determine which racial groups are under- and over-represented in its student population and thus entitled to or excluded from (as is the case for Asian Americans) racial preference. App. 301a. UT later retreated, eventually claiming that it paid "limited attention" to demographic imbalances and was not using race "so that its undergraduate population directly mirrors the demographics of Texas." App. 191a-97a.

UT ultimately chose to dilute the demographic interest presented in its Proposal to a vague and undefined concept: that it seeks only to reduce, not eliminate, "the degree of disparity" between its minority enrollment and state demographics. App. 197a. Such an undefined goal cannot be subjected to strict scrutiny. There is simply no way for a court to know what specific "demographic" interest UT was pursuing, why a race-neutral alternative could not achieve that interest, and when that "demographic" goal

would be satisfied. UT's equivocation undermines any claim that an asserted interest in demographic parity is "both constitutionally permissible and substantial." *Fisher I*, 133 S. Ct. at 2418.

UT similarly equivocated regarding its "classroom diversity" rationale throughout this litigation.[5] The Proposal claimed a compelling interest in ensuring that each classroom of five or more students had at least two African Americans, two Hispanics, and two Asian Americans. *See supra* at 7. At times, UT adhered to its position that it "still [had] not reached a critical mass at the classroom level." App. 212a (citations and quotations omitted). But given how "unachievable and unrealistic" that objective was, App. 321a (Jones, J., dissenting from denial of rehearing en banc), UT eventually took the view that classroom diversity was merely a "red flag that UT had not yet fully realized its constitutional interest in diversity," Resp. Br. 43. UT has still not identified a level of classroom diversity that it deems sufficient, leaving its "red flag" interest incapable of strict-scrutiny review. A court cannot evaluate whether UT's classrooms could be diversified through non-racial means based on an unclear "red flag" benchmark, or determine when that "red flag" will disappear.

These problems seemingly are what led UT, without any formal acknowledgement, to abandon the Proposal's stated objectives, *see infra* at 43-47, and assert that both

5. *Compare, e.g.*, Tr. of Oral Arg., *Fisher v. Univ. of Texas at Austin*, No. 08-263 (W.D. Tex.) (Doc. 118), at 38:4-39:14, *with* Letter, *Fisher v. Univ. of Texas at Austin*, No. 08-263 (W.D. Tex.) (Doc 113).

had been "concocted by Fisher," *see supra* at 16. In their place, UT now claims that its interest has always been in improving "intra-racial diversity," an interest that appeared for the first time on appeal. But, as would be expected for a litigation-conjured objective, it suffers from an even greater lack of clarity than the now abandoned interests preceding it.

Intra-racial diversity is not a "clearly identified" educational goal that would allow a court to determine "whether the means chosen by the University to attain diversity are narrowly tailored to that goal." *Fisher I,* 133 S. Ct. at 2419-20. As Judge Garza stressed in dissent, UT "has not provided any concrete targets for admitting more minority students possessing these unique qualitative-diversity characteristics—that is, the 'other types of diversity' beyond race alone." App. 73a. Nor has UT identified what diverse characteristics are supposedly lacking in Top 10% minority admittees, other than wealth and education in predominantly white high schools. And, finally, UT has not identified "[a]t what point ... this qualitative diversity target [would] be achieved." *Id.* UT "offers no method for this court to determine when, if ever, its [intra-racial diversity] goal (which remains undefined) … will ever be reached." *Id.* 77a. As a result, UT's "diversity within diversity" interest is just "too imprecise to permit the requisite strict scrutiny analysis." *Id.* 73a-74a.

Fisher I did not demand "clarity" from UT for form's sake. "The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review." *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting). That review cannot be conducted

without clearly defined objectives. Accepting UT's amorphous "diversity within diversity" interest would limit courts to the same "good faith" deferential review this Court rejected in *Fisher I*. In other words, if UT is permitted to determine for itself when its intra-racial diversity goals are met, there will be no way for courts to "'smoke out'" whether its use of race is "illegitimate." *Croson*, 488 U.S. at 721. Nor will there be any way to independently determine that race is being used "as a last resort." *Id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment). UT's lack of clarity therefore dooms its effort to rely on any interest in intra-racial diversity as a defense for its use of race.

