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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief addresses the following question:

Whether this Court's precedents regarding the Fourteenth Amendment's Equal Protection Clause permit the University of Texas to operate a race-conscious "holistic" admissions program that is opaque, arbitrary, and structured to frustrate searching judicial review.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

This case is important to Cato because it implicates Cato's longstanding belief that all citizens should be treated equally before the law and that, accordingly, government's use of racial and ethnic classifications must be strictly circumscribed. Such classifications are, at the very least, in tension with the equal protection and due process guarantees of the Fourteenth Amendment. Their use must therefore be subject to the most searching judicial review.

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[1]Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Texas's race-conscious admissions system fails to satisfy narrow-tailoring requirements because it is arbitrary, opaque, and incapable of generating the evidence necessary to allow searching judicial review. Those specific deficiencies are not due to the University's failure to seriously consider race-neutral alternatives—that is a separate and independent ground for reversal—but are attributable to the University's "holistic" review process, which is designed to shield its race-based decision-making from any real scrutiny.

The record reveals that the University's race-conscious holistic review program is a black box. The "holistic" aspect is that application readers reduce *all* of an applicant's characteristics—including race—to a single, indivisible score, ranging from 1 to 6, used directly in determining admissions. This use of race is *arbitrary*: despite the enormous emphasis admissions officials place on racial considerations, the decision of when to use race as a "plus" factor and how much weight to accord it are left entirely to application readers, without specific guidance or oversight. It is *opaque*: even the University has no way to oversee decisions regarding race because it has structured its plan so that those decisions cannot be disentangled from the consideration of other factors. And it is *unmeasurable*: the University cannot identify students admitted because of racial preferences and has no ability to identify their char-

acteristics or ascertain the impact of racial preferences on diversity at any level.

These deficiencies preclude the University from meeting its burden of "prov[ing] that the means chosen…to attain diversity are narrowly tailored to that goal." *Fisher v. Univ. of Tx. at Austin*, 133 S. Ct. 2411, 2420 (2013). Because the University's holistic review process treats race arbitrarily, the record is bereft of evidence showing exactly "how and when" it employs racial preferences, as required to support their necessity. *Parents Involved in Cmty. Schls. v. Seattle Schl. Dist. No. 1*, 551 U.S. 701, 784 (2007) (Kennedy, J., concurring). Likewise, the University's choice to adopt a program that is incapable of monitoring, evaluation, or measurement of results precludes any showing that the program actually furthers any legitimate diversity interest, much less that it does so in a meaningful fashion tailored to fit the University's stated "qualitative" diversity goal. And the University's use of race is so arbitrary and open-ended that it cannot even demonstrate that "'each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" *Fisher*, 133 S. Ct. at 2418 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)). In sum, the University's holistic review program is incapable of providing a basis for the Court to assure itself that that the use of race here is "specifically and narrowly framed" to achieve the University's diversity goal. *Id.* at 2420 (quotation marks omitted).

The University's apparent belief that *Grutter* broadly sanctioned race-based holistic review, irrespective of necessity and other aspects of narrow tailoring, is not unique. In fact, the University's holistic review program is typical of those adopted by many schools in the wake of *Grutter*. The history of these programs demonstrates that they can be an effective means of obscuring the use of race in admissions and thereby circumventing constitutional limitations on that use. It is, in fact, well documented that universities have used holistic review to achieve outright racial balancing, including reducing Jewish enrollment, implementing *de facto* quotas for preferred minority groups, and capping admissions of Asian-American applicants. Only a decision that directly addresses the deficiencies of the University's holistic review regime can put an end to these abuses.

The Court must make clear that "holistic review," as both a label and a concept, is not a constitutional talisman. No matter what label it uses or how convoluted an admissions program it devises, a public university may take account of race in admissions only if "the program can meet the test of strict scrutiny by the judiciary." *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). The very features of its admissions program that the University touts as "holistic" are the same ones that preclude it from proving that its program is narrowly tailored to achieve its diversity goal. On that basis, the Court should hold that its use of racial preferences fails to satisfy strict scrutiny.

ARGUMENT

I. The University's Race-Conscious Holistic Review Program Is Opaque, Arbitrary, and Unaccountable

To uphold a race-based admissions program, the Court must assay its particulars—that is, the "precise" mechanics of how the program uses race and the results of so doing. *Parents Involved*, 551 U.S. at 785 (Kennedy, J., concurring). Accordingly, this brief recites the record evidence concerning the University of Texas's holistic review program.

