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 RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

In *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2417 (2013), this Court accepted "as given" *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). The Court reaffirmed that universities have a "compelling interest" in seeking "the educational benefits that flow from student body diversity." *Fisher*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 330). The Court held that *Bakke* and *Grutter* call for accepting the University of Texas at Austin (UT)'s "conclusion, 'based on its experience and expertise,' that a diverse student body would serve its educational goals." *Id.* (citation omitted). And the Court remanded for the Fifth Circuit to reconsider whether UT's "admissions program is narrowly tailored to obtain the educational benefits of diversity." *Id.* at 2421.

Now that the case is back before the Court, petitioner has completely retooled her challenge to UT's admissions policy. This time, she focuses *not* on whether UT's individualized consideration of race in holistic review is narrowly tailored, but on whether UT had a compelling interest to begin with. First, she argues that UT cannot rely on the "educational benefits of diversity" as its compelling interest, but instead, must "clearly specify" a more particularized interest. Pet. Br. 3; *see id.* at 20, 26, 29. Next, she argues that UT claims a new, discrete interest in "intra-racial" diversity (*id.* at 3; *see id.* at 15, 16, 21, 29), which she caricatures as an interest in seeking "more minority students from affluent communities" (*id.* at 42; *see id.* at 15, 36, 37). Petitioner is doubly wrong.

Petitioner's argument that UT must identify a more particular interest was considered—and rejected—in *Grutter*, when the Court held that the "educational benefits of diversity" is a compelling interest, over the objection that this interest was too amorphous to qualify as compelling. *See* 539 U.S. at 327-33; *id.* at 354 (Thomas, J., dissenting in part, joined by Scalia, J., in part) (arguing that this interest is not defined with sufficient "precision" to qualify as compelling). That ruling was the heart of *Grutter*—and, as the Court explained, it follows directly from Justice Powell's opinion in *Bakke*. *Id.* at 327-33. Petitioner's argument that UT has to identify a more specific interest is just her latest back-door attempt to gut *Bakke* and *Grutter*.

Petitioner's argument that UT's interest is favoring "affluent" minorities is a fabrication. From the announcement of its 2004 proposal to consider race in holistic review forward, UT has stated that its interest is the very one that Justice Powell recognized as compelling in *Bakke* and that *Grutter* reaffirmed is compelling. SJA 1a-2a, 3a-4a. Far from pursuing the perverse interest petitioner has concocted, UT has repeatedly made clear that it seeks minority students—and students of all races—from different backgrounds, with different experiences, and different perspectives. That is the essence of the diversity that this Court's precedents recognize as compelling. *See Fisher*, 133 S. Ct. at 2417-18 (discussing *Bakke*).

Petitioner asks this Court to adopt a radically different conception of diversity. In her view, diversity depends on skin color alone and should be measured simply by counting students of color on campus. In her view, minority students are fungible and should be lumped together to gauge diversity. Pet. Br. 5, 6, 9, 10.

In her view, two African-American applicants with different backgrounds and experiences are the same. *Id.* at 36-37. And in her view, two students from the same community would bring the "same" (*id.* at 37) perspectives to campus, and be just as likely to "break down racial stereotypes" (*Grutter*, 539 U.S. at 330), even if one student is African-American and the other white. That position not only asks this Court to deny that "race unfortunately still matters" in our society (*id.* at 333), but denies that individuals' "own, unique experience[s]" (*id.*) can affect who they are.

Petitioner is no more persuasive when she finally arrives—at page 38 of her brief—to her few "narrow tailoring" objections. These arguments, too, are based on a mischaracterization of the record and the manner in which UT's holistic policy actually works. They ask this Court to stick its head in the sand and deny that—as virtually every selective university in America has determined—a holistic review of *many* factors will generate a more diverse, and more educationally beneficial, class than automatic admission based on a *single* factor (class rank). Like petitioner's attack on UT's interest, these arguments are ultimately aimed at dismantling, rather than applying, the Court's existing precedent, and replacing it with a regime in which race can essentially never be considered even in holistic review, no matter how individualized or modest.

And petitioner has an even more fundamental problem, which she just ignores: she lacks Article III standing to press her claim. Now that her request for declaratory and injunctive relief is moot, petitioner can no longer show that the relief she requested would redress any injury she alleged—a core requirement of standing. Petitioner seems to view her lack of standing

as a technicality that should be overlooked given the importance of the question presented. But this Court has no more fundamental duty than to limit the exercise of the judicial power to actual controversies, with plaintiffs who have standing at all times.

STATEMENT OF THE CASE

A. UT And Its Educational Mission

For over a century, UT has served as the flagship public university in Texas. During the first 70-plus years of its existence, UT, like much of the South during this era, was racially segregated by law. The first African-American was not admitted until 1950, and the vestiges of de jure segregation lingered long thereafter. No. 11-345 Resp. Br. 3-4. UT is painfully aware of that history, and the lingering perception that "[UT] is largely closed to nonwhite applicants and does not provide a welcoming supportive environment to underrepresented minority students." SJA 14a. While petitioner ignores this history, UT still confronts it.

Indeed, just this summer, UT, like much of the South, experienced a poignant reminder of its past and the continuing relevance of race, especially among African-Americans, in America today. In response to the outcry that swept the South in the wake of the tragic Charleston church shooting in June, UT students led a movement to remove a statue of Jefferson Davis from an outdoor mall on UT's campus, amidst a debate over the statue's meaning and impact. UT's student body brought many different viewpoints to that debate, and this event is just one of many constant reminders that race remains relevant in Austin, as in America, today. *See* Sweatt Family Amicus Br. 34.

UT's central mission is educating the future leaders of Texas, in a State that is increasingly diverse. JA 253a, 407a, 415a-16a, 478a-79a; SJA 23a. UT, like virtually every other selective university in America, has concluded that assembling a student body that not only is exceptionally talented, but also richly diverse, is key to achieving that objective. JA 359a, 414a-15a, 478a, 481a. UT has a "broad vision of diversity," which looks to many factors, including socioeconomic background, extracurricular interests, hardships overcome, special talents, and race and ethnicity. *Id.* at 414a-15a, 424a. UT's own experience has confirmed the judgment of the Nation's top schools, as well as America's military and leading companies, that diversity is critical to preparing students to succeed in the world they will enter when they leave campus.

The educational benefits of diversity include, but are not limited to, bringing unique and direct perspectives to the issues and topics discussed and debated in classrooms, promoting cross-racial understanding, breaking down racial and ethnic stereotypes, and creating an environment in which students do not feel like spokespersons for their race. *Id.* at 415a-16a, 478a-79a. These benefits enhance the education that every Longhorn receives and are especially important in a State as diverse as Texas, where the majority of UT's graduates will work.

B. UT's Efforts To Meet Its Educational Objectives In The Wake Of *Hopwood*

One of petitioner's central claims is that UT failed to try "race-neutral means" to achieve the educational benefits of diversity before adopting the policy at issue. Pet. Br. 22, 24, 38, 47. As the district court found, that argument "ignore[s] the facts." Pet. App. 310a. After

the Fifth Circuit invalidated UT's consideration of race in undergraduate admissions in *Hopwood v. Texas*, 78 F.3d 932 (1996), UT undertook numerous race-neutral efforts to achieve diversity—and diversity plummeted.

For example, UT adopted a Personal Achievement Index (PAI)—to go along with an Academic Index (AI)—that included a holistic review of a wide variety of factors other than race, including several "socio-economic" factors. JA 162a-63a. In addition, UT bolstered its recruitment budget and established three new regional admissions centers to increase UT's visibility with prospective students, parents, and high school administrators in geographic markets with historically few UT students. *Id.* at 450a-51a. UT also created scholarship programs aimed at recruiting highly qualified students of all races from lower socioeconomic backgrounds. *Id.* at 448a-52a; *see id.* at 324a-26a. And UT launched promotional campaigns to recruit minority applicants from traditionally underrepresented backgrounds. *Id.* at 448a-52a.

Nevertheless, UT experienced an immediate, and glaring, decline in enrollment among underrepresented minorities. Compared to 1995, for example, enrollment of African-American students in 1997 dropped almost 40%—from 309 to 190 African-American students in a freshman class of 7,085, or less than 3% of the class. Pet. App. 165a; JA 99a. Enrollment of Hispanic students dropped by 5% (from 935 to 892). *Id.*

C. The Texas Legislature Responds By Enacting The Top 10% Law

In 1997, the Texas legislature enacted the Top 10% Law (1997 Tex. Gen. Laws 155 (HB 588)), which guaranteed admission to UT to any student in the top

10% of the graduating class of a Texas high school that ranks its students. Tex. Educ. Code § 51.803; JA 418a-19a. A key objective of HB 588 was to increase the admission of underrepresented minorities. Pet. App. 166a; JA 170a; House Research Organization Daily Floor Report: HB 588 at 4-5 (Apr. 15, 1997).

While the Top 10% Law ensures an opportunity to attend UT for well-deserving students—of all races—from across Texas, it has systemic drawbacks as well. Basing admission on "just a single criteria" not only undermines "academic selectivity," Pet. App. 200a, 203a n.149, but also excludes consideration of the broad array of factors that contribute to a genuinely diverse student body. The racial diversity that the law does add is largely a product of the well-known fact that the Texas school system remains largely segregated—with overwhelmingly Hispanic schools in places like San Antonio and the Rio Grande Valley, and overwhelmingly African-American schools in places like Houston and Dallas. Pet. App. 32a-33a, 34a-35a.[1]

Petitioner has declared that the Top 10% Law was a "success" in achieving "real diversity" at UT. Pet. Br. 2 (citation omitted). She has a dim view of success—and diversity. First, petitioner ignores the significant blow to diversity—in the broad and qualitative sense recognized by *Bakke*—that comes from selecting a class based on one factor (class rank), and nothing else. *See* JA 253a, 408a. Second, she ignores the evidence of glaring racial isolation that persisted at UT. For

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[1] Excerpts of a map cited by the Fifth Circuit illustrating the stark pattern of racial segregation in Texas are appended to this brief. *See* Pet. App. 34a n.101; Add. 1a-3a.

example, in 2002, just 3.4% of the freshman class was African-American. *Id.* at 177a. The isolation was less severe for Hispanic students (who comprised 14.3% of the freshman class in 2002), but Hispanic applicants still faced declining odds of admission, which were masked by the significant growth of Hispanics in the admissions pool generally. *Id.*; SJA 43a.

