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

AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the system of admissions employed by the University of Texas's undergraduate college in 2008 violate the Equal Protection Clause?

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INTEREST OF AMICI CURIAE[1]

The Center for Individual Rights is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in this Court. It has a particular interest in, and has brought numerous cases concerning, what it views as unconstitutional racial classifications by government, particularly in admissions systems of institutions of higher education. It represented the plaintiffs in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

In *Grutter*, this Court, relying on Justice Powell's *Bakke* opinion, held that universities are entitled to some deference in determining whether attaining a diverse student body is a goal so compelling to their mission that they are entitled to consider and weigh the race of applicants in determining whether those applicants should be admitted. *Grutter*, 539 U.S. at 329 ("'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'") (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 318-

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[1] This brief is filed with the parties' consent evidenced by blanket consent letters filed with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

319 (1978) (opinion of Powell, J.). *See also Fisher v. University of Texas*, 133 S. Ct. 2411, 2419 (2013) (decision to pursue educational benefits that flow from student body diversity is "an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*."). *But see id.* ("There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity.").

This deference was supported by two pillars. First, that "academic freedom" is a compelling interest entitling universities to consider race in selecting its student body. Second, that a system of admissions that considered race along with other possible diversity factors was substantially different from a system that set aside seats for minorities, or that used points to attain a given racial/ethnic mix.

This Court should reconsider these assumptions and the deference to the academy that they led to. The notion of "academic freedom" in Justice Powell's opinion is inconsistent with much other authority from this Court. Not only has this Court not yet reconciled this conflicting authority, no such reconciliation is possible. "Academic freedom" is a dangerous and uncertain basis for justifying the consideration of race in admissions.

Moreover, the line between a system that considers race in a "dispositive" way and one that considers it as one of many factors is evanescent and elusive. Both logic and experience since 1978

demonstrate that the two types of systems are far more alike than different. Whatever importance this Court chooses to place on the difference, it does not deserve to be the basis for a presumption of good faith that essentially eviscerates the first half (the identification of a compelling governmental interest) of the strict scrutiny standard.

ARGUMENT

Academic freedom, while an important value and, to some degree, protected by the First Amendment when asserted by private individuals or entities, has never been an adequate justification for discriminatory or exclusionary policies by public entities. Moreover, as any number of Justices on this Court have pointed out, the distinction between a valid "plus" system and an illegal system is mostly one of candor, in which a lack of candor is rewarded. These are inappropriate bases to lower the scrutiny by which this Court should examine any use of race by state institutions.

I. THE PROBLEMATIC RELIANCE ON "ACADEMIC FREEDOM" IN *BAKKE*

In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court found that the admissions program of the University of California Medical School at Davis, which set aside 16% of the places for incoming students for educationally or economically disadvantaged minorities, violated Title VI of the Civil Rights Act

of 1964. *Id.* at 269-72. Five Justices, however, concluded that race could be considered in Davis's admissions process under some circumstances. No single theory, though, explained why that was so. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218 (1995) ("Bakke did not produce an opinion for the Court."); *cf. Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting) (the *Bakke* majority for overturning the lower court's injunction against any use of race was "divided over the application of the Equal Protection Clause--and by extension Title VI--to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for any particular substantive interpretation of Title VI.").

Justice Powell, in an opinion written only for himself, applied strict scrutiny to the Davis program. He concluded that "academic freedom," although not a specifically enumerated constitutional right, was a "special concern" of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). The Regents specifically wanted their institutions to select a group of students who would contribute to a robust exchange of ideas, and argued that "ethnic diversity" was a means of achieving that goal. *Id.* at 313-15. While rejecting the argument that Davis's specific program of reserving spaces for disadvantaged minorities was necessary to achieve the robust exchange of ideas that the Regents allegedly wanted, Justice Powell

did state that race and ethnicity could be considered as "plus" factors by universities seeking to achieve that goal. Justice Powell opined that a state interest in a robust exchange of ideas would not justify the consideration of race to achieve the ethnic diversity promoted by UC Davis, but could justify its consideration to achieve a diversity which "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

The first thing to note about Justice Powell's compelling interest of academic freedom is how different it is from the generally-understood notion of academic freedom. Academic freedom is committed to the robust exchange of ideas, *Keyishian v. Bd. of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967), with no ideas deemed better than others simply because they are more widely held. Yet Justice Powell *rejected* Davis's idea of how a university should select its students in order to maximize learning for all. *Id.* at 315 ("[P]etitioner's argument that [ethnic diversity] is the only effective means of serving the interests of diversity is seriously flawed."). Accordingly to Justice Powell, Davis's view of proper class formation "focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Id.* (emphasis in original). Justice Powell preferred Harvard's use of race in admissions to achieve diversity. *Id.* at 316-17; *cf. Grutter*, 529 U.S. at 324 ("Justice Powell was, however, careful to emphasize that *in his view* race 'is only one element

in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.'") (emphasis added) (quoting *Bakke*, 438 U.S.at 314).