The general contours of the University's admissions system are as follows: The bulk of students (81 percent in 2008) are admitted pursuant to the Top Ten Percent Law, which grants automatic admission to any public state college to all students in the top 10 percent of their class at high schools in Texas. Pet. App. 3a. The remaining in-state applicants are then subject to "holistic review," which considers applicants' "Academic Index" ("AI") and "Personal Achievement Index" ("PAI") scores. Pet. App. 4a. The AI score is based on standardized test scores, class rank, and high school coursework. Pet. App. 5a. The PAI score is based on the average score for two essays and a "personal achievement score," which is based on a "holistic review" of various factors, including race. *Id.* What makes this procedure "holistic" is that it reduces *all* of an applicant's characteristics to a single, indivisible score, ranging from 1 to 6. Pet. App. 5a–6a; J.A. 162a–63a. Applicants are

then selected, major-by-major, on the basis of their combined AI and PAI scores. Pet. App. 6a.

The lower court concurred in the University's view that its consideration of race serves "to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to [the University's] academic mission." Pet. App. 46a–47a. Left unsaid was how, exactly, admissions officials use race to achieve that fairly specific goal.

There is no indication that they do. In deposition testimony submitted at the summary-judgment stage, the only thing the University's admissions representatives would say regarding the way the University uses race is that they value a "sense of cultural awareness." Pls.' Mot. Summ. J., Ex. 4 ("Bremen Dep."), *Fisher v. Univ. of Tx. at Austin*, No. 08-cv-263 (W.D. Tex. Jan. 23, 2009), at 30. That distinctive phrase—"cultural awareness"—appears a dozen times in the testimony of the University's admissions consultant, *id.* at 30, 32, 41, 45, 46, 60, as well as repeatedly in the testimony of the University's associate director of admissions, who is responsible for admissions policy.[2] J.A. 257a–58a, 268a–69a. In fact, it is the only evidence the district court was able to muster when it sought to describe how

[2] Both officials, it should be noted, prepared for their depositions with the same set of University attorneys. Bremen Dep. at 6; J.A. 205a–06a.

the University actually uses race in evaluating applications. Pet. App. 280a.

No other evidence supports any connection between the University's use of race in holistic review and its avowed diversity goal. The University's admissions officials believe that race "is an important credential to be considered" and therefore ensure that application readers are "certainly aware of the applicant's race" by requiring that it be reported "on the front page of the application."[3] J.A. 219a, 254a. But the University does not train its application readers on how specifically to make use of race in evaluating applications. Bremen Dep. at 29–30, 49–50; J.A. 221a. That is a notable omission, because University officials testified that it does not use race as a "plus" factor in favor of applicants of particular minority groups that it believes are underrepresented on campus, diversity-wise; consideration of race, they testified, can potentially benefit any applicant, regardless of his or her race, at the discretion of the reader. J.A. 256a, 334a. Nor is there a particular weight or value given to race when it is used as a "plus" factor; that too is left to the reader's discretion. Bremen Dep. at 22; J.A. 342a. Despite using race in this open-ended fashion, the University does not even provide a second review to ensure consistency and correctness in application readers' use

[3] The admissions office's mission, according to its director, is "to recruit and enroll students in attempting to have a very diverse student body." J.A. 304a.

of race, as it does with the grading of application essays. J.A. 224a–26a, 284a.

The record also shows that the University has no way to ascertain whether its use of race actually furthers its stated purpose. In fact, the University concedes that it has no measurement of—and no way of finding out—how many students have been admitted due to its consideration of race or who these students might be. J.A. 259a, 263a, 337a, 344a–45a. Its director of admissions testified that racial consideration could not be dispositive as to any particular applicant and that he could not identify any applicant admitted based on race. J.A. 344a–45a. *See also* Pet. App. 80a n.19 (Garza, J., dissenting) ("When asked whether any one factor in the PAI calculation could be determinative for an applicant's admission, Dr. Bruce Walker, Vice Provost and Director of Admissions, stated 'no.'").

In sum, the University's race-conscious holistic review program operates as a black box, inscrutable in its use of race to choose among applicants for admission.

II. The University's Race-Conscious Holistic Review Program Is Incapable of Satisfying Strict Scrutiny

The University cannot carry its burden of "prov[ing] that the means chosen by the University to attain diversity are narrowly tailored to that goal," *Fisher*, 133 S. Ct. at 2420, because its holistic review program is inherently incapable of providing

the kind of evidence necessary for the Court to uphold the use of racial classifications. In particular, the Court's equal protection cases, including *Grutter* and *Fisher*, have identified four separate requirements that a university employing a race-conscious admissions process must satisfy to demonstrate that its plan is narrowly tailored, and each is associated with an evidentiary burden on the university, to facilitate the court's review of its program consistent with strict scrutiny. The University's showing satisfies none of them.