D. UT's Proposal To Add Race As A Factor In Its Holistic Review Of Applicants

In June 2003, this Court decided *Grutter* and thereby eliminated *Hopwood*'s outright ban on considering race in admissions. Petitioner claims (at 2) that "the day that *Grutter* issued, UT leapt at the opportunity to reintroduce racial preferences." This claim is based on a statement by UT's president, who was well aware of UT's struggle to achieve meaningful diversity through race-neutral means during the seven prior years. But nothing was decided that day. Instead, UT undertook a *year-long* assessment of whether UT had met its "overall goal of having a student body that is meritorious and diverse in a variety of educationally relevant ways," which included discussions with administrators, faculty, and students. JA 445a-46a, 481a. This lengthy process culminated in a *proposal* that UT made to the Board of Regents in June 2004 (2004 Proposal). SJA 1a-39a.

The 2004 Proposal explained, on the first page and throughout, that UT sought to achieve the same interest that this Court had just reaffirmed was compelling—the "educational values of diversity." *Id.* at 1a. UT further explained that, just as the Court had credited in *Bakke* and *Grutter*, the concept of diversity that it sought to achieve "encompasses a far broader array of qualifications and characteristics of which

racial or ethnic origin is but a single though important element." *Id.* at 3a (citations omitted). UT stressed, for example, that "[t]o break down stereotypes, there should be enough minority students for classroom discussion to reflect 'a variety of views among minority students.'" *Id.* at 1a (quoting *Grutter*).

The 2004 Proposal endorsed this Court's conclusion in *Grutter* that percentage plans, standing alone, "preclude individualized consideration of applicants." *Id.* at 6a-7a. It also noted that UT's attempt to increase diversity through race-neutral means had failed to achieve an environment in which the educational benefits of diversity were fully realized. *Id.* at 24a-25a. And in light of those objectives, UT explained that admissions decisions should reflect "an individualized, holistic review of each applicant, taking into consideration the many ways in which the academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of [UT]." *Id.* at 23a.

E. UT's Holistic Consideration Of Race

In August 2004, the Board of Regents—which is comprised of members appointed by the Governor of Texas—approved UT's proposal. The policy was first implemented with the 2005 admissions class.

Petitioner suggests (at 9) that the holistic admissions policy applies only to *in-state* applicants. In fact, it applies to all applicants who are not subject to automatic admission under the Top 10% Law—because they fall outside the top 10% of their class, attend a Texas school that (like some of the best schools in the State) does not rank students, or attend an out-of-state school. Holistic review results in a Personal

Achievement Score (PAS) based on an individualized review of six factors, one of which is "special circumstances." JA 424a, 429a-31a. The "special circumstances" factor is broken down into seven attributes, one of which is race (*id.* at 430a)—making race one of seven factors considered within one of six PAS categories—truly a "factor of factors" (Pet. App. 44a-45a). No "point[s]" or "automatic" advantages are based on race. JA 431a-32a; No. 11-345 Resp. Br. 13-14.

UT's holistic review process is conducted by trained admissions officers who read files in their entirety. The process looks at each applicant as a whole person—thus offsetting the one-dimensional aspect of the Top 10% Law—and considers the applicant's race only as one factor among many used to "examine the student in 'their totality,' 'everything that they represent, everything that they've done, everything that they can possibly bring to the table.'" JA 179a. "Race is contextual, just like every other part of the applicant's file." *Id.* at 219a. Race allows readers to consider "how does the student maneuver in their own world, how do they maneuver in someone else's world"? *Id.* at 260a-61a. No individual PAS factor is given any numerical value or is determinative. *Id.* at 429a-31a.

While it is undisputed that race is "a meaningful factor that can make a difference in the evaluation of a student's application," Pet. App. 281a; *see id.* at 180a, petitioner claims that UT's consideration of race has had only a "negligible" impact on diversity at UT. Pet. Br. 9; *see id.* at 24, 46. Here again, facts intrude. Even just looking at the numbers (as petitioner does)—and ignoring the benefits of holistic review in increasing diversity in the broad sense recognized by this Court—by 2007, the number of enrolled African-American

students admitted through holistic review had nearly doubled from 2004, climbing from 3.6% of the holistic class in 2004 to 6.8% in 2007. SJA 157a. Enrollment of Hispanic students likewise increased. *Id.* And 20% of all African-Americans students offered admission to the 2008 class, and 15% of all Hispanic students, were admitted through holistic review. *Id.* at 158a.

F. The Texas Legislature Endorses UT's Hybrid Approach For Attaining Diversity

Under UT's hybrid admissions plan, the majority of the incoming class was admitted under the Top 10% Law, and the remainder through race-conscious holistic review. Over time, however, the volume of Top 10% admits began to crowd out holistic admits because of the sheer number of students in the top 10% of their class in Texas—with Top 10% admits eventually filling 81% of the entering class in 2008. SJA 159a.

The Texas legislature responded, in 2009, by authorizing UT to limit Top 10% admissions to 75% of the entering class. Pet. App. 42a-43a; *see* Tex. Educ. Code § 51.803(a-1) (SB 175). In doing so, the legislature recognized that UT "need[ed] the flexibility to consider criteria other than high school rank, such as test scores, special talents, leadership ability, personal achievements, or other relevant aspects of what the student can offer the academic environment." House Research Organization Bill Analysis: SB 175 at 4 (Feb. 26, 2009) (SB 175 Bill Analysis). SB 175 sought to give UT (and other Texas schools) "the flexibility they need to carry out their educational mission and maintain a more well-rounded student body." *Id.* The legislature not only was aware of UT's consideration of race in holistic review, but conditioned SB 175's cap on Top 10% admits on UT's continued use of race by specifying

that the 75% cap expires if a court invalidates UT's use of race or UT decides that race should no longer be a factor in holistic review. Tex. Educ. Code § 51.803(k).

Legislators supporting SB 175 explained that promoting greater student diversity at Texas universities implicated nothing less than the "economic viability of the state," given the increasingly diverse makeup of Texas. SB 175 Bill Analysis at 5-6. They also noted that the Top 10% Law not only "hamper[ed] the university's ability to admit an ethnically diverse student body," but also "chok[ed] the flow of other talented students into fields like engineering, computer science, architecture, music, and the arts." *Id.* at 6. They also observed that a robust holistic review "allow[s] institutions to recruit a rich array of students, including minority students." *Id.*[2]

G. Petitioner's Challenge To UT's Policy

Petitioner, a Texas resident, applied for admission to UT's 2008 freshman class in Business Administration or Liberal Arts. Because petitioner did not graduate in the top 10% of her high school class, she was eligible for admission only under holistic review. Pet. App. 3a-4a. Based on her grades and SAT score, petitioner's AI score was 3.1 (out of 4.1). *Id.* at 6a. Given the intense competition in 2008, no holistic applicants for the fall 2008 Business or Liberal Arts freshman class were admitted unless their AI score exceeded 3.5. JA 465a-66a. In other words, even if petitioner had earned "a 'perfect' PAI score of 6," she

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[2] The cited legislative materials concerning SB 175 can be accessed at http://www.legis.state.tx.us.

would not have been admitted to the Fall 2008 freshman class. *Id.*; *see also* Pet. App. 6a-7a; UT CA5 Supp. Br. 11-13; No. 11-345 Resp. Br. 15-17. Petitioner's application to UT was denied.[3]

In 2008, petitioner filed suit against UT and University officials under 42 U.S.C. § 1983, challenging UT's admissions policy and seeking declaratory and injunctive relief requiring UT to reconsider her application on a race-blind basis, along with "monetary damages" in the amount of her application fees. JA 129a. She then enrolled at Louisiana State University (LSU). The district court granted summary judgment for UT, upholding UT's policy under *Grutter*. Pet. App. 315a-16a. The Fifth Circuit affirmed, finding that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*." *Id.* at 151a (citation omitted). Judge Garza agreed UT had shown that its policy is constitutional under *Grutter*, but argued that *Grutter* was wrongly decided. *Id.* at 244a (concurring).

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[3] Petitioner was also denied admission to UT's 2008 summer class, which had a different admissions track based on a second holistic review of files. JA 229a, 463a-64a. (UT discontinued this separate program in 2009.) Petitioner claims that some minority applicants with lower AI scores than hers were admitted to the 2008 summer class. Pet. Cert Reply 3. But the evidence does not prove that *petitioner* would have been admitted to the summer class but for the consideration of race. Many factors affect holistic review; race is only a factor of a factor. *See supra* at 10; No. 11-345 Resp. Br. 16-17 n.6. In any event, petitioner has abandoned any challenge to the now-defunct summer program by focusing her challenge on the fall admissions program, to which she indisputably would not have been admitted no matter her race.

In February 2012, this Court granted certiorari to review the Fifth Circuit's decision. Shortly thereafter, petitioner graduated from LSU. Pet. App. 58a. In June 2013, this Court vacated the Fifth Circuit's opinion. 133 S. Ct. 2411. While accepting *Bakke* and *Grutter* "as given" (*id.* at 2417), the Court held that the Fifth Circuit improperly deferred to UT in determining whether its admissions policy was narrowly tailored. *Id.* at 2421. The Court remanded with instructions to "assess whether [UT] has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Id.* The Court did not address UT's argument that petitioner lacked standing because she had already graduated from college and the damages she requested would not redress any alleged injury.

