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 OF JAMES F. BLUMSTEIN, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

James F. Blumstein
Counsel of Record
Vanderbilt University
School of Law
131 21st Avenue S.
Nashville, TN 37203-1181
615-322-3710
james.blumstein@Law.Vanderbilt.Edu

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

OTHER AUTHORITY

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is filed by and on behalf of James F. Blumstein. Mr. Blumstein is University Professor of Constitutional Law and Health Law and Policy at Vanderbilt Law School and Vanderbilt University Medical School, and Professor of Management at Vanderbilt's Owen Graduate of Management. He has served as Chair, Tennessee State Advisory Committee to the U.S. Commission on Civil Rights and now serves as a member of the National Advisory Board of the Robert Wood Johnson Health Policy Center at Meharry Medical College. Professor Blumstein has been an active teacher/scholar in constitutional law for over forty years and believes that his perspective will assist this Court in its deliberations. His biography and c.v. are available at http://law.vanderbilt.edu/bio/james-blumstein.

In this brief, Professor Blumstein speaks for himself, not his institutional affiliations.[1]

---

[1] No counsel for any party authored this brief in whole or in part, nor did any party, person or entity other than *amicus* make a monetary contribution to the preparation and submission of this brief. Reimbursement for printing expenses will be sought from funds made available by Vanderbilt Law School to support faculty work related to professional/research interests. Such financial support does not signify a position by the University on the merits of the positions advanced in this Brief. The parties have blanketly consented to the filing of *amicus* briefs.

SUMMARY OF ARGUMENT

This is the second time that the racial preference scheme of the University of Texas at Austin is before this Court.

In Round One, *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) (*Fisher I*), the Court reaffirmed that race-preferenced admissions programs are subject to "strict scrutiny," the most rigorous and least deferential constitutional standard of review. *Fisher I* emphasized that strict scrutiny was not just a nominal but an actual requirement of review, including no deference on critical elements of strict scrutiny analysis – that is, seriously strict scrutiny. Accordingly, a public university such as the University of Texas (UT) has the burden to demonstrate that explicitly considering *race* as part of the admissions process is *necessary* to achieve the educational benefits of a diverse student body (a race-neutral construct that the Court had previously found to be a compelling interest in the unique context of university admissions, *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

Fisher I made it clear that courts will *not* defer to the university's judgment on the issue of *implementation* of an admissions policy aimed at achieving the compelling interest of "student body diversity" – the means-ends or narrow-tailoring analytical component of strict scrutiny. With respect to narrow tailoring, *Fisher I* commands that this Court's general approach and precedents regarding race-based conduct apply, with no special rules or deference for university admissions.

For purposes of deciding what constitutes a compelling interest under strict scrutiny, *Grutter* had shown special solicitude and deference to universities regarding admissions. That deference, uncharacteristic of strict scrutiny, was grounded in First-Amendment-based considerations of academic freedom and was limited to the particular context of institutions of higher education. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722-24 (2007). Under *Fisher I*, such solicitude and deference, inconsistent with general norms of strict-scrutiny analysis, are categorically inapplicable to the means-ends component of strict scrutiny in any context, including university admissions.

In short, *Fisher I* clarified *Grutter*. It did not disturb the *Grutter* deference to a university's formulating educational goals and missions. The race-neutral goal of achieving the educational benefits of "student body diversity" (as distinct from "racial diversity") is a compelling interest that, when properly tailored, can justify the use of race in a non-remedial setting. But *Fisher I* rejected *Grutter*'s special solicitude and deference to universities in their admissions process with respect to the narrow-tailoring component of strict scrutiny. When public universities such as UT seek to make use of *race* as a means of achieving the *race-neutral* goal of "student body diversity," seriously strict scrutiny applies. That means no deference is accorded to public universities such as UT on their overt use of race in the implementation of the goal of achieving "student body diversity," as broadly defined in *Grutter*.

As an outcome, race may be a component of "student body diversity." But when overtly used as a means of achieving the race-neutral objective of "student body diversity," that overt use of race by universities is presumptively unconstitutional and must be justified by the university both in terms of the educational benefits that are obtained for the overall educational mission of the university and in terms of the unavailability of reasonable, non-racial alternatives that achieve comparable educational benefits.