A. The University's Holistic Review Program Is Incapable of Demonstrating the Necessity of Racial Classifications

The University falls far short of justifying the necessity of its use of race in holistic review. Narrow tailoring "requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." *Fisher*, 133 S. Ct. at 2420. That entails "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications," to the point that the reviewing court is "satisfied that no workable race-neutral alternatives" would suffice. *Id*. This "searching examination," *id*., requires "a thorough understanding of how a plan works." *Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring). To that end, the university "must establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program." *Id*. *See also Fisher*, 133 S. Ct. at

2421 (strict scrutiny requires a court to give "close analysis to the evidence of how the process works in practice").

Despite the great emphasis the University places on race in its admissions process, the record is bereft of evidence showing "how and when" it employs racial classifications, as required to support their necessity. *Parents Involved*, 551 U.S. at 784–85 (Kennedy, J., concurring). Indeed, the University's own evidence shows that its holistic review program is structured to avoid any precise "how" or "when." *How* race operates as a "plus" factor is left entirely to application readers—who are free to accord it any weight whatsoever in determining an applicant's personal achievement score—without any specific guidance, training, or oversight. Likewise, application readers are free to determine *when* race will benefit a particular applicant, without guidance, limitation, or oversight. There is no indication that the University's use of race is tethered in any respect to its espoused "diversity within diversity" aim.

This evidence would be sufficient to support a finding that the University's holistic review program is *designed* to treat race in a "far-reaching, inconsistent, and ad hoc manner." *Id*. at 786 (Kennedy, J., concurring). And that would be fatal. *Fisher*, 133 U.S. at 2420.

At the very least, the University has failed to show that "in fact it relies on racial classifications in a manner narrowly tailored to the interest in question." *Parents Involved*, 551 U.S. at 786 (Kennedy, J.,

concurring). *Parents Involved* illustrates the government's burden in this respect. That case involved a county's student assignment plan that relied on racial classification to allocate slots in certain schools. The county, Justice Kennedy's controlling opinion found, "explained how and when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny." *Id*. at 784–85 (Kennedy, J., concurring). For example, it "fail[ed] to make clear…who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision." *Id*. at 785. Accordingly, the county was unable to rebut the presumption—presumed because ambiguities must be construed against the state under strict scrutiny—that its use of race was arbitrary. *Id*. at 786. The University's holistic review program suffers precisely the same shortcoming: no one can say precisely how it functions, much less how it serves to further any legitimate purpose, and much less still why it is necessary.

There are grounds for serious doubt on that score. Although the University claims that considering race is necessary to achieve qualitative diversity, it "has not shown that qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law." Pet. App. 74a (Garza, J., dissenting). Instead, it asks the Court to assume

that such students are "somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." *Id.* at 75a. But the burden of proof under strict scrutiny is the government's, and "[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State." *Parents Involved*, 551 U.S. at 786 (Kennedy, J., concurring).

Moreover, while claiming to evaluate applicants on their academic and personal achievements, as well as race, the University actually admitted substantial numbers of students through its holistic review program who were flagged by its president for special treatment, irrespective of their personal achievement scores. Its own report on this hitherto secret track of holistic review concluded that race and ethnicity were an "important consideration" that resulted in the admission of students with scores and achievements substantially below those of other applicants. In other words, the University uses race in ways that are precisely contrary to its stated aims, confirming that its holistic review process is arbitrary and easily manipulated and that its recently minted "qualitative" diversity rationale is a pretext. By all indications—including the conclusion of the report it commissioned—the University's true motivation is "simple racial politics." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).[4]

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[4] For background on the University's secret admissions program, see Br. of Cato Inst. in Support of Certiorari at 8–12,

Just as the City of Richmond's "random inclusion of racial groups" in the set-aside program at issue in *Croson* "strongly impugn[ed] [its] claim of remedial motivation," 488 U.S. at 506, so too does the University's *ad hoc* use of race in admissions impugn its claim to pursue "qualitative" diversity. There is no basis for the Court to conclude that the University's reasons for using race, as revealed through its practices, "are clearly identified and unquestionably legitimate." *Fisher*, 133 S. Ct. at 2419 (internal quotation marks and alterations omitted).