Following additional briefing and oral argument, the Fifth Circuit again held that UT's admissions policy is constitutional. Pet. App. 2a-3a. The Court stated that UT's argument that petitioner lacks standing had "force," but concluded that this Court's silence on petitioner's standing in *Fisher* precluded the court from accepting this argument. *Id.* at 9a-10a & n.26. After repeatedly stressing the "exacting scrutiny" called for by this Court's decision (*e.g.*, *id.* at 3a, 17a-19a, 22a), the Fifth Circuit found that UT's limited consideration of race was narrowly tailored to UT's compelling interest in achieving student body diversity (*id.* at 41a). Judge Garza dissented. *Id.* at 57a.

SUMMARY OF ARGUMENT

I. This action should be dismissed for lack of standing. Because petitioner brought suit only on behalf of herself, her request for declaratory and injunctive relief became moot when she graduated

from LSU three years ago. The only request for relief remaining in this case is her request for "monetary damages" in the amount of her application fees. But petitioner would have paid those fees if she had been admitted to UT, and such damages would not change (or "equalize")—in any way—the process under which she competed for admission to UT. Accordingly, petitioner can no longer show that the particular relief she requested would redress the particular injuries she alleged—a fatal deficiency under Article III.

II. On the merits, petitioner's attempt to reframe this case as a challenge to UT's *interest* in considering race in holistic review should be rejected. UT made clear from its 2004 Proposal forward that its interest is securing the educational benefits of diversity—the same interest this Court held was compelling in *Bakke*, *Grutter*, and *Fisher*. Petitioner's argument that a university must identify a more particular interest is foreclosed by *Grutter*—a case she has not asked this Court to overrule in any respect. And petitioner's claim that UT is pursuing an interest in favoring "privileged" minorities is unfounded. UT simply seeks minority students with different backgrounds, different experiences, and different perspectives. That is precisely the diversity that this Court has held universities have a compelling interest in seeking.

As Justice Powell observed in *Bakke*, the diversity that advances constitutional objectives encompasses a "broad[] array of qualifications and characteristics of which racial and ethnic origin is but a single though important element." 438 U.S. at 315. That includes a diversity of backgrounds and experiences within, as well as among, racial groups. Indeed, as the Harvard Plan Justice Powell appended to his opinion recognized,

promoting such diversity is one of the most obvious ways of breaking down stereotypes and fostering a variety of perspectives among—and within—racial groups. That is especially true in a State like Texas, where there remain stark patterns of racial segregation. Petitioner's view that UT must ignore differences among people of the same race, and treat African-American and Hispanic students as a fungible commodity in gauging diversity, demeans the dignity of those individuals and is starkly at odds with the Court's equal protection jurisprudence.

III. What is left of petitioner's narrow-tailoring objection also fails. Abandoning any serious challenge to how UT's holistic consideration of race works in practice, petitioner's main argument is that the Top 10% Law makes race-conscious holistic review unnecessary. But that argument ignores the jarring racial isolation that existed at UT, especially among African-American students, before UT adopted the plan at issue; it ignores that roughly a quarter of the admissions class is not even eligible for Top 10% admission; it ignores the undeniable fact that the Top 10% Law trades on the de facto segregation that still exists in Texas; and it ignores the Texas legislature's own judgment that race-conscious holistic review is a necessary complement to the Top 10% Law. The only difference between this case and *Grutter* is that UT considers race for only a portion of its admissions pool, and UT's policy lacks the features that Justice Kennedy criticized in his dissent in *Grutter*. Those differences cannot make UT's policy unconstitutional.

IV. The Fifth Circuit properly held that UT's limited consideration of race in holistic review is a necessary, and constitutional, complement to the Top

10% Law. But if the Court nevertheless concludes that the existing record is not sufficient, the answer is to order a trial, not to grant judgment for petitioner.

ARGUMENT

I. PETITIONER LACKS STANDING

Petitioner, like any litigant, must show that she has Article III standing at all times. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). That includes the requirement of showing not only that she has suffered an "injury in fact," but that her alleged "injury will be 'redressed by a favorable disposition.'" *Id.* at 560-61 (citation omitted). Because of the way she chose to plead her case, and her graduation from LSU years ago, petitioner can no longer meet this core requirement. Petitioner claims (at 2-3) that this Court "rejected" UT's standing argument in *Fisher*. But the Court did not say a word on petitioner's standing, and the Court's silence on that issue did not decide it. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); Pet. App. 58a (Garza, J., dissenting).

A. Petitioner Cannot Meet Article III's Minimum Requirements

Even if petitioner could show an injury in fact despite the unrebutted summary judgment record establishing that, with her AI score, she would not have been admitted to the Fall 2008 Class no matter what her race, she must still establish "that the requested relief will redress [her] injury." *Steel Co.*, 523 U.S. at 103 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45-46 (1976)); *see Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984); *see also Steel Co.*, 523 U.S. at 104-05 (burden falls on plaintiff to show that the "particulars of [her] complaint" meet redressability

requirement). Petitioner's complaint alleges two separate injuries: first, the denial of an "opportunity to attend [UT]" (JA 119a, 126a), and second, the failure to be "considered on an equal basis with African-American and Hispanic applicants" (*id.* at 118a, 125a). The relief petitioner has requested (*id.* at 128a-29a) simply would not redress either alleged injury.

1. Petitioner's request for declaratory and injunctive relief (*id.*) would have redressed her alleged injuries when she brought this action—and was still interested in attending UT. But her request for such relief became moot when she graduated from LSU in 2012. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *DeFunis v. Odegaard*, 416 U.S. 312, 314, 319-20 (1974) (per curiam). To avoid this problem, petitioner could have brought a class action on behalf of future applicants too, as the plaintiffs in *Grutter*, *Gratz*, and *Bakke* did. *See Gratz*, 539 U.S. at 268. But she did not.

2. Petitioner also requested "[m]onetary damages in the form of refund of application fees and all associated expenses"—$100. JA 129a; *id.* at 115a. But such damages would not redress her alleged injuries.

That is indisputably true for petitioner's alleged denial-of-admission injury. Petitioner herself has averred that that injury "*cannot* be redressed by money damages" (*id.* at 119a (emphasis added)), and she thus has forfeited any request for such relief. *See id.* at 127a (limiting request for "monetary damages" to alleged equal-opportunity-to-compete injury); *id.* at 127a-28a (same). Whether or not petitioner might have requested damages for the denial-of-admission injury, that statement is binding on petitioner. *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 676-77 (2010); *id.*

at 704 (Kennedy, J., concurring); *University Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 442 (D.C. Cir. 1999).

That leaves petitioner's alleged equal-opportunity-to-compete injury. Because this sort of injury is focused on the process, and not the denial of the benefit sought, this Court has always treated it as redressable only by prospective relief—guaranteeing "equal treatment" the next time. A party alleging such an injury must show that it is "able and ready" to compete again for the benefit sought. *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see Gratz*, 539 U.S. at 262; *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995). But petitioner plainly flunks that requirement because it is undisputed she will never compete again for undergraduate admission to UT.

In any event, while obtaining a $100 damages award might provide some "psychic satisfaction," *Steel Co.*, 523 U.S. at 107, Article III requires petitioner to show "that the requested relief will redress *the alleged injury*." *Id.* at 103 (emphasis added). And she cannot do so. Damages in the amount of the application fees would not make the admissions process any more "equal"—or change the way she competed at all. Nor is $100 in any way a measure of any alleged injury. Petitioner would have paid the application fees even if UT had not considered race at all—and even if she had been *admitted*. The application fees, in short, have no relationship whatever to the alleged injury. *See* Adam D. Chandler, *How (Not) To Bring An Affirmative-Action Challenge*, 122 Yale L.J. Online 85, 97 (2012).

That is the end of the matter. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff

into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107. This case underscores why that requirement makes sense. If "application fee" damages were sufficient to redress an equal-opportunity-to-compete injury, then even applicants who had *secured* the benefit sought (whether admission, a contract, or other good) would have standing to pursue such a claim.[4]

3. Petitioner's request for attorney's fees and costs also does not help her. It is settled that such a request cannot confer standing. *See Diamond v. Charles*, 476 U.S. 54, 70 (1986) (attorney's fees); *Steel Co.*, 523 U.S. at 107 (costs); *see also Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) ("[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to [standing]."). Likewise, it is settled that a general prayer for relief is insufficient to confer standing. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997). Any other rule would eviscerate Article III's redressability requirement.

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[4] This Court has indicated that the denial of the benefit sought could be redressed by monetary damages. *Adarand Constructors, Inc.*, 515 U.S. at 210 (contractor may "of course … seek damages for loss of th[e] contract"). But as noted, petitioner has forfeited such damages. Nor has she sought damages for emotional distress or the like. *Cf. Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974) (allowing recovery for "emotional distress and humiliation" for alleged racial discrimination).

B. Petitioner's Attempts To Circumvent This Clear Standing Defect Fail

Petitioner's attempts to "finesse" (*Lujan*, 504 U.S. at 569-70) this glaring standing defect fail.

1. Petitioner argues that the possibility of "nominal damages" confers standing. Pet. Cert. Reply 2. Because they "are symbolic only," *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1264 (10th Cir. 2004) (McConnell, J., concurring), a request for nominal damages, alone, should be insufficient to confer standing. *Id.* at 1266-69. But the bigger problem for petitioner is that she did not request nominal damages; she very specifically requested $100 in monetary damages in the amount of her application fees. So she has forfeited any request for nominal damages. *Cf. Magnett v. Pelletier*, 488 F.2d 33, 35 (1st Cir. 1973) ($500 is not nominal damages).

Judge Garza tried to fix this defect by construing petitioner's request for "monetary damages" as a request for "nominal damages." Pet. App. 60a (dissenting). But this Court has rejected such constructions. *See Arizonans for Official English*, 520 U.S. at 71 (refusing to construe general prayer for relief as request for nominal damages to "save the case" under Article III); *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (refusing to consider claim for damages not set forth in complaint). Petitioner's citation to a lower court decision (*see* Pet. Cert. Reply 2) is no answer to the rule consistently followed by this Court. And given that the complaint specified the precise monetary damages petitioner sought—a "refund of application fees and all associated expenses" (JA 129a)—it would be especially improper to construe her request for damages as a request for nominal damages.