Fisher I doctrinally mainstreamed narrow-tailoring analysis under strict scrutiny; it cabined the special solicitude and deference for university admissions under strict scrutiny to the recognition of "student body diversity" as a compelling interest. But, as for implementation of that interest – the narrow tailoring component of strict scrutiny – no such special solicitude or deference applies. The Court's general "affirmative action" precedents apply to the narrow tailoring element of strict scrutiny, even when race is sought to be used non-remedially as in the context of university admissions (which is the context of *Fisher II* as now before this Court).

Since narrow-tailoring analysis is now mainstreamed, and race-based university admissions decisions must be seriously scrutinized, UT's use of overt racial criteria in the holistic admissions process is called into question by this Court's racial gerrymandering and peremptory challenge cases, which place strict limits on government's ability to use race as a proxy for other characteristics, such as experience, attitude, or outlook. These lines of cases have not, previously, been considered in analysis of

race-based university admissions, but *Fisher I*'s mainstreaming of narrow-tailoring analysis in university admissions requires this Court to come to grips with the disconnect between UT's rationale for using race-based admissions in its holistic review process and this Court's rejection of the use of race as a proxy for other characteristics – a principle that pervades the racial gerrymandering and peremptory challenge (jury selection) cases.

The legal framework established by *Fisher I* makes it very difficult for race-preferenced admissions programs to pass constitutional muster; that framework was essentially ignored by the Court of Appeals in this case.

ARGUMENT

I. *Fisher I*

Fisher I reaffirmed (i) the principle that racial classifications are subject to strict scrutiny and (ii) the principle of racial reciprocity in the application of equal protection – *i.e.*, racial classifications are subject to strict scrutiny "regardless of the race of those burdened or benefited." *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

A. Seriously Strict Scrutiny

Strict scrutiny has two parts or prongs. Under the first part, the Court requires that the overt use of race be justified by a compelling interest, to be judged by a court with the burden of justification on the governmental entity seeking to use race overtly in its decisionmaking process. Under the second part, the Court requires a very tight relationship between the

means used and the compelling interest pursued. The use of race to achieve a compelling interest, such as the race-neutral compelling interest of "student body diversity," must be justified by the governmental entity (UT) and carefully evaluated by the Court. Approval follows only if no race-neutral means are reasonably available to achieve the compelling interest – in this case, the educational benefits from the race-neutral objective of "student body diversity."

Fisher I put back the "strict" in strict scrutiny with respect to the narrow tailoring component of the analysis.

Strict scrutiny contemplates the loss of the presumption of validity that normally attaches to government conduct and places on the government the burden of justification for using race-based conduct. *Fisher I*, 133 S. Ct. at 2419-20 ("The University must prove that the means chosen… to attain diversity are narrowly tailored to that goal"). *Fisher I* emphasized just how "strict" the strict-scrutiny standard really is. *Id*. at 2419 ("Strict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate'") (internal cite omitted; brackets in original). Racial classifications are "contrary to our traditions and hence constitutionally suspect" so they must be subjected to "the most rigid scrutiny." *Id.*, at 2418 (internal cites omitted).

Judicial deference is inconsistent with strict-scrutiny analysis. *Fisher I* did not disturb the deference accorded to governmental (academic) interests in the context of higher education as

recognized in *Grutter v. Bollinger*, 539 U.S. 306 (2003). It assumed that such deference, albeit inconsistent as a general matter with strict scrutiny, would remain untouched on university academic/educational matters. That is the first prong of strict scrutiny – determining whether an interest advanced is compelling.

But *Fisher I* drew a critical distinction on the deference issue between reviewing a university's academic/educational objectives (adhering to or at least not undoing *Grutter*'s deference) and reviewing the means used for implementing those objectives – *i.e.*, the narrow tailoring component of strict scrutiny. On narrow tailoring, "the University receives no deference," 133 S. Ct. 2420, meaning that "[t]he University must prove that the means chosen … to attain diversity are narrowly tailored to that goal." *Id*. at 2419-20. Strict scrutiny means that courts cannot defer to a university at the *implementation* stage. That holding mainstreamed strict-scrutiny narrow-tailoring analysis in the context of race-based university admissions with strict-scrutiny narrow-tailoring analysis of other race-based classifications. *Id*. at 2421 ("The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts"). This was the most significant doctrinal clarification of *Fisher I*.

The question for the Court in *Fisher II* is whether the Court of Appeals majority adhered to the requirements of traditional narrow tailoring in the context of strict scrutiny. It did not.