II. UT's Post-Hoc Asserted Interest In Intra-Racial Diversity Cannot Survive Strict Scrutiny.

Setting aside UT's failure to satisfy the "clarity" requirement, UT's mid-litigation assertion of an intra-racial diversity interest still cannot survive strict-scrutiny review. First, the interest contravenes a basic ground rule of strict scrutiny: that the asserted justification is the actual rationale for the decision to use racial classifications and is substantiated by the evidentiary record. Second, the interest fails strict scrutiny on the merits: UT's use of race in the pursuit of intra-racial diversity is not narrowly tailored to advance a compelling government interest.

A. UT's Belatedly Raised Intra-Racial Diversity Interest Does Not Comply With The Ground Rules Of Strict Scrutiny.

Strict scrutiny imposes two ground rules that are preconditions to judicial review. First, the interest must

be "the actual [reason] underlying the discriminatory classification," *Mississippi Univ. for Women*, 458 U.S. at 730, not a post-hoc rationalization for classifications imposed on different grounds, *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). "The justification," that is, "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* at 533; *see also Shaw*, 517 U.S. at 908 n.4 ("[A] racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the [government]."). A change in reasoning in the middle of litigation indicates that the justification was "motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493.

Second, the university must produce evidence "to support [its] conclusion" that the use of race was necessary to achieve its asserted goal "at the time it acted." *Shaw*, 517 U.S. at 915. "[O]verbroad generalizations about the different talents [and] capacities" of the favored and disfavored groups do not suffice. *Virginia*, 518 U.S. at 533. In other words, the university must marshal "empirical evidence," *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting), supporting its conclusion, and it must do so "before it implements the classification," *Shaw*, 517 U.S. at 908 n.4; *see, e.g.*, *Mississippi Univ. for Women*, 458 U.S. at 729-30 & n.16 (invalidating a gender classification because the State "made no showing" of "discriminatory barriers faced by women"). In sum, employing race without contemporaneous evidence supporting the actual rationale indicates that the alleged interest is "too amorphous, too insubstantial" a basis to justify racial classifications. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting).

Honoring these ground rules ensures that strict scrutiny is "real, not feigned." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). Indeed, to ignore these ground rules would be to reduce the strict-scrutiny analysis to rational-basis review. *See Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 179 (1980) (explaining that, under rational-basis review, it is "constitutionally irrelevant [what] reasoning in fact underlay the … decision") (citation and quotations omitted); *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (explaining that, under rational basis review, there is "no obligation to produce evidence to sustain [the] rationality" of the classification as the "burden is on the one attacking [it] to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record"). This is the deferential review the Court's *Fisher I* decision rejected.

UT's invocation of intra-racial diversity fails both requirements. First, the Proposal did not set forth any interest in intra-racial diversity. UT instead claimed that it was reintroducing racial preferences to achieve demographic parity and classroom diversity. *See supra* at 7-8. UT tries to manufacture a hook for its intra-racial diversity interest in its Proposal, but it can only point to two sentences that say nothing about this newfound interest. Brief in Opposition ("BIO") 23. Both simply parrot *Grutter*. The first does so word-for-word. *See* SJA 1a (quoting *Grutter*, 539 U.S. at 330). The second paraphrases a single sentence from the decision. *Compare* SJA 23a, *with Grutter*, 539 U.S. at 337. Further, the quotations from *Grutter* say nothing about intra-racial diversity. They concern the way applications are processed and the need to use race in an "individualized" way—not a university's claimed justification for having not reached critical mass.

More fundamentally, the idea that two sentences plucked from UT's 39-page Proposal constitute the actual reasons for UT's resort to racial preferences is untenable. They could never even begin to establish that UT studied whether the pre-2004 race-neutral system led to a deficiency in intra-racial diversity, much less how adding race to the PAI factors would somehow remediate that supposed problem. The Proposal simply does not justify the reintroduction of racial preferences based on intra-racial diversity.