2. Petitioner argues that her request for "monetary damages" should be construed as one for "restitution." Pet. Cert. Reply 2. But it does not matter what petitioner *calls* the application fees; they would not redress her alleged equal-opportunity-to-compete injury. Petitioner also waived this argument: her complaint does not seek "restitution," a "different remed[y]" than "monetary damages." *Schlueter v. Latek*, 683 F.3d 350, 353-54 (7th Cir. 2012) (Posner, J.). And, in any event, petitioner would not be entitled to restitution because UT was not unjustly enriched. Regardless of whether UT's policy is valid, UT did exactly what it promised, and petitioner received everything she was promised; UT considered her application under an individualized, holistic review that petitioner knew or should have known would consider race (*see* JA 107a-08a). *See, e.g.*, *State Farm Auto. Ins. Co. v. Newburg Chiropractic, P.S.C.*, 741 F.3d 661, 665 (6th Cir. 2013) (Sutton, J.); *Schank v. Schuchman*, 106 N.E. 127, 129 (N.Y. 1914) (Cardozo, J.).[5]

3. Finally, petitioner points to the fact that the district court bifurcated the liability and remedy stages of this case. Pet. Cert. Reply 2-3. But that routine case-management order did not (and could not) eliminate petitioner's burden to show that she has standing at all stages of the case; it simply deferred any need to fashion a remedy until after there has been any finding of any liability. The redressability inquiry turns on whether the "*requested* relief will redress the

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[5] UT did not "toss[] out" petitioner's "lottery ticket" to UT, as amicus Heriot (at 39) suggests. UT considered petitioner's application under its admissions policy, just as it agreed to do.

alleged injury." *Steel Co.*, 523 U.S. at 103 (emphasis added). That determination is made based on the complaint. *See id.* at 103-10; *Allen*, 468 U.S. at 753. The bifurcation order gets petitioner nowhere.

C. Respecting Article III's Limits Is Especially Important In Cases Like This

Even when a plaintiff alleges an injury of the most pressing nature, courts lack the power to redress it unless Article III's requirements are met. In *Allen v. Wright*, for example, the Court recognized that the claimed injury—plaintiffs' "children's diminished ability to receive an education in a racially integrated school"—not only was cognizable, but "one of the most serious injuries recognized in our legal system." 468 U.S. at 756. Yet, "[d]espite the constitutional importance of curing th[at] injury," the Court held that the federal courts could not redress it because Article III standing was lacking. *Id.* at 756-57. So too here.

Respecting Article III's limits here will not insulate admissions policies from review. Indeed, the new suits brought by members of petitioner's own legal team challenging the race-conscious admissions policies at other universities illustrate that these pleading defects can be easily avoided. *See* Opp. 28-29. At the same time, glossing over the standing requirement here would drive a stake through the redressability requirement and undermine confidence in the Court's commitment to the consistent and even-handed enforcement of Article III. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("[B]y adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect … for the Court's adjudicatory process.'" (citation omitted)).

The case should be dismissed for lack of standing, or the writ of certiorari should be dismissed as improvidently granted. *Cf. id.* at 110-11.

II. UT HAS ASSERTED A COMPELLING INTEREST IN CONSIDERING RACE

On the merits, petitioner has recast her case as a challenge to whether UT had a compelling interest to consider race to begin with. That argument fails.

A. UT Has Consistently Made Clear That Its Interest In Diversity Is The Very One This Court Has Repeatedly Held Is Compelling

1. This Court has repeatedly held that universities have a compelling interest in seeking the educational benefits of student body diversity, including "enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Fisher*, 133 S. Ct. at 2418. In *Bakke*, Justice Powell explained that this interest was "clearly … a constitutionally permissible goal for an institution of higher education"—indeed, a goal of "paramount importance." 438 U.S. at 312-13. In *Grutter*, this Court reaffirmed "Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." 539 U.S. at 323, 325; *see id.* at 387 (Kennedy, J. dissenting) (Justice Powell's opinion in *Bakke* "states the correct rule for resolving this case"). And in *Fisher*, this Court again accepted this compelling interest. 133 S. Ct. at 2417-18.

This Court has also repeatedly emphasized that the diversity that produces educational benefits is "complex." *Id.* As Justice Powell explained, the constitutionally compelling interest in diversity "is not an interest in simple ethnic diversity," but an interest that "encompasses a far broader array of qualifications

and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315; *accord Grutter*, 438 U.S. at 324-25, 329-30 (quoting *Bakke*); *Fisher*, 133 S. Ct. at 2418 (quoting *Bakke*). In addition, the Court has recognized that a university is entitled to make "an academic judgment"—protected by the First Amendment—that the pursuit of such diversity is "integral to its [educational] mission." *Fisher*, 133 S. Ct. at 2419; *see Bakke*, 438 U.S. at 311-13; *Grutter*, 539 U.S. at 328-29; *id.* at 387-88 (Kennedy, J., dissenting).

2. UT has made clear from the outset—including "at the time" its decision was made (Pet. Br. 3)—that its interest in considering race is the same one that this Court has repeatedly held is compelling. SJA 1a, 3a-4a, 23a-25a, 29a. Under the heading, "DIVERSITY BROADLY CONSIDERED," the 2004 Proposal explained that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is a single though important element." *Id.* at 3a (quoting *Grutter* and *Bakke*). The 2004 Proposal further explained that the Top 10% Law "preclude[s]" the kind of "individualized consideration of applicants" necessary to generate such diversity (*id.* at 6a-7a), and that UT's attempt to increase student body diversity through race-neutral means had failed to achieve UT's interest in achieving the educational benefits of diversity (*id.* at 23a-25a).

The 2004 Proposal also explained that student body diversity, in the broad sense described above, helps to "break down stereotypes," "promote[] cross-racial understanding," and create "classroom discussion … reflect[ing] 'a variety of views among minority

students.'" *Id.* at 1a (quoting *Grutter*); *see id.* at 25a (UT seeks to "provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society"). In UT's judgment, these benefits "promote[] learning outcomes and better prepare[] students for an increasingly diverse work force, for civic responsibility in a diverse society, and for entry into professions, where they will need to deal with people of different races, cultures, languages, and backgrounds." JA 478a-79a; *see id.* at 415a-16a. As this Court had just recognized in *Grutter*, "numerous studies" confirm these benefits. 539 U.S. at 330.

While ignoring UT's stated objective, petitioner argues that UT's Proposal set out "two reasons" for considering race: (1) "demographic parity," and (2) "classroom diversity." Pet. Br. 7, 27-28. That is a distortion of UT's policy. Indeed, the 2004 Proposal explicitly disclaimed the first supposed interest, stating that UT's consideration of race was "*not* an exercise in racial balancing" (SJA 24a (emphasis added)), and petitioner has conceded that UT did *not* adopt any demographic or other "target" (JA 181a). As to the second, UT did not set a discrete "classroom diversity" target (*id.* at 317a); it pointed to the evidence of stark racial isolation in classrooms as one indication that it was not achieving the full educational benefits of diversity—UT's stated objective. SJA 1a-3a, 24a-26a; *see* JA 316a. For example, UT's study showed that there were zero or one African-American students in 90% of the undergraduate classrooms of the most typical size (5-24 students). SJA 140a. The classroom diversity study itself stated that UT's objective was

the "educational benefits of diversity" (*id.* at 69a), not some discrete "classroom diversity" target (JA 317a).

3. Throughout this litigation, UT has repeatedly reiterated that its interest in considering race is the same one this Court found compelling in *Grutter*—the educational benefits of diversity. It did so in the district court on summary judgment, Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. 8-10, ECF No. 96-1; in the Fifth Circuit during the initial appeal, Br. for Appellees 14-16; in this Court in 2012, No. 11-345 Resp. Br. 23; in the Fifth Circuit on remand, UT Supp. Br. 39-41; and in this Court on certiorari, Opp. 22-24. UT also has repeatedly explained that it has never pursued the discrete "demographic parity" and "classroom diversity" interests petitioner claimed. *See* No. 11-345 Resp. Br. 28-31, 39-40; UT CA5 Supp. Br. 46; Opp. 25 & n.3. Petitioner's challenge to UT's interest in considering race is thus based on a false premise.

B. Petitioner's Argument That UT Must Identify A More Discrete Interest Is An Attempt To Relitigate *Grutter*

The crux of petitioner's new argument is that UT must identify a more specific interest than the one this Court has repeatedly held is compelling. *See* Pet. Br. 3 (UT must "clearly specify an interest"), 20 (must identify "interest in educational diversity with clarity"; must give "precise reasons"), 21 ("must have evidence"), 26-27 (must "clearly describe and support" interest), 29 (must "'clearly identif[y]' educational goal"), 29-30 (must "clearly define[] objectives"), 31 ("must produce evidence"). This argument should sound familiar to this Court, because it is practically ripped from the pages of the plaintiff's brief in *Grutter*.

The central question raised and resolved by this Court in *Grutter* was the continuing validity of "Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." 539 U.S. at 325. In addition to extensive party briefing on that question, a mountain of amicus briefs filed on behalf of educational institutions, military leaders, Fortune 100 companies, and other groups and individuals were filed expounding the educational benefits of diversity. And the Court squarely resolved this precise question by "hold[ing] that the Law School has a compelling interest in attaining a diverse student body." *Id.* at 328.