Narrow tailoring requires a public university such as UT to prove that it cannot achieve the educational benefits of the race-neutral construct of "student body

diversity" without considering race, and the university receives no deference on that issue. That is, *Fisher I* recognized that "student body diversity" means more than "racial diversity" and that the attainment of the educational benefits of "student body diversity" must be pursued through "race-neutral" means if they are "workable" and "available." Only if UT can demonstrate that "workable race-neutral alternatives do not suffice" to achieve the educational benefits that emanate from "student body diversity" can UT "turn[] to racial classifications." *Fisher*, 133 S. Ct. at 2420.

Upon analysis, the decision of the Court of Appeals does not come close to satisfying the rigorous narrow tailoring analysis required by *Fisher I*. Among other flaws, the Court of Appeals' decision errs by impermissibly conflating the achievement of "racial diversity" with the achievement of the recognized compelling interest of "student body diversity," a race-neutral concept. "Racial diversity" is a component of "student body diversity," but the narrow tailoring inquiry only allows the overt use of race to achieve "student body diversity" as a "last resort," *Parents Involved*, 551 U.S. at 735 (Opinion of the Court, quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in judgment)), when the broad educational goals of student body diversity cannot otherwise be achieved. Unfortunately, and impermissibly, the use of race is the first and only resort that UT and the Court of Appeals checked into in this case.

B. Racial Reciprocity

Fisher I also reaffirmed the principle of racial reciprocity in the application of equal protection – *i.e.*,

racial classifications are subject to strict scrutiny "regardless of the race of those burdened or benefited." *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

This is the race-as-poison or race-as-cancer theory: "[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). "The rationale for adopting the racial-reciprocity principle is that the use of race in a pluralistic, democratic society is poisonous (or like cancer)." James F. Blumstein, Grutter *and* Fisher*: A Reassessment and a Preview*, 65 VAND. L. REV. EN BANC 57, 61 (2012) [hereinafter Blumstein]. Racially discriminatory laws are thus subjected to strict-scrutiny review even when race is not used hegemonically by the white majority to subjugate or stigmatize racial minorities. Even though affirmative action programs do not use race hegemonically, the "analysis and level of scrutiny… do not vary simply because the objective appears acceptable." *Fisher I*, 133 S.Ct. at 2421 (internal cite omitted).

II. The Analytical Treatment of Racial Classifications

"It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved*, 551 U.S. at 711. The Equal Protection Clause, as a general proposition, embraces the principle of "racial *neutrality* in governmental decisionmaking." *Miller v. Johnson*, 515 U.S at 904 (emphasis added). Even when the white majority uses racial classifications ostensibly to *benefit* racial minorities, the purposes of equal protection are

implicated because such classifications promote racialism – the mindset to use race as an appropriate and reliable means of classifying people or distributing benefits. Racialism is a constitutional evil to be avoided because it "stimulate[s] society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs." *Shaw v. Reno*, 509 U.S. 630, 643 (1993)(internal cite omitted). The use of race, even non-hegemonically, is dangerous and suspect – like a poison or cancer – and that insight undergirds the Court's racial reciprocity principle that all race classifications are subject to strict scrutiny. Blumstein, *supra*, at 61. "[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Gratz v. Bollinger*, 539 U.S. at 270 (internal cite omitted).

As previously noted, strict scrutiny has two components – judicial review of the justifications put forth to validate a race-based classification and judicial review of the relationship of means and ends (the narrow tailoring inquiry). The justifications must be compelling or overriding. And the means-ends "fit" must be very tight. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (my first case). The nature of strict scrutiny is judicial non-deference. The traditional presumption of validity is inapplicable, indeed reversed; the government, which seeks to use race-based classifications, must bear the burden of justification on both prongs of the strict scrutiny analysis.

A. The Compelling Interest Recognized in *Grutter*: Student Body Diversity vs. Racial Diversity

Before 2003, when this Court decided *Grutter*, this Court had reserved the use of race to the remedial context. The only "compelling interest" recognized as justifying government's use of race in the school context was remedying the ongoing effects of identified intentional racial discrimination. *Parents Involved*, 551 U.S. at 720 (recognizing the "compelling interest of remedying the effects of past intentional discrimination").

Grutter, for the first time, upheld the use of race-based governmental conduct on non-remedial grounds. *Grutter* upheld under strict scrutiny the use of race in university admissions to achieve "student body diversity" at an institution of higher education. 539 U.S. at 325.