The "presumptive skepticism of all racial classifications" prohibits a court "from accepting on its face" the government's determination that racial preferences are necessary. *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (citation omitted). Uncritical acceptance of the government's decision to employ preferences "would be surrendering…[the Court's] role in enforcing the constitutional limits on race-based official action." *Id*. This the Court "may not do." *Id*. (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Fisher v. Univ. of Tx. at Austin, No. 14-981 (filed March 16, 2015).

B. The University's Holistic Review Program Is Incapable of Demonstrating that Its Race-Based Means "Fit" the University's Diversity Goal

Regardless of whether the University has demonstrated the necessity of racial classifications, it has failed to show that the race-based means it has used "fit" its diversity goal. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)). Accordingly, even where the government has shown that consideration of race is "necessary," it still must demonstrate "that 'the means chosen *fit* the compelling goal'" it has identified, *Grutter*, 539 U.S. at 333 (quoting *Croson*, 488 U.S. at 493) (emphasis added and alterations omitted), and do so "with greater precision than any alternative means." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (Powell, J.). In other words, the government must "account for the classification system it has chosen," proving "its plan to be narrowly tailored to achieve its own ends." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring). That, in turn, allows the reviewing court "to confront the reality of how the [race-conscious] policy is implemented." *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

The substantive requirement of proper fit therefore imposes an evidentiary burden on a government

entity seeking to defend its use of race. In general, narrow tailoring requires that "that the size of racial preferences used in affirmative action programs should be the minimum necessary to achieve the compelling government interest." Ian Ayres & Sydney Foster, Don't Tell, Don't Ask: Narrow Tailoring After *Grutter* and *Gratz*, 85 Tex. L. Rev. 517, 521 (2007). That requirement ensures that a race-conscious program is "the 'least restrictive alternative' and 'work the least harm possible' on nonpreferred racial groups so as not to impose an undue burden on them." *Id.* at 523 (quoting, respectively, *Fullilove*, 448 U.S. at 508 (Powell, J., concurring), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 308 (1978) (Powell, J.)). Logically, then, "quantification of some sort is a necessary prerequisite of being able to test whether racial preferences are narrowly tailored to achieve the government's compelling interest." *Id.* at 520. At a minimum, in order to facilitate "rigorous judicial review, with strict scrutiny as the controlling standard," a race-conscious admissions program must be "supported by empirical evidence." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). *See also id.* at 381–85 (Rehnquist, C.J., dissenting) (analyzing statistics regarding challenged program to determine "fit").

The University's holistic review program satisfies none of this. Its use of race is completely divorced from its stated goal of achieving "qualitative" diversity. This is true as to the operation of the program itself—which uses race in an arbitrary fashion, with-

out respect to the University's stated diversity goal. And it is true of the University's choice to design a program that is incapable of monitoring, evaluation, or even identifying afterwards which applicants were benefited by consideration of race or admitted due to race. This lack of quantification can only exacerbate the program's arbitrariness. *See* Ayres & Foster, *supra*, at 568–69 (explaining how "lack of transparency invites more arbitrary admissions decisions" and allows "individual admissions officers [to] make admissions decisions that are relatively more inconsistent").

It also means that the University has no way to demonstrate that its race-based holistic review program is advancing its diversity goal, no way to make required adjustments that would improve the program's fit, and no way to demonstrate that it is applying racial preferences no larger than necessary or that the contours of its program are less restrictive and less burdensome than other possible designs. For that reason, the record contains no evidence that the University's approach to awarding racial preferences advances any diversity goal, let alone that it advances the University's specific "qualitative" diversity goal in a meaningful and narrowly tailored fashion.

Absent such empirical evidence, the Court has no basis to assure itself that the "connection between justification and classification" is, as required, "exact." *Adarand*, 515 U.S. at 220 (quoting *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting)).

C. The University Cannot Show that Its Holistic Review Program Provides Individualized Consideration to Every Applicant

Although the University's holistic review program might appear, despite any other flaws, to at least provide for individualized consideration of applicants, the record does not actually support that point.

Under narrow tailoring, it is "the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" *Fisher*, 133 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 337). Put differently, a university "cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U. S. at 315 (Powell, J.)). Instead, it must "giv[e] serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id*. at 337. "The importance of this individualized consideration in the context of a race-conscious admissions program is paramount." *Grutter*, 539 U.S. at 337. *See also Bakke*, 438 U.S., at 318 n.52 (Powell, J.) (identifying the "denial…of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).