The plaintiff in *Grutter* made the same argument that petitioner now advances in this case about requiring the university to identify, and prove, an interest with more "clarity" and "precis[ion]" (Pet. Br. 20). *See Grutter* Pet. Br. 22, 2003 WL 164185 (arguing that the Law School's diversity interest "is inherently unsuited to be a compelling interest" because the interest "is simply too indeterminate, open-ended, and unbounded by ascertainable standards"); *see id.* at 30 (arguing that "[t]he concept of 'diversity' is itself notoriously ill-defined"). Two Justices agreed. *See Grutter*, 539 U.S. at 356-57 (Thomas, J., dissenting in part, joined by Scalia, J., in part); *id.* at 362-64; *id.* at 347-48 (Scalia, J., dissenting in part, joined by Thomas, J.). But the Court held that the law school's interest in "attaining a diverse student body" not only was sufficiently specific, but compelling. *Id.* at 329.

Some may "disagree[] about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity." *Fisher*, 133 S. Ct. at 2419. But petitioner herself has

forfeited any challenge to *Bakke* and *Grutter*. *See id.*; *id.* at 2422 (Scalia, J., concurring); Pet. App. 181a. This case therefore provides no opportunity to reconsider *Grutter*. *Cf. Randall v. Sorrell*, 548 U.S. 230, 264 (2006) (Alito, J., concurring in part and concurring in judgment) ("Whether or not a case can be made for reexamining [precedent] in whole or in part, what matters is that respondents do not do so here ….").

C. Petitioner Both Misrepresents, And Misconceives, UT's Interest In Diversity

Throughout this litigation, petitioner has attempted to twist UT's defense of its policy by claiming that UT is pursuing discrete ends that it has not. For example, in 2012, petitioner incorrectly claimed that UT was pursuing discrete ends in "racial balancing" and "classroom diversity." *See* No. 11-345 Resp. Br. 28-31, 39-40. The Court, rightly, declined to accept either of those arguments. This time, she repackages her prior argument that UT is pursuing a "post-hoc" "interest in 'intra-racial diversity,'" which she mischaracterizes as an interest in admitting "more affluent" minority students. Pet. Br. 16-17; *see id.* at 15, 21-22, 29, 35, 37, 42; No. 11-345 Reply Br. 12-14. The Court should again reject petitioner's caricature of UT's interest.

1. Petitioner's argument that UT's interest is admitting "privileged" minority students (Pet. Br. 37) is based on a distortion of UT's explanation of one of the ways in which selecting part of the class through holistic review furthers UT's (actual) interest in attaining the educational benefits of diversity. No class selected according to a single-factor (such as class rank) will be as diverse, across many dimensions, as it could be if supplemented with students selected through holistic review. *See, e.g.*, JA 252-53a, 408a-09a.

For example, the Top 10% Law will select *no* students, white or minority, who had remarkable achievements or are exceptional or unusual in some way, but fall just below the top decile of their high school class by GPA. A process genuinely interested in *diversity*, in all its dimensions, cannot possibly ignore that blind spot.

Attention to this individualized conception of diversity is especially critical in the State of Texas, where patterns of racial segregation persist to this day. *See* Pet. App. 32a-39a; No. 11-345 Sweatt Family Amicus Br. 23-31; No. 11-345 NAACP Amicus Br. 6-23. The Top 10% Law was designed to trade upon this unfortunate geographic fact. This racial segregation—starkly illustrated by the maps reproduced in the addendum hereto—is a known fact in Texas.

In light of that undeniable pattern of segregation, UT's holistic review is especially important in assuring that Hispanic and African-American students—just like students of all other races—come from a diversity of backgrounds, with a diversity of experiences, including the experience of growing up as a minority in an integrated community or being a minority who is not the first in their family to attend college. *See* No. 11-345 Resp. Br. 33-34; CA5 Supp. Br. 47-48; SJA 163a-64a. These students add to the diversity at UT because they have a different set of experiences and backgrounds to add to classroom debate, help to challenge racial stereotypes, and often have already demonstrated an ability to cross racial barriers and maneuver outside their "bubble." JA 257a.

Petitioner's contention that UT has asserted an interest in "preferring minority students from wealthier, integrated backgrounds" (Pet. Br. 36; *see id.* at 15, 37, 42) is false and disproved by the record. UT

expends significant efforts in recruiting students—of all races—from disadvantaged backgrounds, and UT certainly wants students who have overcome such obstacles. *See supra* at 6; JA 162a-63a. Such students do not "lack" (Pet. Br. 36) anything, and they enrich the diversity at UT. But the key point—simply ignored by petitioner—is that UT does not seek minority students with any *particular* background; it seeks a student body that includes both minority—and non-minority—students with the *variety* of backgrounds and experiences that is necessary to achieve all of diversity's benefits. No. 11-345 Resp. Br. 34; SJA 163a-65a; CA5 Supp. Br. 48; Opp. 24.[6]

2. This is not a "post-hoc rationalization." Pet. Br. 31. It is the essence of the broad-based conception of diversity that UT outlined in its 2004 Proposal—and that this Court has repeatedly emphasized. SJA 1a-3a, 25a; *see supra* at 25. As the Court underscored in *Fisher*, the "central point" of Justice Powell's opinion in *Bakke* is that the diversity that advances educational objectives "encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element." 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 315); *see Grutter*, 539 U.S. at 324-25 (same). Attaining such diversity, this Court emphasized, "serves values beyond race alone, including enhanced classroom

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[6] Petitioner argues (at 40 & n.7) that UT's policy is "at war with itself" because UT seeks minority students from different backgrounds, with different experiences. But this contention just underscores how limited her conception of diversity is. Any policy that genuinely seeks diversity in the broad sense would seek students of all races from different backgrounds.

dialogue and the lessening of racial isolation and stereotypes." *Fisher*, 133 S. Ct. at 2418. Ensuring a diversity of backgrounds within, as well as among, racial groups is one of the most obvious ways to ensure a diversity of views and to break down stereotypes.

The Harvard plan commended in *Bakke* recognized the value of diversity within, as well as among, racial groups. To illustrate how the "critical criteria" in achieving the educational benefits of diversity "are often individual qualities or experience *not dependent upon race but sometimes associated with* it," the Harvard plan gave the example of two different African-American applicants—"A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power." *Bakke*, 438 U.S. at 324 (emphasis added) (quoting Harvard Plan). The plan recognized that each of these applicants would add to student body diversity in their own unique ways, and that the university's diversity interest would be furthered by both. *Id.*; *see Gratz*, 539 U.S. at 272-73 (relying on same example).

This is not some newfangled concept. As Professors Bowen and Bok observed in their leading work on the educational benefits of diversity, it is "clear … that a student body containing many different backgrounds, talents, and experiences will be a richer environment in which to develop [racial understanding]." William G. Bowen & Derek Bok, *The Shape of the River* 280 (1998). "In this respect," they explained, "minority students of all kinds can have something to offer their

classmates. The black student with high grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx." *Id.*; *see id.* at 236 ("greater diversity *within* the minority community" can promote the educational benefits of diversity (emphasis added)).

The same goes for two Hispanic students from San Antonio, or two African-American students from Houston, one of whom graduated from a high-performing, integrated school and the other from a low-performing, racially identifiable school. *See* Pet. App. 34a-37a (discussing examples); Add. 2a-3a (showing demographics of San Antonio and Houston). Each of these students would bring his own unique perspective to UT based in part on his particular background and experience. Both would contribute to the diversity of UT's student body, but in distinct ways, by virtue of their distinct backgrounds and experiences. And together, they would help defeat racial stereotypes, reinforced by the racial segregation in Texas, that all Hispanics or African-Americans come from the same background or have the same experiences.

UT's holistic admissions process is designed to identify, and value, such diversity. Not only does the special circumstances factor include a variety of factors in addition to race (*e.g.*, an applicant's background, school, or neighborhood, JA 258a, 363a, 480a), but a purpose of considering such factors is to identify "individuals who can enrich classroom discussions with their unique experiences." SJA 28a. Just as overcoming adversity may distinguish an applicant, minority or otherwise, so too may showing an ability to cross racial lines and maneuver outside one's "bubble." JA 257a; *see id.* at 258a-59a, 260a-61a, 430a. UT's

holistic policy not only values the "Hispanic student [who] was president of a Hispanic majority high school," but "an African-American student who is president of his or her majority white school." *Id.* at 484a-85a. UT's policy recognizes that both students bring "an additional aspect of diversity." *Id.* at 485a.

Seeking diversity within diversity underscores that it is *not* "all about race"—*i.e.*, that UT does not "enroll a student just because they are black … or just because they're Hispanic." *Id.* at 360a. Quite the opposite. UT appreciates that every student brings "a lot of other diversity pieces with them," like "geographic diversity, … socioeconomic diversity, … the type of school [a student] came from, … [the type of community he grew up in] rural, inner city, suburban, … [his] background growing up," and so on. *Id.* at 360a, 363a. Race, along with other factors, simply provides a "contextual background for the student's achievements and in determining potential contributions to [UT]." SJA 29a. The point of such holistic review is that "[s]tudents … are more than just their race." JA 360a-61a.

Any other conception of diversity would be perverse—and grossly out of step with this Court's equal protection jurisprudence—because it would "fail[] to account for the differences between people of the same race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 434 (2006). Instead, it would treat all members of the same race as fungible, thereby "reinforc[ing] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (quoting *Shaw v. Reno*, 509 U.S. 630, 657 (1993)).

Experience, not to mention this Court's own precedents, teaches the profound flaws in that view.

D. Petitioner's Limited Conception Of Diversity Subverts The Dignity Of Individuals

This Court has stressed that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Parents Involved*, 551 U.S. at 746 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). This is precisely why UT has adopted an admissions policy that gives attention to the individual *as a whole*, and not just his or her ancestry or race. Petitioner is asking this Court to hold that a university must ignore the individuality of students'—or at least African-American and Hispanic students'—own unique backgrounds, experiences, and perspectives.

Indeed, petitioner lumps all underrepresented minorities together into an undifferentiated "minority" statistic to gauge diversity, as if all minorities think alike and are defined by their skin color, no matter what their individual backgrounds and experiences. *See* Pet. Br. 5, 6, 9, 10, 46. Remarkably, petitioner suggests that two African-American applicants who grew up in different communities should be considered interchangeable, even if their life experiences were different, and that African-American and white applicants from the same community should be deemed to have the "*same* experiences and viewpoints," even if one experienced discrimination, racial isolation, or simply minority status, and the other was part of the dominant racial majority in the community. *Id.* at 37.