A "key limitation" of the compelling interest recognized in *Grutter* was its application to a "specific type of broad-based diversity," *Parents Involved*, 551 U.S. at 725, which included a "broader assessment of diversity, and not simply an effort to achieve racial balance, which … would be 'patently unconstitutional.'" *Id*. at 723 (internal cite omitted). The compelling interest recognized in *Grutter* was race-neutral – "student body diversity," *Grutter*, 539 U.S. at 328 – not "racial diversity." Under *Grutter*, "student body diversity" can include "racial diversity" among its elements, but it also takes into account "all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id*. at 334 (internal cite omitted). And, importantly, the educational

benefits from "student body diversity" – the race-neutral objective – can be achieved in some circumstances without substantial racial diversity; whether or not and to what extent racial diversity must be part of the student body diversity equation depends not on considerations of racial justice for racial minorities but on the unique contributions that racial minorities might make, in particularized and carefully defined educational settings, to the overall educational experience of all matriculated students.

The rationale for finding that "student body diversity" is a compelling interest in the context of higher education admissions was the goal of "obtaining the educational benefits that flow from a diverse student body" in the higher education setting. *Id*. at 328, 343. *Grutter* permitted the positive use of race in order to achieve the educational benefits derived from the compelling interest of student body diversity.

The justification for the positive use of race in *Grutter* did not focus on redressing harms to or achieving some form of justice for racial-minority students; remediation was not the objective or the supporting rationale. Accordingly, the specific interests of minority students who may have been victims of past discrimination in a broad societal sense were not part of the analytical calculus. And no showing of harm to racial minorities or race-specific benefits to racial-minority students was required or even part of the analytical framework in *Grutter*.

Instead, the focus was on the educational benefits to all students who matriculated to the university. And "[t]he students who secured the lion's share of the educational benefits from student body diversity were

white students who matriculated" to the university. Blumstein, *supra*, at 65. That is, under the diversity rationale, minority students are valued because of the "potential 'to contribute to the learning of those around them,'" *Grutter*, 539 U.S. at 315 (internal cite omitted), and racial minority students "receive preference not because of their own interests, but as instruments for improving educational opportunity and attainment for all matriculated students (most of whom are white)." Blumstein, *supra*, at 65-66. As I have noted, "[t]his rationale for providing preference to minority students commodifies them, turning them into instruments of education primarily for others – vehicles for the advancement of the educational mission of a public university." *Id*. at 66.

This commodification of minority students on the basis of their race is problematic, to say the least, yet it reinforces the point that the objective of student body diversity must be educational improvement for the university as a whole. The unit of analysis is not opportunity for minority students but educational benefit for all students in the overall program of the university. And that is where an understanding of narrow-tailoring analysis becomes critical after *Fisher I* (and where the Court of Appeals erred).

B. Narrow Tailoring

Grutter seemed to call for deference not only to a university's goal of achieving student body diversity but also to the narrow tailoring analysis. *Grutter* assumed that "racial diversity" was a necessary component of "student body diversity" and that racial diversity could not be achieved without the use of racial preferences. Analytically, that initial assumption was

erroneous; it must not be assumed but proven in particularized contexts. The broad concept of student body diversity is race-neutral and has many components. Adding additional components may achieve the educational benefits of student body diversity even if not all components of student body diversity are present. After all, in *Grutter* itself, not all components of student body diversity were present in a critical mass, 539 U.S. at 381 (Rehnquist, C.J., dissenting), yet the overall educational objectives of student body diversity were attained.

Fisher I clarifies and corrects the misperception that "racial diversity," in all contexts, is a *sine qua non* of achieving the educational benefits of "student body diversity." This is one place where the Court of Appeals herein went astray. In the holistic admissions review process, the Court of Appeals considered the inclusion of different groups of minority students – what has been called intra-racial considerations. But, analytically, the narrow tailoring analysis does not even get to the question of whether such intra-racial factors are permissible and if so under what standards. There is a prior question, unaddressed by the Court of Appeals: In the holistic review process, can UT justify the claim, under serious strict scrutiny analysis, that the son or daughter of a black professional family makes a "necessary" contribution to the overall educational benefits of UT's educational program as compared to a similarly situated child of a white professional family? Only if UT bears its burden of making such a threshold showing in the context of the Top Ten Percent program can the analysis proceed to the question whether UT has adequately shouldered its burden of establishing that the overt use of race itself

is needed to achieve the incremental, race-neutral educational benefits claimed for student body diversity.