Due to the black-box nature of the holistic review process, the University cannot show that its admissions readers do not treat race as "the defining feature" of applications. *Fisher*, 133 S. Ct. at 2420 (citation omitted). The weight accorded to race as a "plus" factor is entirely at the discretion of the reader, and there is no way to ascertain whether it amounts to a thumb or a brick on the scale in calculating any given applicant's personal achievement score. Because admissions are based on a combination of scores reflecting personal and academic achievement, giving substantial weight to race can overwhelm other factors in admission—which would effectively insulate applicants receiving racial preferences from competing with other applicants. Holistic review is uniquely susceptible to such manipulation and can be an effective cover for improper use of race. *See infra* § III. Lacking evidence of both how its application readers award racial preferences and the results of its use of racial preferences, the University has no ability to demonstrate that "each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Fisher*, 133 S. Ct. at 2418 (quoting *Grutter*, 539 U.S. at 334). *See also Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (describing university's burden to adopt "sufficient procedures" that guarantee "individual consideration" for "each applicant").

D. The University's Holistic Review Program Frustrates Accountability and Transparency

Finally, the University's holistic review program undermines the kind of public accountability and transparency that the Court has identified as the hallmark of a permissibly tailored race-conscious plan.

Public understanding and oversight go hand in hand with proper narrow tailoring, which forces government to consider race-neutral alternatives in good faith. Conversely, absent searching review that forces them to confront the necessity of race-based measures, university administrators "have few incentives to make the existing minority admissions schemes transparent." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). The same cloak of complexity that can be employed to shield improper consideration of race, *see Parents Involved*, 551 U.S. at 785–86 (Kennedy, J., concurring), similarly serves to frustrate public understanding that might force improvement through the mechanism of enlightened self-government, rather than through the imperfect means of litigation. Where "programs have not been openly adopted and administered.... they have not benefited from the scrutiny and testing of means to ends assured by public deliberation." Drew S. Days, III, *Fullilove*, 96 Yale L.J. 453, 458–59 (1987).

No such scrutiny is possible here. The University's holistic review program is a black box providing the public and potential applicants with no information

on the extent to which race matters in admissions. University officials are cagey in answering even the most straightforward questions, such as the circumstances where race counts as a "plus," J.A. 220a (refusing to answer question); the weight given to race, J.A. 219a–20a, 342a (it's "contextual"); and how using race as a "plus" for applicants of particular races affects applicants from nonpreferred racial groups, J.A. 262a–65a (denying that giving a benefit to one applicant negatively impacts the prospects of other applicants competing for the same slots). In its public communications, as in its court filings, the University wields "holistic review" as a shield to hide what it is doing, obscure the role of race in admissions, and frustrate scrutiny of its admissions program.

When the use of racial classifications extends beyond what is necessary and narrowly tailored, the "unhappy consequence" is "to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493. Instead of promoting inclusiveness and cross-racial understanding, they may bring about the perverse result of "reinforc[ing] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having

no relation to individual worth." *Bakke*, 438 U.S. at 298 (Powell, J.).

In these ways, unnecessary or otherwise arbitrary racial preferences serve to undermine the rich diversity that *Bakke* and *Grutter* sought to promote.

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"[I]t is for the courts, not for university administrators, to ensure that 'the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" *Fisher*, 132 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 333) (alterations omitted). With respect to the University's holistic review program, that task "is almost impossible" due to the University's failure to link that program to its stated diversity goal in any way. *Compare Croson*, 488 U.S. at 507. Because establishing that its means are properly tailored was the University's burden, that deficiency is fatal.

II. Holistic Review Can Serve as a Cover for Illegitimate or Unnecessary Use of Race

The University of Texas's apparent belief that it may implement preferences through an opaque, arbitrary, unmeasurable, and unreviewable program so long as it pays lip service to diversity and individualized consideration through holistic review is understandable. It, like many other schools, viewed *Grutter* as a blanket endorsement of race-based ho-

listic review—no matter the particulars of strict scrutiny.[5] And like other schools, it thereby "made race a more pervasive and heavily weighted factor, introduced racial discrimination among preferred minorities, and thoroughly subordinated socioeconomic diversity to racial diversity." Richard Sander & Stuart Taylor, Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It 212–13 (2012). In this respect, "*Bakke* and *Grutter* [have been] completely ineffective in accomplishing their declared objective of ending 'racial balancing,' mechanical use of racial preferences, and efforts to entrench preferences for the long term." *Id.* at 214.