Petitioner's position is an affront to individuality, and to reality. No two students bring with them to campus the "*same* experiences and viewpoints" (*id.*). That includes two students who, while both African American, grew up in different communities, with different experiences. *See Bakke*, 438 U.S. at 323 (noting the benefits of admitting a diversity of African-American students, with "the *variety* of points of view, backgrounds, and experiences of blacks in the United States" (emphasis added) (quoting Harvard plan)). And it includes two persons who, while from the same community, have a different race. Petitioner is asking this Court to deny that "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333.

Just as *reducing* "an individual to an assigned racial identity" demeans his dignity, *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring in part and concurring in the judgment), so does *ignoring* that an individual's race may shape his experience and viewpoints. And just as using "crude racial categories" to classify individuals is an affront to individual dignity, *see id.* at 786, 797 (Kennedy, J.), so is denying that individuals of the same race can have different viewpoints based on their own experiences and backgrounds. UT's holistic consideration of race respects the individual by taking into account *all* the factors that make each applicant unique. Petitioner is asking this Court to ignore those truths and reduce individuals to "nothing more than their race." *Texas*

Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, 135 S. Ct. 2507, 2525 (2015).

III. UT'S POLICY IS NARROWLY TAILORED

Petitioner's narrow-tailoring objections—which up to this point had been the focus of her challenge—have become an afterthought. And petitioner scarcely challenges how UT's policy "works in practice"—the focus of this Court's remand order. *Fisher*, 133 S. Ct. at 2421. In any event, the Fifth Circuit properly held—under the exacting scrutiny demanded by this Court in *Fisher*—that UT's policy is narrow tailored.

A. UT Permissibly Determined That The Status Quo Was Unacceptable In 2004

As both the Fifth Circuit and the district court found (Pet. App. 29a, 310a), the record overwhelmingly shows that UT gave serious, good faith consideration to race-neutral alternatives before adopting the policy at issue. The record is replete with evidence showing that UT undertook extensive efforts—over the eight years between *Hopwood* and the adoption of the policy at issue—to boost minority enrollment through the race-neutral means touted by petitioner, including substituting "socioeconomic" factors for race in holistic review. *See supra* at 6. Indeed, even Judge Garza acknowledged that "the University's many efforts to achieve a diverse campus learning environment without resorting to racial classifications are commendable." Pet. App. 86a (dissenting). A reviewing "court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes." *Fisher*, 133 S. Ct. at 2420. Petitioner ignores UT's own experience.

Despite UT's good-faith efforts, UT experienced an immediate and unmistakable decline in minority enrollment. From 1997 to 2002, African-American enrollment dropped nearly in half, enrollment of underrepresented minorities generally remained stagnant or worse, and minority students' odds of admission worsened under race-blind holistic review. JA 172a. As the number of mandatory admits under the Top 10% Law increased and that pool became more and more competitive, by 2003, the number of holistic enrollees had dropped to 73 African-Americans. JA 175a-77a. Hispanic holistic enrollment was better but still suffered—dropping from 534 in 1997 (7.5% of the class) to 210 in 2003 (3.2% of the class). *Id.* In short, racial isolation was growing at alarming rates, especially among African-Americans.

The rosy picture petitioner paints—and her stunning claim of a "dramatic increase" in underrepresented minorities (Pet. Br. 10)—is a mirage. For example, petitioner tries to obscure the strikingly low levels of African-American enrollment by simply lumping African-American and Hispanic students together into one "minority" mass. *See, e.g.*, *id.* at 5, 6, 9, 10. Petitioner also ignores the dramatic increase in the number of Hispanic students in the applicant pool, which masked their dwindling odds of admission under UT's race-blind admissions policy. *See* Pet. App. 273a; *supra* at 8. And petitioner's argument asks the Court to accept 1996—the year *Hopwood* was decided and UT suspended all consideration of race at the height of the admissions season—as a golden age of (and a cap on) diversity, when only 4.1% of the entering class was African-American (compared to 7% at other selective

schools during this period, *The Shape of the River* 51) and 14.5% was Hispanic. JA 158a.

In arguing (at 46) that UT "achieved critical mass no later than 2003," petitioner asks this Court to go further than Judge Garza, who joined the panel in unanimously rejecting petitioner's arguments that UT "had achieved a 'critical mass' in 2004." Pet. App. 71a n.11. While UT looked to many factors in determining that it had not yet achieved, or could expect to sustain, the educational benefits of diversity (*see* No. 11-345 Resp. Br. 41-43, 46), one fact suffices to prove the point. In 2004, African-Americans comprised only 4.5% of the freshman class—309 students out of a class of 6,796—and that number was even lower in 2003, underscoring just how alarming the situation was for African Americans. JA 177a. Not surprisingly, that data was accompanied by evidence of glaring racial isolation among African-American students. *Supra* at 7-8. UT properly determined that it could not realize, much less sustain, the educational benefits of diversity with such glaring racial isolation among African Americans.

Judge Garza attacked *Grutter*'s concept of "critical mass" as "subjective, circular, or tautological." Pet. App. 69a. Petitioner does not take up that argument (and so has waived it), presumably because it is just an attack on *Grutter*, which held that the "concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce." 539 U.S. at 330. In so holding, the Court rejected the argument that this concept of critical mass was too "mystical and metaphysical" (*Grutter* Pet. Br. 31; *see* Reply Br. 4-5, 2003 WL 1610793) to satisfy narrow tailoring under strict scrutiny. If *stare decisis* means anything, that issue cannot be revisited in a case where

petitioner has waived any challenge to *Grutter* and this Court has already accepted that decision "as a given."

Remarkably, petitioner faults (at 8) UT for *not* adopting "any specific or approximate level of minority admissions that would constitute a 'critical mass.'" But the concern that Michigan might be using the educational concept of critical mass "to achieve numerical goals indistinguishable from quotas" was precisely the issue that worried the dissenters in *Grutter*. *See, e.g.*, 539 U.S. at 389 (Kennedy, J.). Petitioner's paradoxical argument that UT's policy is unconstitutional because UT indisputably has *not* set or pursued any specific numerical targets (*see* JA 181a) is therefore an attack on both the majority (539 U.S. at 335) *and* the dissent in *Grutter* (*id.* at 389). The absence of any specific racial target or goal cannot possibly be a constitutional flaw in UT's policy.[7]

B. UT Properly Concluded That The Individualized Consideration Of Race In Holistic Review Was Necessary To Complement The Top 10% Law

Petitioner renews her claim that the Top 10% Law is a complete, workable alternative to considering race in the holistic review of applicants ineligible for Top 10% admission. Pet. Br. 38-42. Once again, *Grutter* intervenes. In *Grutter*, this Court rejected the argument that percentage plans—including Texas's Top 10% Law, in particular—provide a workable

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[7] Not only has UT not adopted any numerical target, but the evidence shows that the number of African-American and Hispanic holistic admits fluctuated materially from year to year between 2003-2008. *See* SJA 169a-70a.

alternative to individualized, holistic consideration of race, pointing out that such plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340. Because petitioner has not asked this Court to overrule *Grutter* in any way, there is no basis for reconsidering that part of the decision. But in any event, the Texas experience simply confirms that the Court was correct.

The Top 10% Law has its pluses, including the fact that it provides a well-deserved opportunity for students across Texas to attend the State's flagship public institution. But no selective university in America selects all of its students based solely on class rank or GPA, because such a one-dimensional method of admissions obviously sacrifices student body diversity in the broad sense recognized by this Court. Indeed, given that the Top 10% Law "admit[s] students based on the sole metric of high school class rank," even Judge Garza acknowledged that "*some form* of holistic review is advisable to supplement the admissions process." Pet. App. 87a (dissenting).

Moreover, even petitioner does not argue that the Top 10% Law is a *complete* alternative to holistic review—and it is not. A significant segment of UT's admissions pool—typically, at least 25% of the entering class (SJA 159a)—is categorically ineligible for admission under the Top 10% Law. This segment comprises Texas students who attend public or private schools that do not rank their students—some of the highest-achieving schools in Texas—and out-of-state and international students. Petitioner has never argued that the Top 10% Law is an available

alternative for that important applicant pool. So the question is why would the Constitution prevent UT from making that segment of the class diverse as well, using the same kind of policy that this Court approved—on a broader scale—in *Bakke* and *Grutter*?

The reason petitioner offers is that the Top 10% Law already gives UT as many minority students as UT could constitutionally seek to achieve its educational objectives. But as explained above, UT plainly had not achieved its educational objectives before it adopted the holistic plan at issue. Indeed, in 2002, just 3.4% of the freshman class was African-American (JA 177a) and UT's research confirmed that having so few African-American students on campus led them to experience extreme racial isolation. *See id.* at 446a; SJA 66a-70a. And, as noted, even Judge Garza recognized that UT had not reached a critical mass in 2004. Pet. App. 71a n.11; *cf. Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in judgment) (plurality was "profoundly mistaken" to the extent it "suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools").

Petitioner also ignores how few minorities could be offered admission through holistic review, if race could not be considered at all. Because the great majority of the entering class is filled with Top 10% admits, the holistic admissions process is exceptionally competitive. That was particularly true in petitioner's admissions year, 2008, when the 21,000 applicants not admitted under the Top 10% Law competed for 4,000 spots. JA 210a. The competition is particularly fierce for minority applicants, who do not fare as well as non-minority applicants in the holistic review process. *See*

Pet. App. 22a-23a, 55a. If that process had to become entirely race-blind, things would get even worse for minority applicants. As the Fifth Circuit put it, given the test score gaps between minorities and non-minorities, if holistic review did not consider "each individual's contributions to [UT]'s diversity, including those that stem from race, holistic admissions would approach an all-white enterprise." *Id.* at 23a-24a.