The Court of Appeals erred by following *Grutter* rather than *Fisher I* in this portion of its analysis, assuming that holistic review (the admissions process for slots not allocated under the Top Ten Percent program) must consider race overtly in order to increase the representation of a different group of minority students than are being admitted under the Top Ten Percent program.

To summarize, *Fisher I* alters *Grutter*'s narrow-tailoring analytical approach; it puts the "strict" back into the narrow tailoring aspect of strict scrutiny, even for university admissions. *Fisher I* makes clear that no special deference attaches to university admissions decisions in the narrow tailoring component of strict scrutiny. State universities like UT bear the burden of proving that they cannot achieve the educational benefits of student body diversity without considering race, and the state university receives no deference on that question.

C. The Application of *Fisher I*'s Narrow Tailoring Analysis: Lessons from the Racial Gerrymandering and Peremptory Challenge Cases

For purposes of narrow tailoring analysis under strict scrutiny, *Fisher I* treats university admissions as it does other strict scrutiny contexts. 133 S. Ct. at 2419-21. It rejected a watered-down version and instead mandated the same strict-scrutiny standard on narrow tailoring that it would apply to any other racial classification – no deference. And, given the Top Ten

Percent program in Texas, which guarantees admission to students who graduate in the top ten percent of their high school class and which provides considerable diversity at UT (racial and otherwise), the university must establish that the incremental benefit to the educational process beyond the baseline created by the Top Ten Percent program justifies the use of race as a last resort. See *Parents Involved*, 551 U.S. at 734 (|[T]he minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications").[2]

The university cannot make that showing because clear non-racial alternatives exist. For example, expanding the Top Ten Percent program would increase racial diversity as a component of student body diversity even further and would not substantially threaten the university's claim to selectivity (a concern regarding Michigan Law School in *Grutter*). More generous need-based financial aid might be another race-neutral alternative, successfully implemented at other highly-competitive academic institutions. That is an especially strong attraction if financial aid is in the form of a grant rather than a loan.

UT seeks to redirect attention to concerns about the diversity-insufficiency associated with the Top Ten Percent program itself, which is a state-adopted and mandated program that is not under challenge in this proceeding.

---

[2] This component of *Parents Involved* was contained in Section III.C. of the opinion, which was an Opinion of the Court joined by five justices.

The Court of Appeals accepted UT's position that racial preferences were needed in order to admit minority students who would not be admitted based on their own indicators and who did not qualify under the Top Ten Percent program. These apparently are minority students at high schools with higher-achieving students, whose objective scores would not result in admission and who themselves are not in the top ten percent of students in their schools.

UT must show that "it is 'necessary' … to use race to achieve the educational benefits of diversity," which "involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." *Fisher I*, 133 S. Ct. at 2420. And given the baseline established by the Top Ten Percent program, UT must show that the incremental benefit from the overt consideration of race is justified on educational grounds. *Parents Involved*, 551 U.S. at 734 and note 2, *supra*. There is nothing in the decision of the Court of Appeals that would indicate that UT has carried its burden under the seriously strict scrutiny of narrow tailoring called for in *Fisher I*.

While "racial diversity" may be a component of "student body diversity," it is distinct from the racially-neutral construct of student body diversity. There are, therefore, two distinct inquiries under narrow tailoring, both subject to the highly non-deferential review that generally characterizes strict scrutiny.

First, is increased "racial" diversity necessary to achieve the educational benefits of "student body diversity" in the portion of the admissions process dedicated to holistic review? This point must be proved by UT without judicial deference, not assumed.

Second, and from an educational perspective and in the context of the Top Ten Percent program, if "racial diversity" is a necessary component of "student body diversity" for the holistic admissions component, can that racial diversity be achieved in a manner that does not rely on the use of overt racial criteria? Are there race-neutral alternatives that are "workable" and "available"? Under *Fisher I*, only if the university can demonstrate that "workable race-neutral alternatives do not suffice" to achieve the educational benefits that derive from student body diversity can a university "turn[] to racial classifications." *Fisher I*, 133 S. Ct. at 2420. And that inquiry must take into account the baseline of diversity at UT in light of the Top Ten Percent program, a baseline level of student body diversity that was absent from the Michigan Law School in the *Grutter* case.

The Court of Appeals did not address the first question and dodged the second one. Yet the university had the burden of establishing the validity of its racial preference program on both issues, something it just assumed without confronting.