It is understandable why UT chose to change its rationale for racial preferences once forced to defend its system under traditional strict scrutiny. *See infra at* 43-47. That the handwriting was on the wall, however, neither licensed UT to defend its program on a post-hoc rationale nor empowered the Fifth Circuit to countenance that maneuver. UT's decision to rely on a rationale that was invented years after Ms. Fisher's application was denied by UT (and even longer after UT made the decision to inject race into its PAI calculus) must be rejected. Indeed, the judgment below could be reversed on this basis alone.

Second, UT never offered any evidence—much less contemporaneous evidence—that it chose to employ race as a factor in admissions decisions in order to compensate for a lack of intra-racial diversity. Applying the settled contemporaneous-evidence requirement to this case, *Shaw*, 517 U.S. at 908 n.4; *Hogan*, 458 U.S. at 730 & n.16, this Court instructed the Fifth Circuit on remand to "assess whether [UT] *has offered* sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity," *Fisher I*, 133 S. Ct. at 2421 (emphasis added). The Court

emphasized that UT's defense of its use of race must be based on "this record." *Id.* Not surprisingly, UT could point to *no* record evidence, let alone strong evidence, to substantiate its assertion—invented while this case was on appeal—that it had an unmet need for intra-racial diversity.

The studies underlying the Proposal purported to show that UT was failing to meet its demographic and classroom diversity goals. *See id.* at 2416. Critically, then, the Proposal did not mention intra-racial diversity, let alone point to or rely on evidence of any deficiency with respect to any such interest. And UT, despite having every opportunity to develop the record, never produced any such evidence during discovery nor submitted any other contemporaneous evidence to substantiate this interest during the summary judgment proceedings. *See supra* at 19-20. The summary judgment record, therefore, neither asserts this intra-racial diversity interest as the reason for using racial preferences in 2008 nor includes any evidence substantiating the need to use race in pursuit of this post-hoc rationale.

That UT had no evidence on this point is the very reason why the Fifth Circuit "ventur[ed] far beyond the summary judgment record," App. 75a n.15 (Garza, J., dissenting), and conducted its own research in an attempt to engineer a factual basis for UT's intra-racial diversity goal, *see* App. 24a n.70, App. 25a n.73, App. 32a-33a nn.97-98, App. 34a n.101, App. 35a-38a nn.103-120, App. 43a nn.123-26. But that was improper. As explained above, strict scrutiny prohibits this kind of judicial freelancing. Worse still, the Fifth Circuit's factfinding expedition violated this Court's instructions to apply strict scrutiny

based on the reasons UT had given and based on the record, *Fisher I*, 130 S. Ct. at 2421, as well as basic rules of appellate procedure, *see Maine v. Taylor*, 477 U.S. 131, 144-45 (1986) ("Factfinding is the basic responsibility of the district courts, rather than the appellate courts."). Judgment in Ms. Fisher's favor thus is warranted. Even apart from the fact that UT's intra-racial diversity interest is an improper post-hoc rationale, there simply is no competent evidence to substantiate it.

B. UT's Belatedly Raised Intra-Racial Diversity Interest Cannot Survive Strict Scrutiny In Any Event.

The Fifth Circuit's failure to follow the ground rules of strict scrutiny enabled it to endorse a novel interest in "intra-racial" diversity that foreclosed rigorous judicial review. UT bears the burden of demonstrating that its use of race "is precisely tailored to serve a compelling governmental interest." *Fisher I*, 133 S. Ct. at 2417. Subjecting intra-racial diversity to strict-scrutiny review demonstrates that UT's newfound rationale is not compelling and could not be implemented in a narrowly tailored manner.

Rigorous judicial review would have revealed that UT's alleged intra-racial diversity interest is stereotypical and far from compelling. Nothing in *Bakke*, *Grutter*, *Gratz*, or *Fisher I* supports this novel interest. It is not only too amorphous, *see supra* at 29-30, but the Fifth Circuit justified it based upon a naked assumption that, as a group, minority students admitted via the Top 10% Law are less able to contribute to diversity than their non-Top-10% counterparts simply because they tend to come

from poorer communities and majority-minority schools. *See supra* at 17-18. The Fifth Circuit accepted UT's group-based assumption that comparatively well-funded, predominately white high schools generate "students of unique talents and backgrounds who can enrich the diversity of the student body in distinct ways." App. 39a. Just as "[i]t cannot be entertained as a serious proposition that all individuals of the same race think alike," *Schuette*, 134 S. Ct. at 1634, it cannot be assumed that all minorities admitted via the Top 10% Law uniformly lack the "unique talents and backgrounds" UT claims to value, App. 40a.