Thus, Justice Powell had a very constrained and idiosyncratic vision of academic freedom: the freedom to imitate Harvard.

In *Grutter*, this Court first mentioned Justice Powell's rationale and its grounding in academic freedom. *Grutter*, 539 U.S. at 324. It further stated that "[o]ur conclusion that the Law School has a compelling interest in a diverse student body is informed by *our view* that attaining a diverse student body is at the heart of the Law School's *proper* institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" 539 U.S. at 329 (emphasis added) (quoting *Bakke*, 438 U.S. at 318-319). Thus, again, this Court suggested that the exercise of "academic freedom" protected by the First Amendment was subject to approval by this Court as "proper"; only *after* such imprimatur came does the Court then go on to presume the good faith of the institution.

This notion of academic freedom contrasts with the much more limited notion of academic freedom provided in cases like *Runyon v. McCrary*, 427 U.S. 160 (1976). There, of course, the Court rejected a First Amendment argument by a segregationist *private* school to the effect that it had

the right to select its students in a way that would not undermine its segregationist message. *Id.* at 176.

When *Runyon* is considered with Justice Powell's *Bakke* opinion and this Court's opinion in *Grutter*, this Court's jurisprudence appears to reach the counterintuitive conclusion that the First Amendment provides better protection for *public* institutions to engage in race-consciousness in admissions than it does for private ones. *But see Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006) ("It is not clear, for example, how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters. *See also, e.g., Trs. of Dartmouth Coll. v. Woodward*, 4 Wheat. 518, 17 U.S. 518, 629, 4 L.Ed. 629 (1819). One does not generally think of the First Amendment as protecting the State from the people but the other way around — of the Amendment protecting individuals from the State."); *Hopwood v. Texas*, 78 F.3d 932, 943 n.25 (5th Cir. 1996).

Worse, it suggests that the Court's deference to, and protection of, "academic freedom" of institutions depends upon those institutions adopting ideas with which a majority of the members of this Court agree.

This Court should abandon the notion that "academic freedom" – whether to choose a more racially diverse student body, to choose a more

generally diverse student body, or to choose a more homogenous student body – is a compelling governmental interest that supports the use of race to determine who is admitted to a public school. The current course diminishes two crucial parts of the Constitution: the First Amendment (by suggesting that some ideas are entitled to more protection than others) and the Equal Protection Clause (by abandoning the principle of equal treatment in favor of implementing fashionable academic theories). No good can come of continuing on it.

Rather, the determination of whether the state has a compelling interest should come from rigorous evidence that the use of race leads to substantial improvements in the educational process. That assessment should be made, in the same fashion, for *any* use of race, be it preferences to attain a diverse student body or race-segregated elementary schools (to cite another currently-fashionable educational theory). No state actors, not even university administrators, are entitled to deference in their decision to use race to pursue some educational goal.

II. THIS COURT'S CURRENT "NARROW TAILORING" JURISPRUDENCE ENCOURAGES STEALTH

In *Bakke*, Justice Powell distinguished between a "plus" system and the system employed by the Davis Medical School (reserving some spots for qualified, disadvantaged minorities). In *Grutter* and

Gratz, this Court distinguished between the "point" system employed by the University of Michigan's undergraduate school of Literature, Science, and Arts and the more "holistic" system employed by that university's law school.

In both cases, a minority of the Justices of this Court found that these distinctions elevated form over substance. *Bakke*, 438 U.S. at 379 (Brennan, J., concurring in the judgment in part and dissenting in part) (there was no basis "for preferring a particular preference program simply because in achieving the same goals that (Davis) is pursuing, it proceeds in a manner that is not immediately apparent to the public."); *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting) ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed college affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.").

Similarly, most lower courts have found the distinction between a goal and a quota difficult to discern. *Middleton v. City of Flint*, 92 F.3d 396, 412-13 (6th Cir 1996) ("[W]e note that quotas and preferences are easily transformed from one into the other.") (*citing Bakke*, 438 U.S. at 378 (Brennan, concurring and dissenting)); *Hopwood*, 78 F.3d at 948 n.36 (noting that "even if a 'plus' system were permissible, it likely would be impossible to maintain such a system without degeneration into nothing more than a 'quota' program") (*citing Bakke*, 438 U.S. at 378 (Brennan concurring in the

judgment in part and dissenting in part)); *Valentine v. Smith*, 654 F.2d 503, 510 n.15 (8th Cir. 1981) ("Any distinction between goals, quotas, and targets is primarily semantic.") (*citing Bakke*, 438 U.S. at 378 (Brennan concurring in the judgment in part and dissenting in part)).

This is particularly so given Justice Powell's suggestion that weights applied to race and other diversity factors "may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class," *Bakke*, 438 U.S. at 318, and his somewhat vague references to the degree to which a school could look at numbers. *Id.* at 316 (quoting Appendix to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amicus Curiae, Regents of the University of California v. Bakke, No 76-811, *2-3 (filed June 7, 1977)). Examining the mix, and varying the weight given to race (or membership in a given race) can only be for one purpose: to achieve a proper racial mix. *But cf. Grutter*, 539 U.S. at 335-36 (holding that the law school's attempt to achieve a "critical mass" of underrepresented minorities, its attention to numbers, and its consultation with daily reports that provided racial breakdown of its incoming class did not change its "flexible admission system" into a "rigid quota").