(1)

The university asserts that it must use racial preferences to admit certain types of minority students who would not otherwise be admitted; but it does not show why additional "racial" diversity in the holistic admissions process is "necessary" to attain the educational advantages of student body diversity in light of the baseline established by the Top Ten Percent program. Why are minority students at high schools with higher-achieving students so critical to the attainment of student body diversity at UT (from the

point of view of enhancing the educational experience primarily for other matriculating or already matriculated students)?

UT's apparent response is that minority students at high schools with higher-achieving students are different from white students at those high schools in terms of their value to contributing to the educational benefits of all students at UT. This assumption of the differences between white students and minority students at the same high school and their contribution to the educational process at UT comes dangerously close to racial stereotyping and racial profiling – using race as a proxy for other (unarticulated and undefined) values or characteristics. Moreover, these assumptions run counter to this Court's warnings in analogous cases – involving racial gerrymandering and peremptory challenges in jury selection – that have never before been analyzed or considered in the context of achieving student body diversity at a university.

This Court has applied strict scrutiny to racial classifications in multiple contexts. But a search of the Court's opinion in *Grutter* shows that it did not cite or mention analogous cases that have arisen in different contexts such as racial gerrymandering or peremptory challenges in the process of jury selection. Now that *Fisher I* has mandated that narrow-tailoring analysis in the context of overt race-based university admissions must be mainstreamed, so that other similar precedents from other areas are operative, *Grutter*'s failure to consider these other contexts is called into question.

UT's use of student body diversity to justify race-based admissions makes race-based assumptions

about students that are impermissible (or at least highly questionable). UT's consideration of race in the holistic admissions process assumes that minority students from a particular high school, with a high-achieving student body, can be differentiated from white students from that same high-achieving high school, solely on the basis of race. UT assumes that the use of a race-based distinction is necessary or indispensable to achieving a marginal level of increase in educational attainment for all matriculated students at UT – beyond that achieved under the Top Ten Percent program.

To be clear about this – and its odious foundation –, the Court of Appeals credited UT's assertion that it needed to (not just wanted to) use race-based criteria in the holistic admissions process because, somehow, the child of a black professional family would add more to the educational mission of UT than the contribution of the child of a white professional family from the same high school with the same socioeconomic background and circumstances and in light of the level of student body diversity already achieved under the Top Ten Percent program.

This is using race as a proxy for other things, such as experience and attitudes. It constitutes forbidden stereotyping (even profiling) that the Court has prohibited in other contexts, such as racial gerrymandering and peremptory challenges in jury selection. Those other contexts are part of the mainstream narrow-tailoring analysis that *Fisher I* now mandates as applicable in the context of university admissions. See Blumstein, *supra*, at 70 ("[N]arrow-tailoring analysis… calls into question the assumption

that the use of racial criteria or the achievement of racial diversity is necessarily required to achieve student body diversity," an analysis that is "buttressed by the jury-selection (peremptory challenge) cases and the racial gerrymander cases," which "*Grutter* [did] not consider or discuss and that are in tension with *Grutter*").

UT's use of race-based criteria in the holistic admissions process is premised on assumptions that narrow-tailoring analysis discountenances – assumptions that race can be used as a proxy for other characteristics such as experiences and attitudes. This Court has repeatedly rejected the underlying assumption that a person's race is a legitimate or reliable proxy for his or her experiences, beliefs, or behavior. Such an assumption is an impermissible stereotype, an improper form of racial profiling, and is in considerable tension with this Court's racial gerrymandering and peremptory challenge cases.

In the context of racial gerrymandering, the Court has invalidated legislative districting plans in which racial considerations predominate because the idea that "members of the same racial group … think alike, share the same political interests, and will prefer the same candidates at the polls" constitutes "impermissible racial stereotypes." *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (internal cite omitted). "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630-631 (1991) (as quoted in *Shaw*).

Likewise with jury selection. Race-based peremptory challenges are unconstitutional because they use race as a proxy for a juror's attitudes, experiences, competence, or bias. "Race and sex are not and cannot be accurate proxies for a juror's attitudes, 'bias or competence,' or 'assumption of partiality.'" Blumstein, *supra*, at 71.