UT appears willing to assume that this entire body of minority students lacks a "skill set" UT needs in order to achieve some version of diversity based on nothing more than minor differences in average SAT scores and an assumption that most are "economically disadvantaged" and were educated alongside very few, if any, white students. App. 36a. But these assumptions are as unproven as they are noxious. The Equal Protection Clause does not allow UT to "substitute racial stereotype for evidence, and racial prejudice for reason." *Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013) (Sotomayor, J., respecting denial of certiorari). This rank stereotyping is the "very ill that the Equal Protection Clause seeks to banish." App. 76a (Garza, J., dissenting).

Preferring minority students from wealthier, integrated backgrounds over minority students who have flourished despite economic hardships is at best counter-intuitive if not an outright distortion of the diversity rationale. The use of racial preferences in higher education was originally promoted as a way to open the door of opportunity for minority students

with limited access to educational resources. Moreover, favoring minority students from privileged backgrounds who have been educated at predominantly white schools is incompatible with the endorsement of "student body diversity" as a means of benefiting the education of all students by bringing together people with a variety of unique experiences and viewpoints. *Grutter*, 539 U.S. at 320. These wealthy minority students have the *same* experiences and viewpoints as the majority of UT's freshman class. The only difference is their race or ethnicity.

UT cannot advance its cause by framing its interest as helping it enroll the "African-American fencer" or "Hispanic … who has mastered classical Greek," Oral Arg. Tr. 61:8-10. UT of course has never shown that its use of race has actually helped it enroll these hypothetical students. Nor could it. The use of race as a factor can no more ensure that UT will enroll fencers or Greek classicists than using "leadership" as a factor can ensure that UT will enroll concert pianists. The use of race as a factor in admissions can distinguish students only as to one trait—race; and it thus can serve only one goal—to boost quantitative racial diversity within the student body at UT. *See* JA 261a ("Q: What kind of diversity does the use of race as a factor in admissions promote? A: Using race in admissions helps us achieve racial diversity."). On this record, UT's use of race has failed in that pursuit. *See supra* at 9-10; App. 247a-51a (Garza, J.).[6]

6. Using race to promote intra-racial diversity also pits minority students against each other contrary to *Grutter*. By focusing on "underrepresented minority students" as a group, *Grutter*, 539 U.S. at 316, 318, 319, 320, 335, 336, 338, 341, and defining critical mass in terms of those very same

Moreover, strict scrutiny requires that UT show that its asserted diversity interest cannot be satisfied through race-neutral means. *Fisher I*, 133 S. Ct. at 2420. ("The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."). UT must show, then, that the unidentified characteristics it seeks are uniquely present among minority applicants who are awarded racial preferences and gain admission through the "holistic" AI/PAI process because of them. Yet nothing in the record shows that the Top 10% Law actually enrolls more "economically disadvantaged" minority students who were educated in predominately minority high schools than does the AI/PAI review, much less that those students are incapable of contributing to a constitutionally legitimate form of diversity in the same manner as wealthy minorities from predominantly white schools. App. 74a-76a (Garza, J., dissenting). An array of unproven and counter-intuitive assumptions cannot satisfy UT's narrow tailoring burden.

Indeed, UT does not even "evaluate the diversity present in [the Top 10% Law] group before deploying racial classifications to fill the remaining seats" App. 74a. That is, UT "does not assess" whether Top 10% Law "admittees exhibit sufficient diversity within diversity, whether the requisite 'change agents' are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes." *Id.* UT instead asks the

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"underrepresented minorities," *id.* at 333, the Court disapproved of discrimination in admissions between and among those students in the preferred racial groups. *See id.* at 375 (Thomas, J., concurring in part and dissenting in part) ("[P]referring black to Hispanic applicants, for instance, does nothing to further the interest" in student-body diversity.).