For Justice Powell, at least, a system that considered race explicitly, but along with other factors, *was not even racially discriminatory*.

Bakke, 438 U.S. at 318-19 (opinion of Powell, J.) (stating that "a facial intent to discriminate" does not "exist[] in an admissions program where race or ethnic background is simply one element--to be weighed fairly against other elements--in the selection process"; in such a system, "good faith would be presumed.").[2] Further, there would be "a presumption of legality and legitimate educational purpose," and "there is no warrant for judicial interference in the academic process." *Id.* at 319 n.53.

Justice Powell's opinion, and its adoption in *Grutter*, suggest a much different kind of strict scrutiny than the searching one this Court previously had described. It is based on the notion that there is a substantial difference between the Harvard and University of Michigan Law School

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[2] It would seem that *Grutter* at least formally (albeit implicitly) rejected this argument. *Grutter* purported to apply strict scrutiny to the University of Michigan Law School's admissions system. *Grutter*, 539 U.S. at 327 ("we turn to the question whether the Law School's use of race is justified by a compelling state interest"); *id.* at 334 ("Contrary to Justice Kennedy's assertions, we do not 'abando[n] strict scrutiny . . .'"). The application of strict scrutiny implies that the Court found intentional discrimination. *Wisconsin v. City of New York*, 517 U.S. 1, 19 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government."). But, as noted in the text, *Grutter* adopted Justice Powell's deference to university administrators and thus accepted the defendants' stated goal of diversity as compelling without any significant scrutiny.

systems on the one hand, and the Davis Medical School and UM Literature, Science and Arts system on the other. As any number of Justices of this Court have recognized, though, those systems, and the manner in which they consider race, are far more alike than they are different.

As a consequence, university administrators can seemingly comply with the law simply by avoiding the specific tools that this Court has condemned, and by declaring that their use of race is part of a "holistic" process of evaluation. Since there is no way for anyone outside the process ever to assess that declaration, strict scrutiny devolves into a simplistic scrutiny of the admissions' officers ability to place the correct labels on their process. No evaluation is made of whether the preferences are small or large, and what consequences that might have for the academic performance of the students.

III. THE FACTS HERE DEMONSTRATE THE NEED FOR A SEARCHING STRICT SCRUTINY, INCLUDING AN EXAMINATION OF UT'S COMPELLING INTEREST

As set forth in petitioner's merits brief, the University of Texas here has flitted from one justification for its consideration of race to another throughout the course of this litigation. Initially, UT claimed that its compelling interest in "diversity" was evidenced by the absence of "classroom

diversity" and the failure to match the diversity of the population of the State of Texas. Pet. App. 292a (addressing these arguments and concluding that UT had a compelling interest in developing future leaders that required the school's student population to approximate the racial diversity of the state's population). Now, the claimed need for diversity is evidenced by the need for "diversity within diversity" – the absence of sufficient diversity within various racial groups. As petitioner correctly points out, this ever-changing interpretation of its needs suggests that UT's current justification for its consideration of race was not the actual motivation at the time of its adoption. Pet. Br. 30-33.

The "diversity within diversity" goal raises more questions that UT has failed to answer. First, it assumes that the admissions system without the consideration of race will not achieve that goal, but there is precious little anywhere to explain why that would be so. UT is quite insistent that race may be a positive factor for a member of *any* race. Pet. App. 6a ("because race is a factor considered in the unique context of each applicant's entire experience, it may be a beneficial factor for a minority or a non-minority student") (citing Ishop Aff. ¶ 5). But if that is the case, why is it needed at all?

Second, focusing on "diversity" within racial groups raises the question of how UT will be able to ascertain that the use of race is no longer needed. Its current justification posits that having a reasonable number of African Americans and a

reasonable number of individuals from suburban areas is insufficient to achieve "diversity." It must *also* have a reasonable number of African Americans from suburban areas (and must consciously use race to achieve that goal). But there is no obvious reason why one would stop at African Americans from suburban areas. Surely, African Americans from suburban areas who went to private high schools could demonstrate even more "diversity within diversity," and thus giving a racial preference to those African Americans would further UT's goal.

Because there are innumerable ways for a given racial group to be "diverse," UT's "diversity within diversity" goal is a compelling interest that can always be just out of reach for however long UT wants it to be. It is a recipe for the continuing use of race without any temporal limit. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 276 (1986) (plurality op.) (rejecting rationale for race preferences that would be "ageless in their reach into the past, and timeless in their ability to affect the future"). For that reason, among others, it should not be deemed "compelling."

CONCLUSION

For the foregoing reasons, and those set forth by petitioner and the other *amici* supporting petitioner, this Court should reverse the judgment of the court below.

Respectfully submitted,

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