Thus, private parties that exercise peremptory jury challenges through the use of race are making judgments about juror attitude, experience, competence, and bias. Race (or sex) may enter the peremptory-challenge decision based on probabilistic judgments related to a prospective juror's background and experience. A member of a racial minority may have a set of special or distinct experiences that would shape perceptions about behavior or evidence. The same is true regarding gender-based experiences. But notwithstanding that there may be a "shred of truth" in such generalizations, such "gross generalizations" based on race or sex have been deemed impermissible in the jury-selection process – insufficient to satisfy strict (race) or intermediate (gender) scrutiny. *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127, 139-40 & n.11 (1994).

That is, race and sex are not and cannot be accurate proxies for a juror's attitudes, "bias or competence," *Powers v. Ohio*, 499 U.S. 400, 410 (1991), or "assumptions of partiality." *Georgia v. McCollum*, 505 U.S. 42, 59 (1991). A "race stereotype" cannot serve as a proxy for juror fairness; modes of investigating impartiality other than race must be "explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on

ancestry or skin color." *Edmonson v. Leesville Concrete Co.*, 500 U.S. at 631.

By applying mainstream narrow-tailoring analysis to race-based university admissions cases, *Fisher I* requires that the same non-racial "rational way" must apply not only in jury selection but also in applying narrow tailoring in the context of university admissions. An objective of jury selection is the achievement of an impartial jury that reflects a cross section of the community. Those objectives must be satisfied under the peremptory challenge cases without the overt use of racial criteria.

UT has not explained and cannot explain why these principles of race-neutrality – and the impermissible use of race as a stereotypical proxy for other characteristics that the jury selection and racial gerrymander cases decry – are inapplicable to its decision to apply racial criteria in its holistic admissions process. Indeed, *Fisher I*, by eliminating any special solicitude or deference toward a public university's admissions process, explicitly applies mainstream narrow-tailoring analysis to the university admissions process. Under the circumstances, UT has not set the foundation for its use of racial criteria in its holistic admissions process and just cannot begin to have made the necessary showing. UT's use of racial criteria in its holistic admissions process is premised on the assumption that similarly situated white students and black students, of comparable socioeconomic and cultural backgrounds from the same high schools, should be treated differently on account of their race because of some undefined and amorphous differential contribution to the educational mission of UT. This is

the prohibited use of race as a proxy for other values that runs afoul of the racial gerrymandering and peremptory challenge cases and of *Fisher I*. This Court should make short shrift of UT's positon.

(2)

In addition to addressing the question whether it can use race as a proxy for other values in the context of its holistic admissions process – and whether it needs to achieve racial diversity in the holistic admissions process in order for all matriculated students at UT to achieve the educational benefits of student body diversity –, UT must make the further showing that it cannot achieve "racial diversity" (even if that were permitted) without the use of overt racial criteria because of the unavailability of workable and reasonable alternatives.

UT did not and cannot make any such showing. For purposes of achieving student body diversity, UT compares one group of minority students – those admitted via the Top Ten Percent program – with minority students admitted through holistic review. But non-racial alternatives for achieving student body diversity, such as expanding the scope of the Top Ten Percent program or more elaborate financial aid offerings, are obvious non-racial alternatives.

UT's objections to these kinds of programs are that they would not attract the "right kind" of minority student. But UT has not established that it can use race in the holistic admissions process in order to prefer minority students, as such, to non-minority students on the basis of achieving the educational goals of student body diversity. It is an *a fortiori* case that

UT cannot explain under the student body diversity rationale how preference to one group of minority students is warranted because they differ from another group of minority students on the basis of such characteristics as socioeconomic status.

Minority status cannot be determinative, by itself. That would be unconstitutional as racial balancing; and it would contradict the teachings of the racial gerrymandering and peremptory challenge cases. So, there is no basis for using an overt race-based classification to prefer one group of minority students to another group of the same race, thereby disadvantaging other students (non-minorities) based on racial criteria. The "intra-racial" differences in holistic review are non-racial. Non-minority students are excluded from admission to UT based on their race, but the university has not explained how the racial preferences, with their discriminatory aspects as against members of other racial groups, contribute indispensably to the educational benefits of "student body diversity." This is either unconstitutional as racial balancing or impermissible as a form of racial stereotyping. The "intra-racial" theory, embraced by the Court of Appeals, just cannot be justified under *Fisher I*'s seriously strict scrutiny.