Court "to *assume* that minorities admitted under the" Top 10% Law "are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." App. 75a. But because UT "offers no evidence in the record to prove this," and because the assumption is itself noxious, the Court "must therefore refuse to make this assumption." *Id.* In short, UT's intra-racial diversity interest is not compelling, and even if it were, UT still has failed to substantiate the necessity of using racial preferences to achieve it.

Because it has no evidence of its own, UT will surely point to the facts the Fifth Circuit relied on in endorsing this interest. But the Fifth Circuit's own factfinding fares no better. The court compiled aggregate data showing only that certain Texas school "districts serve majority-minority communities" and produce lower average SAT scores than more integrated Texas high schools. App. 76a. It does not attempt to identify students from those districts that enrolled at UT or consider their individual characteristics. Instead, the Fifth Circuit's factfinding venture simply confirms that majority-minority communities exist and then accepts UT's "standing presumption that minority students admitted [from them] under the Top Ten Percent Law do not possess the characteristics necessary to achieve a campus environment defined by '[intra-racial] diversity.'" App. 76a-77a.

The Equal Protection Clause forbids courts, no less than litigants, from relying on "overbroad generalizations about the different talents, capacities, or preferences" of minority children based solely on the racial makeup of their community and average SAT scores. *Virginia*, 518 U.S. at 533. Such generalizations are not a substitute

for "persuasive evidence" that racial preferences are necessary to achieve diversity. *Id.* at 539. By accepting UT's decision to view minority students admitted via the Top 10% Law this way, "the majority engages in the very stereotyping that the Equal Protection Clause abhors." App. 77a (Garza, J., dissenting).

UT's use of racial preferences also fails narrow tailoring because UT's own AI/PAI system is at war with this alleged interest in intra-racial diversity. UT claims to need racial preferences to enroll more minority applicants from "high-performing" high schools who, "on average, have higher SAT scores than their Top-10% counterparts." *Fisher I* Resp. Br. 33-34. Yet UT has incorporated socioeconomic factors into its PAI calculus making it *more* difficult for those same "high-performing" students to secure admission. Further, UT's outreach and scholarship programs target "predominantly low-income student populations." App. 26a. UT cannot seriously claim that it needs to use racial preferences to enroll a cohort of minority applicants it has chosen to handicap in the application process.[7]

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7. The Fifth Circuit's criticism of the Top 10% Law for "skimming" the economically disadvantaged minority students from the schools in these underfunded school districts, App. 34a, is similarly at war with itself given that it applauds UT's race-neutral "outreach and scholarship efforts, App. 25a. Those programs are designed to attract students from those very same schools In particular, the Court lauded the Longhorn Opportunity Scholarship Program, which is designed to boost enrollment of underrepresented minorities by guaranteeing scholarships to Top 10% "graduates of certain high schools throughout Texas that had predominantly low-income student populations and a history of few, if any, UT Austin matriculates," App. 26a; the

UT also has argued that using race in holistic admissions "giv[es] high scoring minority students a better chance of gaining admission to [UT's] competitive academic departments" than does the Top 10% Law. App. 49a. But the record demonstrates that, from 2005 to 2007, "underrepresented" minorities admitted via the Top 10% Law were accepted into the most competitive programs at substantially higher rates than minority students admitted through the holistic admissions process. In fact, no African American admitted holistically was accepted into UT's highly competitive Business, Communications, or Nursing programs from 2005 to 2007. At the same time, nearly half of all African Americans admitted via holistic review were cascaded into undeclared Liberal Arts. SJA 63a, 166a; Exhibit 24 to Pl.'s Mot. for Summ. J. at Tables 7d, 7e, *Fisher v. Univ. of Texas at Austin*, No. 08-263 (W.D. Tex.) (Doc. 94-27). It thus is UT's race-based holistic admissions—not the Top 10% Law—that has "clustering tendencies." App. 49a. These statistics demonstrate more broadly that underrepresented minority students admitted through the Top 10% Law are at least as qualified, if not more so, than underrepresented minority students admitted through holistic AI/PAI review.

First Generation Scholarship Program, which targets "applicants who are the first in their family to attend college," App. 27a; the opening of admissions centers and holding of recruitment events in Dallas, San Antonio, Houston, and other areas of the State with high concentrations of underprivileged minority students, App. 27a; and the creation of a Financial Aid Outreach Group, which was designed to convince low-income students to attend UT by educating them about the financial aid and support offered by the university, App. 29a.