As noted above, UT's holistic policy also helps offset the fact that the Top 10% Law trades on the "de facto segregation of schools in Texas." *Id.* at 32a-33a. As the Fifth Circuit noted, "over half of Hispanic students and 40% of black students [in Texas] attend a school with 90%-100% minority enrollment." *Id.* at 34a. Most African-American and Hispanic Top 10% admits have graduated from those schools. *Id.* at 35a-36a. UT's holistic admissions policy not only helps ensure minority students with a variety of different backgrounds and perspectives, but helps ensure that UT's admissions policy does not *reinforce* stereotypes that Hispanics come from "the valley" or African-Americans from "the inner city."[8]

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[8] The difference in backgrounds and experience in Top 10% and holistic admits is also evidenced by test score gaps. On average, African-American and Hispanic holistic admits have higher SAT scores than their Top 10% counterparts. *See* 11-345 Resp. Br. 33-34. This presumably explains why Stuart Taylor—one of the authors of the so-called "mismatch" theory (which has been discredited, *see, e.g.*, No. 11-345 Empirical Scholars Amicus Br. 12-27) said "that if he were forced to choose, UT would be better off dropping the 10% plan and taking race into account directly through a holistic evaluation." Jess Bravin, *Justices Face A Test On Race: A University Of Texas Admissions Policy Aims To Help High-Scoring Minorities*, Wall St. J., Oct. 8, 2012. Mr.

Nor is there any basis to hold that UT cannot perform holistic review in the same way as Harvard University or the Little Ivies and, instead, is required to substitute socioeconomic factors for race. UT's own experience confirms that socioeconomic factors are *not* an adequate proxy for race in holistic review. When UT tried that experiment after *Hopwood*, African-American enrollment plummeted and Hispanic underrepresentation increased. *Supra* at 5-6. Meanwhile, the odds of admission for similarly situated white applicants improved. Pet. App. 166a, 205a.

That result is not surprising. While race and poverty are correlated, there are, for example, "almost six times as many white students as black students who both come from [low socio-economic status] families *and* have test scores that are above the threshold for gaining admission to an academically selective college or university." *The Shape of the River*

Taylor renews his "mismatch" arguments in this case. Those arguments are unpersuasive, but critical to understanding them is that they are based on his analysis of the impact of "large preferences" based on race. *E.g.*, Taylor Amicus Br. 16. According to petitioner herself (at 24), the problem with UT's plan is that its consideration of race is too "minimal."

Petitioner's claim (at 41) that no African-American holistic admit was accepted to UT's business, communications, or nursing programs in 2005-2007 is incorrect. The data she is relying on excludes out-of-state admits. The asterisks in the tables do not mean zero; they mean less than five. So in 2005 and 2006, for example, African-Americans *did* enroll in both the business (1) and communications programs (2). And most important, petitioner has just cherry-picked certain programs. UT's engineering and natural science programs, for example—both of which are highly competitive, rigorous, and prestigious—regularly enroll high numbers of holistic minority admits. *See, e.g.*, SJA 63a, 166a.

51; *see also Schuette v. Coalition to Defend Affirmative Action, Integration & Immigration Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1678-80 (2014) (Sotomayor, J., dissenting) (discussing precipitous decline in minority admissions at the University of California and of Michigan after race was excluded from holistic review).

3. As discussed, the Texas Legislature has affirmed UT's judgment that race-conscious holistic review is a necessary complement to the Top 10% Law through its passage of SB 175 in 2009. *Supra* at 11-12. In enacting SB 175, legislators specifically expressed concerns that, as Top 10% admits began to fill more and more of the class, the Top 10% Law "hamper[ed] the university's ability to admit an ethnically diverse student body." SB 175 Bill Analysis at 6.

In *Schuette*, this Court emphasized the value in "[o]ur constitutional system" of allowing the citizens to debate through the political process and enact "new approaches" to "difficult question[s] of public policy," including when it comes to "programs designed to increase diversity." 134 S. Ct. at 1636-38. Of course, the citizens are bound by the Constitution. But the benefits of such experimentation are not a one-way street that only accrue when the citizens decide to *ban* the consideration of race in admissions.

Texas's hybrid approach is tailored to the unique challenges that UT faces in training the future leaders of one of the most diverse States in the Union. The legislative consideration of the delicate and important issue of diversity in higher education, an issue of ongoing debate and concern in Texas (*see* No. 11-345 Texas State Senate and House Member Amicus Br. 12-35), addresses the issue in a way that cannot be

achieved through judicial declaration. This Court has the final say on the constitutionality of UT's admissions policy. But no less than in *Schuette*, it is appropriate also to credit the values of resolving this divisive issue through the democratic process.

C. Petitioner's Paradoxical "Minimal Impact" Argument Is Telling But Unavailing

Petitioner argues that UT's consideration of race is too *modest* to be constitutional. Pet. Br. 9 ("negligible"), 46-47 ("minimal"). But a modest impact is exactly what to expect from the kind of individualized and holistic review sanctioned by *Grutter* and *Bakke*, in which race does not predominate but instead plays only a nuanced and limited role in admissions. *Grutter*, 539 U.S. at 337; *id.* at 392-93 (Kennedy, J., dissenting) (race should be considered as "one modest factor among many others"); *Bakke*, 438 U.S. at 318. Moreover, petitioner ignores the contribution to diversity that holistic review makes in fostering "the richness of diversity as envisioned by *Bakke* against the backdrop of the Top Ten Percent Plan." Pet. App. 45a. As even Judge Garza recognized, diversity cannot be gauged "with reference to numbers alone." *Id.* at 71a n.11 (dissenting).

In any event, petitioner's numbers are flawed. Petitioner argues that, in 2008, only 216 African-American and Hispanic students were admitted through holistic review, resulting in an increase of 33 enrolled holistic minority admits compared to 2004. Pet. Br. 9-10. But those figures are highly misleading. First, they look only to enrollees, not admits, even though an admissions policy can only *admit* students. Second, they exclude out-of-state students altogether, even though at least 30% of all holistic admits in 2008

were from out-of-state. SJA 158a. And third, they fail to account for the unprecedented surge in Top 10% admissions in 2008—to over 80% of the class and 92% of the spaces available for Texas residents (*id.* at 157a; JA 464a)—which crowded out holistic admittees of all backgrounds. In 2006 and 2007, for example, there were 424 and 481 holistic minority enrollees from Texas high schools, respectively, resulting in a bump of 126 and 173 in each year, using the same extrapolation used to generate petitioner's "33" figure. SJA 157a.

Moreover, petitioner ignores other evidence. For example, African-American enrollment nearly doubled from 2002 to 2008—from about 3% to 6%. *Id.* at 156a. In 2008, 20% of all African-American students gained admission through holistic review, as did 15% of all Hispanic admits. *Id.* at 158a. UT's policy is also important in addressing UT's reputation as an unwelcoming and closed community to African-Americans and Hispanics (*id.* at 14a)—a key to encouraging students to apply to and attend UT. Both African-American and Hispanic application and enrollment rates have increased since 2005. *Id.* at 156a. Petitioner also ignores the meaningful impact that even a relatively small increase in minority admissions can make. *See The Shape of the River* 234-35; No. 11-345 Black Student Alliance Amicus Br. 26-28. And petitioner ignores the educational benefits of the increased variety of different viewpoints and perspectives made possible by holistic review, as well as the benefits of breaking down stereotypes and promoting cross-racial understanding by increasing diversity among underrepresented minorities.

As the Fifth Circuit put it, petitioner has an "upside down" conception of narrow tailoring—a sentiment

that Judge Garza shared. Pet. App. 20a, 44a; *see id.* at 72a (dissenting) ("agree[ing] that a race-conscious admissions plan need not have a 'dramatic or lopsided impact' on minority enrollment numbers to survive strict scrutiny"). Instead of dooming UT's plan, the "modest numbers" petitioner attacks "only validate the targeted role of [UT]'s use of *Grutter*." *Id.* at 44a.

D. Petitioner's Fleeting Challenge To How UT's Policy Works Is Unpersuasive

The last time this case was here, the Court emphasized that strict scrutiny must give "close analysis" to "how the process *works in practice*." *Fisher*, 133 S. Ct. at 2421 (emphasis added). Yet petitioner, who has never seriously contested that UT's plan considers race only in an *individualized* way, and who complains that UT's consideration of race is too *modest*, has made only a fleeting, and unpersuasive, challenge to how UT's policy actually works.

Petitioner complains that every applicant is "label[ed] … by race." Pet. Br. 43; *see id.* at 9, 14, 23, 42. The ApplyTexas application used by UT asks applicants to indicate their "ethnic background," though any applicant may decline to answer that question if he wishes. *See* Oct. 16, 2012 Lodging (No. 11-345) (2008 ApplyTexas and Common Applications). That is true for the common application used by most schools. But applicants are no more "labeled" by race than they are by their date of birth, gender, or citizenship—biographical information that also is requested. In any event, the fact that UT is aware of "[e]very" applicants' race (*id.*) in no way distinguishes the UT plan from the plan upheld in *Grutter* or the Harvard Plan approved in *Bakke*. *See Grutter* Resp.

Br. 49, 2003 WL 402236 (law school "pays attention to the racial or ethnic background of *every* applicant").

Petitioner's claim (at 43) that applicants are "score[d] … by race" is another distortion. Like the policy in *Grutter*, UT's policy "awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." 539 U.S. at 337; *see* JA 429a-30a ("no numerical value is ever assigned to any of the individual factors that may make up the [PAS]"). UT's policy is nothing like the policy in *Gratz*, which automatically awarded points based on race. 539 U.S. at 255. Instead, under the UT plan, race entitles no applicant to any point; it is simply considered to "examine the student in 'their totality.'" JA 179a. That is the essence of holistic review. And it is not unusual (or unconstitutional) for an educational institution to score applicants based on a *holistic* consideration of different factors, where race is given no individual weight or score. *See, e.g.*, No. 11-345 Deans Post & Minnow Amicus Br. 6 n.7 (Yale Law School admissions files are "rate[d] … on a scale of two to four").