Justice Kennedy presciently identified this risk, faulting the *Grutter* majority for "nullify[ing] the essential safeguard Justice Powell insisted upon as the precondition of the approval[,]… rigorous judicial review[] with strict scrutiny as the controlling standard." 539 U.S. at 388 (Kennedy, J., dissenting). The primary consequence of *Grutter* has been the widespread adoption of race-based admission programs that elevate form (holistic review) over substance (narrow tailoring with respect to necessity and fit). In other words, schools like the University of Texas favor holistic review precisely because it shields their use of unnecessary and untailored racial pref-

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[5] *See, e.g.*, S.J.A. 15a ("The major requirement of [*Grutter*] is that students be considered individually and holistically.").

erences from the type of rigorous oversight that might enforce compliance with strict scrutiny.

Comprehensive research indicates that holistic review is being abused in just that fashion. A survey of the admissions practices of dozens of the nation's most selective schools found that most of these institutions "group applicants into 'pools,' based on their personal characteristics," including "minority status," and that "applicants are then chosen in comparison to others within their pool, but are no longer compared to applicants outside their pool." Rachel Rubin, Ph.D., Who Gets In and Why? An Examination of Admissions to America's Most Selective Colleges and Universities, International Education Research, vol. 2, issue 2 (2014), at 2.[6] Certain pools, including those of prospective "students who are non-white U.S. citizens," receive special preference, and "[f]or everyone else…it is essentially a fierce competition, based on academic merit, for a finite number of spots." *Id*. at 11. "The most notable 'losers' of pooling are low-income students who are not considered an under-represented minority." *Id*. at 13.

As the author explains, this kind of racial balancing can be and is accomplished in the context of holistic review programs that purport to consider race as only one among many factors and never as a defining factor:

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[6] Available at http://www.todayscience.org/IER/article/ier.v2i2p01.pdf.

> [P]ostsecondary institutions will use any means legally available to meet their objectives. Considering that quotas for certain subgroups are no longer legal, colleges often fulfill their objectives via different matrices and criteria for subgroups of students. While these various matrices and criteria are clear to admissions officers, the disparities between the mean scores of different subgroups may cause the general public to question why one person with a 2400 SAT was not admitted while a student with a 2300 was. The important lesson to remember is that, from the institutional-end, the application process is neither random nor uninformed, and that a great deal of thought and precision goes into determining how to assess applicants.

Id. at 13–14. In other words, not only can holistic review be manipulated to achieve particular racial outcomes, but admissions officials were willing to admit to a researcher that this is what they are doing. For example, as the study's author explained in an interview, if black admissions are lower than the target set by admissions officials, their response is: "let's look at all the black students again and see what we can come up with, where can we find merit in these applications." Scott Jaschik, How They Re-

ally Get In, Inside Higher Ed, April 9, 2012.[7] As a practical matter, this is how race-conscious holistic review actually functions.

Statistical analyses of admissions at schools employing holistic review confirm as much. The University of Wisconsin, for example, denies that it makes decisions based solely or primarily on race, insisting that it employs a "holistic" process like Texas's that "takes into account a range of factors," only one of which is race.[8] But the numbers tell a different story. They show that, in two recent admissions cycles, "UW-Madison rejected 1 black and 3 Hispanics, but 39 Asians and 777 whites, despite having higher test scores *and* class rank compared to the average black admittee." Althea K. Nagai, Ph.D., Racial and Ethnic Preferences in Undergraduate Admissions at the University of Wisconsin-Madison 1 (2011).[9] During that time, the probability of admission for a black or Hispanic applicant with the same average test score and class rank as the median black applicant was 100 percent. *Id*. at 2. By contrast, the probability of admission for white and

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[7] Available at https://www.insidehighered.com/news/2012/04/09/new-research-how-elite-colleges-make-admissions-decisions.

[8] University of Wisconsin-Madison News, UW-Madison responds to attacks on diversity efforts, http://news.wisc.edu/19754.

[9] Available at http://www.ceousa.org/attachments/article/546/U.Wisc.undergrad.pdf,

Asian applicants with the very same academic credentials was 38 percent and 41 percent, respectively. *Id*.

Likewise, the University of Virginia insists that it evaluates applicants "holistically," considering race as just one among many factors, but the numbers suggest otherwise. *See* David J. Armor, Affirmative Action at Three Universities (2004).[10] "For black [Virginia] residents with high school grade point averages from 3.3 to 3.7 and SAT scores from 1051 to 1150, nearly all (86%) were admitted, while only 8% of white students with the same academic qualifications were admitted." *Id*. at 6. As a result, "white applicants with higher grades and test scores are less likely to be admitted than blacks with significantly lower academic credentials." *Id*. at 8.