In sum, the so-called intra-racial theory is a non-starter analytically; it cannot be used as a basis for race-based preferences under the student body diversity theory embraced in *Grutter* and refined in *Parents Involved*. UT's claim that reasonable, non-racial alternatives to the overt use of race are unavailable in the holistic review process is based on an analytical paradigm error; it rejects non-racial

alternatives on spurious grounds related to different characteristics among minorities, but it overlooks the self-evident point that use of non-racial considerations such as socioeconomic status are mandated under *Fisher I*. Such non-racial considerations are properly a part of holistic review, but they are not what UT's program does. UT's holistic admissions program concentrates on socioeconomic differences, but only within racially-defined categories.

Consideration of non-racial socioeconomic factors in admissions is appropriate, even mandated. But UT's holistic admissions process does not use such socioeconomic factors to avoid the use of race; its consideration of such factors is racially defined – comparing minority students admitted under the Top Ten Percent program with minority students admitted through holistic review. But the required analytical comparison is a consideration of the broad student body diversity factors in totality, and UT must justify under narrow tailoring its use of overt racial preferences in the holistic review process. It has not done so, and it cannot do so without resorting to impermissible racial stereotypes that use race as a proxy for other characteristics – and in a context in which non-racial characteristics such as socioeconomic and cultural background of students in holistic review are similar (with students under holistic review coming from the same or similar schools).

III. The Remedy Issues

The Court of Appeals essentially ignored the analytical refinements to narrow-tailoring analysis set out in *Fisher I*. The Court of Appeals' opinion reflects the ongoing temptation to racialize university

admissions, despite this Court's warnings in *Fisher I* that the narrow-tailoring component of strict scrutiny in the university admissions context has been mainstreamed and must be harmonized with comparable doctrine in other areas. No special solicitude or deference on narrow tailoring applies to university admissions, and in *Fisher II* this Court should reiterate that critical holding from *Fisher I*.

This Court should re-emphasize that *Fisher I* (through *Fisher II*) meant what it said – seriously strict scrutiny applies to narrow-tailoring analysis of overt race-based university admissions practices, and the norm of racial reciprocity is a serious principle to be applied with vigor.

"Racial diversity" may be a component of but is distinct from *Grutter*'s "student body diversity." Before a public university like UT can make use of race-based criteria under the banner of promoting "student body diversity," it must shoulder the burden of explaining and justifying why "racial diversity" and the use of racial preferences to achieve racial diversity are essential to the achievement of the educational benefits of student body diversity. The need for the use of race must be proven, not assumed, and the lessons of the racial gerrymandering and peremptory challenge cases must be incorporated into the analysis.

Without special case-specific and context-specific proof and analysis, race cannot be used overtly in the holistic admissions review process. Why is it that children of minority professionals, with comparable socioeconomic and cultural advantages to their white counterparts, may be given preferences, based on their race, in order to improve the educational outcomes at

UT – on top of the educational benefits already achieved in terms of the substantial student body diversity resulting from the Top Ten Program? As the racial gerrymandering and peremptory challenge cases teach, the justification cannot be that race can be used as a proxy for other characteristics in the holistic admissions process. And, in the context of holistic review, UT cannot preference the "right kind" of minority student, based on race, when that means that such minority students are preferenced compared to similarly situated non-minority students who are alike in all relevant and identified ways except for their race.

This Court should reverse the Court of Appeals and make explicit that the principles regarding non-use of race as a proxy for other characteristics, as reflected in the racial gerrymandering and peremptory challenge (jury selection) cases, are a critical part of the narrow tailoring analysis regarding race-based university admissions.

And, because UT has had more than a fair opportunity to make the required showing, and has not done so, the Petitioner should be given the relief she seeks. Such relief would be one way to communicate the seriousness of the doctrinal clarifications of *Fisher I*. This Court has limited tools to highlight the significance of *Fisher I*'s doctrinal clarifications; granting relief to Petitioner at this point is a means for highlighting that UT's (and the Court of Appeals') irredentism in resisting the mandate of *Fisher I* is unacceptable.

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision should be reversed, and judgment should be awarded to Petitioner.

Respectfully submitted,

James F. Blumstein
Counsel of Record
University Professor of Constitutional Law
and Health Law and Policy
Professor of Management
Vanderbilt Law School
131 21st Avenue South
Nashville, TN 37203
Telephone: 615-322-3710
Facsimile: 615-322-6631
Email: James.Blumstein@Vanderbilt.edu

Counsel for Amicus Curiae
James F. Blumstein

September 10, 2015