UT's AI/PAI system does not even remotely advance its claimed interest. If UT wished to enroll more minority students from affluent communities, it could have eliminated from the PAI calculation the socio-economic and other preferences that operate to their disadvantage. UT also could have awarded a preference to students from high-performing schools or made the AI scoring (which takes SAT performance into account) a greater factor in admissions decisions. Any or all of these race-neutral policies could have increased the relative admission chances of affluent minority applicants as much or more than layering racial preferences on top of UT's preexisting AI/PAI system. Strict scrutiny imposes on UT "the ultimate burden of demonstrating, *before turning to racial classifications*, that available, workable race-neutral alternatives do not suffice." *Fisher I*, 133 S. Ct. at 2420 (emphasis added). UT has not met that burden.

Finally, UT tries to salvage its intra-racial diversity interest by pointing to *Bakke*. BIO 22-25. But UT's process bears no resemblance to the plan Justice Powell endorsed in *Bakke*. Justice Powell suggested that the use of race to make comparative decisions between qualified applicants when there were "a few places left to fill" in an entering class could be justified under a diversity rationale. *Bakke*, 438 U.S. at 324 (Appendix to opinion of Powell, J.). But *Bakke* assumed individualized admissions decisions where race is employed at the margins in head-to-head comparison of specific applicants rather than a mechanical scoring system where race is a universal factor. *Bakke* never contemplated the wholesale use of race in the scoring of all applicants. At most, then, *Bakke* might have applied had UT used an admissions system where a limited pool of applicants for a small number of places

was individually evaluated and where race was employed as a tiebreaker. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

But UT did not choose that path. It opted instead for a blunderbuss approach. The undisputed record shows that UT labels and scores each one of its approximately 30,000 applicants by race and then plots each on a grid based on their AI and (race-affected) PAI scores. *See Fisher I*, 133 S. Ct. at 2416. At the actual decision point, all that is displayed in each cell of the grid is the number of applicants with like AI and PAI scores. UT then selects applicants for admission by a mechanical line-drawing process based upon the number of students in each cell, not by hand-picking them based upon a head-to-head comparison. App. 102a-03a; *see also* JA 263a ("When we're evaluating the cell, we're not evaluating individual files at that point … we're making decisions on the number of students that are within that cell[.]"). Put simply, UT makes mechanical, score-driven, admissions decisions where race is a universal scoring element. That and the admissions system Justice Powell endorsed in *Bakke* could not differ more.

III. UT Appropriately Has Abandoned Its Representational And Classroom-Diversity Interests Because Neither Could Have Survived Traditional Strict-Scrutiny Review.

Although UT's Proposal rested on demographic parity and classroom-diversity rationales, UT since has abandoned those interests as defenses for its use of race in admissions decisions. *See supra* at 14. UT therefore can no longer rely on them. *See Wood v. Milyard*, 132 S.

Ct. 1826, 1830 (2012). In waiving those arguments, UT has tacitly (but correctly) admitted that neither interest is compelling or could be furthered by the use of racial preferences in a narrowly tailored way.

UT's now-abandoned interests are not compelling. UT's demographic proportionality objective is not a pursuit of "critical mass" but "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Grutter*, 539 U.S. at 329. This is nothing more than "outright racial balancing," which this Court has held "patently unconstitutional." *Fisher I*, 133 S. Ct. at 2419. The Fifth Circuit, in its vacated opinion, suggested that reliance on demographics was nothing more than paying "measured attention to the community [UT] serves." App. 194a. 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 v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986); *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; *Croson*, 488 U.S. at 499-50.

Nor is an interest in classroom diversity compelling. "The pernicious impact of aspiring to or measuring 'diversity' at the classroom level seems obvious upon reflection," as it ensures "no stopping point for racial preferences despite the logical absurdity of touting 'diversity' as relevant to every subject taught at [UT]." App. 329a (Jones, J., dissenting from denial of rehearing en banc). Ensuring diversity in each of the thousands of classrooms throughout the university thus goes far beyond

the interest endorsed as compelling in *Grutter*. Moreover, UT's definition of classroom diversity—having at least two African-American, two Hispanic, and two Asian-American students present, *see supra* at 7—is literally unattainable in classes of five and practically so in many other small classes. That this metric appears designed to achieve a particular outcome confirms that it is not compelling.