These are just two examples. There are many more.[11] And much attempted research on this topic has been frustrated by schools' refusal to release admissions data. *See, e.g.*, Sander & Taylor, *supra*,

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[10] Available at https://www.nas.org/images/documents/report_affirmative_action_at_three_universities.pdf.

[11] *See, e.g.*, Althea K. Nagai, Ph.D., Racial and Ethnic Preferences in Undergraduate Admissions at Two Ohio Public Universities (2011) (Miami University and Ohio State University); Richard Sander, The Consideration of Race in UCLA Undergraduate Admissions (2012) (discussing abuse of holistic review at school forbidden by law from awarding racial preferences); Althea K. Nagai, Ph.D., Racial and Ethnic Preferences in Admission at the University of Arizona College of Law (2011).

at 175, 235; Tim Groseclose, Cheating: An Insider's Report on the Use of Race in Admissions at UCLA 14–15 (2014); Peter Berkowitz, Affirmative Action and the Demotion of Truth, June 24, 2014.[12]

The abuse of holistic review to evade limitations on the use of race is nothing new. Although Justice Powell in *Bakke* assumed that Harvard College's purportedly "holistic" admissions program would withstand strict scrutiny—the issue was never litigated, Harvard's program not being at issue—holistic review at Harvard has a less-than-illustrious history. As Alan Dershowitz describes in a comprehensive history of Harvard's program, what was initially called "character and fitness" review was instituted at Harvard as a less controversial alternative to capping the number of Jewish students admitted to the College. Alan M. Dershowitz & Laura Hanft, Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?, 1 Cardozo L. Rev. 379, 397 (1979).

As with holistic review programs today, Harvard "purported to be seeking a diverse student body by having its admissions officers consider a variety of both subjective and objective data about each applicant." *Id.* at 399. But "such unlimited discretion makes it possible to target a specific religious or ra-

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[12] Available at http://www.realclearpolitics.com/articles/2014/06/24/affirmative_action_and_the_demotion_of_truth_123078.html.

cial group," and that's exactly what Harvard did. *Id*. The goal, as Harvard's admissions chair explained at the time, was "to reduce their 25% Hebrew total to 15% or less by simply rejecting without detailed explanation." *Id*. at 397 (quoting letter). It worked: Jewish admissions were effectively capped at that lower level for the next two decades. *Id*. at 398.

Beginning in the 1960s, Harvard used the same system to "increase the number of minority persons in the University and in the professions it feeds." *Id*. at 401. To avoid scrutiny and controversy, it was once again "circumspect about the methods it used to target them or the quantitative factors at work," instead using the language of diversity and holistic review. *Id*. at 402. As a practical matter, however, Harvard was "significantly lowering its traditional academic standards for many minority applicants," making race the defining feature in their admissions, *id*.—the very thing *Bakke* would rule off-limits. 438 U.S. at 317 (Powell, J.).

Evidence suggests that Harvard's holistic review program continues to facilitate forbidden racial balancing. Beginning in the 1980s, Asian numbers at Harvard began to grow quickly, reaching a peak of 20 percent in 1993. Ron Unz, The Myth of American Meritocracy, The American Conservative, Nov. 28, 2012.[13] College officials began fretting about the "di-

[13] Available at http://www.theamericanconservative.com/articles/the-myth-of-american-meritocracy/.

versity" of the student body, and "from that year forward, the Asian numbers went into reverse, generally stagnating or declining during the two decades which followed, with the official 2011 figure being 17.2 percent." *Id.* During that same period, the underlying population of Asians in America grew faster than any other racial group, and Asian students' academic achievement also rose sharply, to the point that Asians make up almost 28 percent of National Merit Scholar semifinalists and similar proportions of other elite designations. *Id.* Going by the numbers, Asian-American admitted to Harvard are underrepresented by a factor of half or more relative to the number of applications from Asian-Americans. *Id.* This has led many to conclude that, under the guise of advancing diversity, Harvard's holistic review program discriminates against Asians today in the same way that it discriminated against Jews decades ago. And it's not just Harvard: the same pattern of discrimination against Asian-American applicants is evident at other elite universities that employ holistic review. *See id.* (surveying trends among the Ivy League universities and other elite schools).

By favorably citing Harvard's experience as consistent with its constitutional rule, and by taking Harvard at its word as to how its program actually functioned, *Bakke* inadvertently "legitimated an admissions process that is *inherently capable* of gross abuse and that…*has in fact been deliberately* manipulated for the specific purpose of perpetuating reli-

gious and ethnic discrimination in college admissions." Dershowitz & Hanft, *supra*, at 385. But Justice Powell's misapprehension as to Harvard-style "holistic" plans is understandable. "The incredible staying power" of diversity-focused holistic review, Dershowitz concluded, "is due as much to the model's marvelous ability to mask genuine institutional criteria, which cannot or will not be publicly articulated, as it is to any deep-seated belief in the value of diversity as an educational desideratum." *Id*. at 404. Even if not all holistic review programs are instituted to achieve forbidden racial outcomes, they are uniquely susceptible to that abuse and adept at obscuring illegitimate purposes—as well as arbitrary racial preferences—behind the language of diversity and their own opaque processes.

Only a decision holding that every race-conscious admissions program—including those based on holistic review—must satisfy strict scrutiny in all respects will put an end to this cynical practice by the University and its peers.

III. The Court Should Address Holistic Review in This Case

While the University's factual circumstances differ from those of other schools, its holistic review process is typical. To correct the widespread misconceptions among university officials regarding the applicability and substance of strict scrutiny in the wake of *Grutter*, the Court should address this aspect of Texas's admissions program.

To begin with, this issue is properly before the Court. The petitioner's motion for summary judgment, denial of which is under review here, challenged the University to meet its burden to "prove that [its] use of race in its current admissions program employs narrowly tailored measures that further compelling governmental interests." Pls.' Mot. Summ. J., Mem. in Support, *Fisher v. Univ. of Tx. at Austin*, No. 08-cv-263 (W.D. Tex. Jan. 23, 2009), at 7 (quotation marks omitted). *See also id.* at 19–30. The University, in turn, defended its holistic review program, arguing that it compared favorably to that upheld in *Grutter*. Defs.' Mot. Summ. J., Mem. in Support, *Fisher v. Univ. of Tx. at Austin*, No. 08-cv-263 (W.D. Tex. Feb. 23, 2009), at 10–14. The court of appeals concurred in that view, upholding the University's plan in part on that basis. Pet. App. 39a, 51a. Judge Garza disagreed with that conclusion, arguing that the court was "obligated to consider the particular challenged race-conscious program on its own terms." Pet. App. 83a. And the issue is encompassed by the question presented here, whether the University's program is supportable "under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment." Pet. at i.[14]

A decision that answers that question narrowly—such as by focusing on the necessity of racial classifi-

[14] And the Court may, if it believes further briefing is warranted, set this case for reargument and direct the parties to specifically address the University's holistic review process.

cations to achieve "qualitative" diversity in the context of Texas's Top Ten Percent Law—may provide only limited guidance to other universities and the lower courts. In certain respects, the University's factual circumstances are unique: it is an elite public university, it fills a large proportion of its seats through the race-neutral Top Ten Percent Law, and the operation of that law ensures broad diversity in every dimension. While there are other elite public universities, they are not subject to laws providing for the automatic admission of certain students, and they exercise commensurately more discretion in admissions. A decision that responds only to Texas's unique circumstances—that it has no conceivable need for racial preferences to achieve broad diversity—could perversely have little impact on the practices of schools that subject *all* applicants to race-based holistic review.

Such a decision would also risk deterring other jurisdictions from adopting race-neutral measures to increase diversity similar to Texas's Top Ten Percent Law. University officials and their legislative supporters would recognize that even experimenting with such programs could make them targets for litigation seeking to eradicate any remaining use of racial preferences. This, too, would be a perverse result, given the emphasis the Court has placed on "serious, good faith consideration of workable race-neutral alternatives." *Fisher*, 133 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 339–40).

By contrast, a decision reviewing the University's holistic review regime would be broadly applicable, due to the uniformity of practice post-*Grutter*, and could only encourage universities and lawmakers to explore race-neutral alternatives to preferences. *See Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting) ("Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives."). It could also provide concrete guidance to universities and the lower courts on how exactly universities must support and justify race-conscious admissions programs. To date, such guidance has been lacking. *Cf. Fisher*, 133 S. Ct. at 2421 (directing the court of appeals, without further specifics, to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored"). And such a decision would necessarily serve "to make the existing minority admissions schemes transparent and protective of individual review" and thereby reduce "the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

In sum, even without revisiting *Grutter*'s holding that diversity may justify consideration of race in university admissions, the Court may substantially curtail improper use of race by identifying the infirmities inherent in the University's holistic review regime.

CONCLUSION

Because the University of Texas's holistic review program fails strict scrutiny, the decision of the court below should be reversed.

Respectfully submitted,

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