Even if an interest in classroom diversity were compelling, it could never be implemented in a narrowly tailored way. As UT's own 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. 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. Hence, there are no "means" available to UT that can be narrowly tailored to the "end" of classroom diversity.

There are several additional reasons why UT's abandoned interests fail narrow tailoring. UT has not met its burden of demonstrating why it has not yet achieved critical mass or provided any evidentiary basis—let alone a "strong" one—for its untenable conclusion that minority enrollment would fall short, absent racial preference, of the level needed to meet UT's educational goals. "Narrow

tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." *Fisher I*, 133 S. Ct. at 2420. UT's own admissions statistics demonstrate that UT effectively achieved critical mass no later than 2003, the last year it employed its race neutral admissions plan, and certainly would have achieved critical mass without them by 2007, the year before Ms. Fisher applied for admission. The Fifth Circuit acknowledged the same by concluding that UT was short of critical mass only by deferring to UT's "good faith conclusion" to that effect. App. 212a.[8]

Further, where (as here) racial classifications have only a "minimal impact" in advancing the compelling interest, it "casts doubt on the necessity of using such classifications" in the first place 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). In 2008, after classifying 29,501 applicants by race, UT enrolled 216 African-American and Hispanic students through the race-affected AI/PAI analysis. App. 247a-49a (Garza, J.). 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 have accounted for, at most, approximately 3% of the in-state freshman class. App. 249a. But, in fact, race

8. UT's own public statements provide confirmation that UT had reached critical mass. In 2000, UT 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." JA 393a. In 2003, UT proudly announced that it had "effectively compensated for the loss of affirmative action." JA 396a.

was not decisive for many of the 216 "underrepresented" minority students. *See supra* at 10. UT does not measure or have any way of knowing how many applicants actually benefit from the consideration of race, *see supra* at 9, but the number is undoubtedly "tiny." App. 328a (Jones, J.)

Moreover, there are numerous other available race-neutral means of achieving the same result. UT could have intensified its outreach efforts to African-American and Hispanic admittees in the hopes of boosting their enrollment; uncapped the Top 10% Law, which UT has acknowledged would increase minority enrollment at least as much or more than the use of racial classifications in admissions decisions; and/or boosted African-American and Hispanic enrollment through any number of minor adjustments to its PAI calculus giving greater weight to socio-economic factors.

In contrast to the ease with which UT could increase racial diversity via race-neutral alternatives, using racial classifications to achieve minimal gains comes at an extraordinarily high cost. 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.'" *Parents Involved*, 551 U.S. at 746 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).[9] That is far too high a price to pay for any marginal benefit the use of racial preferences may confer on underrepresented minority students.

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9. The "mismatch" effects of racial classifications are also well-documented. *See Fisher I*, 132 S.Ct. at 2431-32 (Thomas, J concurring).

This Court's equal-protection decisions *should* have made clear to universities and lower courts that the use of race in admissions decisions is constitutionally disfavored and permissible only when no reasonably available non-racial alternative would advance the educational diversity interest about as well. Unfortunately, the *Grutter* decision was read by many as allowing the routine incorporation of race into admissions decisions as long as the system is "holistic" and no quotas or fixed-point pluses are used. As a consequence, racial preferences have become a standard element of admissions systems of universities throughout the country.

Fisher I, which stressed the importance of real strict scrutiny should have forced a hard second look at these practices. But the Fifth Circuit's validation of intra-racial diversity opened yet another escape valve for widespread use of racial preferences. The time now has come for a definitive rejection of UT's racial preferences. Doing so will send a clear signal to universities that they must pursue race-neutral alternatives and use race only as a last resort, and it will remind the lower courts that they must rigorously apply strict scrutiny in order to fulfill their responsibility to safeguard the right of all prospective students to equal protection of the laws.

CONCLUSION

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

Respectfully submitted,

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