Petitioner complains (at 43) that the ultimate admit, or deny, decision is made by UT on a *race-blind* basis. This is yet another example of the Bizarro Equal Protection World she is asking this Court to inhabit. It cannot possibly be a constitutional *flaw* that UT makes the ultimate admissions decision on a race-blind basis. The UT plan takes advantage of the benefits of the individualized and modest consideration of race, but also ensures that the ultimate admissions decisions cannot be *based on race*. This process, while not required by the Constitution, can only *protect* the dignity interests of applicants in ensuring that the ultimate admissions decisions are made on a

"competitive" basis in which race is only one factor in a truly individualized and holistic evaluation. *See Bakke*, 438 U.S. at 320. Again, petitioner has it backwards.

Petitioner similarly argues (at 42) that UT's plan is unconstitutional because it does not "make comparative decision[s] between qualified applicants when there [are] 'a few places left to fill.'" This argument also fails. First, the whole point of UT's limited and individualized holistic review process *is* to compare applicants based on what unique backgrounds, experiences, or other individual characteristics they would add to campus. *See supra* at 9-11. Second, petitioner herself argues that UT's consideration of race has only a "minimal" impact on diversity—in other words, filling only a "few places." And third, this argument is really just a cynical effort to limit the pursuit of a diverse student body to places like Cambridge, and deny them to the Nation's public universities—some of the best, and most affordable, educational institutions in this country.

Finally, petitioner argues (at 38) that UT's policy is flawed because UT does *not* monitor the make-up of its class during the admissions cycle in deciding how to fill slots. Here again, petitioner is offering a topsy turvy view of equal protection. In his dissent in *Grutter*, Justice Kennedy criticized the Michigan plan precisely because he concluded that Michigan admissions officials *were* engaged in such monitoring. *Grutter*, 539 U.S. at 391-92 (Kennedy, J., dissenting); *cf. id.* at 336 (majority op.) (addressing those concerns). The record in this case conclusively establishes that UT does not engage

in such monitoring. JA 448a, 465a. And that is yet another sign that the UT plan is constitutional.[9]

IV. PETITIONER IS NOT ENTITLED TO SUMMARY JUDGMENT

Petitioner argues that this Court should "enter judgment" for her. Pet. Br. 24; *see id.* at 25, 35. For the reasons explained above, the Fifth Circuit properly concluded that UT's policy is constitutional on the existing record. But if the Court believes there are any deficiencies in that record that cast doubt on the constitutionality of UT's policy, the answer is to order a trial, not to grant summary judgment for petitioner. Opp. 21-22. That is especially true given that *Fisher* sheds additional light on the governing legal standard not available when the summary judgment record was compiled. This Court remanded for the Fifth Circuit to "assess" "whether summary judgment in favor of the University would be appropriate." *Fisher*, 133 S. Ct. at 2421. If the answer is no, the fact that the parties cross-moved for summary judgment neither entitles petitioner to summary judgment nor waives UT's right to a jury trial. *See* 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2720 (3d ed. 1998) (citing cases); *Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir.), *cert. denied*, 513 U.S. 839 (1994).[10]

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[9] Amicus Cato Institute points to the "Kroll Report" as evidence that UT's holistic policy is impermissible. Petitioner, however, has not advanced that argument in her opening brief (and so has waived it). For good reason: the Kroll Report has no bearing on the policy challenged here. Opp. 19-20 n.2.

[10] Following *Fisher*, UT asked the Fifth Circuit to remand the case to the district court to allow it to engage in further fact-

The summary judgment record by no means constitutes all the evidence UT would offer in support of its policy. For example, the trial in *Grutter* included the testimony of many witnesses, including experts, on matters such as why the Law School adopted its policy, how it worked in practice, and how it advanced the educational benefits of diversity. *See Grutter v. Bollinger*, 137 F. Supp. 2d 821, 825-39 (E.D. Mich. 2001), *rev'd in part, vacated in part*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 959 (2003). UT would present ample additional evidence on such matters at a trial, including examples of UT minority students who were ineligible for admission under the Top 10% Law, but who were admitted under UT's holistic review policy and have made important contributions to the educational environment at UT and have served as change agents on campus in helping to break down racial barriers. A trial would also allow for fact-finding on whether petitioner was even injured at all by UT's consideration of race. *See supra* at 12-13.

Petitioner complains that the Fifth Circuit went outside the record in explaining some of the systemic drawbacks of the Top 10% Law. Pet. Br. 21, 34, 39. Petitioner mischaracterizes the Fifth Circuit's decision. Opp. 20. Moreover, the facts that the Fifth Circuit pointed to about the operation of the Top 10% Law and geographic realities in Texas are common knowledge in Texas and irrefutable. Recognizing such facts did not entail "factfinding" (Pet. Br. 21), just taking note of the obvious. *See* Fed. R. Evid. 201. But if this Court has

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finding. The Fifth Circuit determined that such a remand was unnecessary to resolve this case. Pet. App. 10a-12a.

any doubts about how the Top 10% Law works, or how UT's holistic plan offsets the tradeoffs of the Top 10% law, the answer is to remand for a trial.

At a bare minimum, UT has presented sufficient evidence to preclude summary judgment for petitioner. That includes evidence establishing at least a triable issue on whether (1) UT made a serious, good faith effort to try race-neutral alternatives before adopting the policy at issue; (2) UT had already achieved the educational benefits of diversity by 2004 (or 2008); (3) UT's holistic consideration of race was necessary to offset the systemic drawbacks of the Top 10% Law; and (4) UT's consideration of race is modest and individualized in practice. Because the evidence presented by UT on such issues is at least "susceptible of different interpretations or inferences by the trier of fact," *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999), UT is entitled to a trial if the Court concludes this evidence does not entitle it to summary judgment.

* * * * *

Petitioner and her team have been clear about what they seek to accomplish through this litigation. It is not ensuring that when race *is* considered in admissions, it is considered only in a modest, individualized, and narrowly tailored way, as *Bakke* and *Grutter* require. It is a regime under which "students' race isn't used at all in college admissions."[11] The Court rejected such a regime in *Bakke*, and the Court did so again in *Grutter*. Indeed, in *Bakke*,

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[11] Tr. of Press Conf. with Abigail Fisher, Am. Enter. Inst., Washington, D.C. (June 24, 2013). Petitioner and her team have made numerous statements to the same effect.

Justice Powell explained that, in barring the university "from *ever* considering the race of any applicant, … the courts below failed to recognize that the State has a substantial interest that *legitimately* may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320 (emphases added).

Accepting *Bakke* and *Grutter* as given, the Fifth Circuit properly held that UT's individualized, holistic consideration of race is "properly devised" and thus permissibly advances UT's compelling interest in achieving the educational benefits of diversity. The Court should reject petitioner's transparent invitation to accept *Bakke* and *Grutter* in theory, but gut them in fact. Dismantling those landmark precedents in a case in which no party has even asked the Court to overrule them, and in which the plaintiff lacks standing, not only would undermine the legitimacy of this Court—reason enough to exercise the customary restraint. But doing so also would jeopardize the "nation's future," as Justice Powell warned, by effectively preventing universities from educating America's future leaders in an environment "as diverse as this Nation of many peoples." *Id.* at 313 (citation omitted).

CONCLUSION

The Court should order dismissal of this case for lack of standing, or dismiss the writ of certiorari as improvidently granted. In the alternative, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted.

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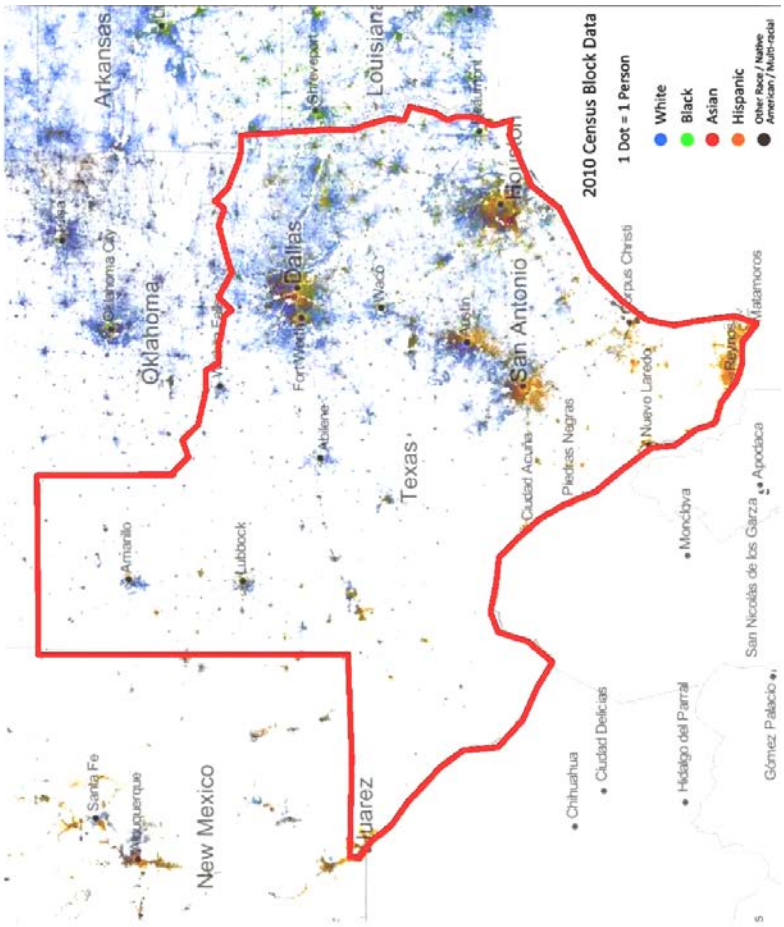
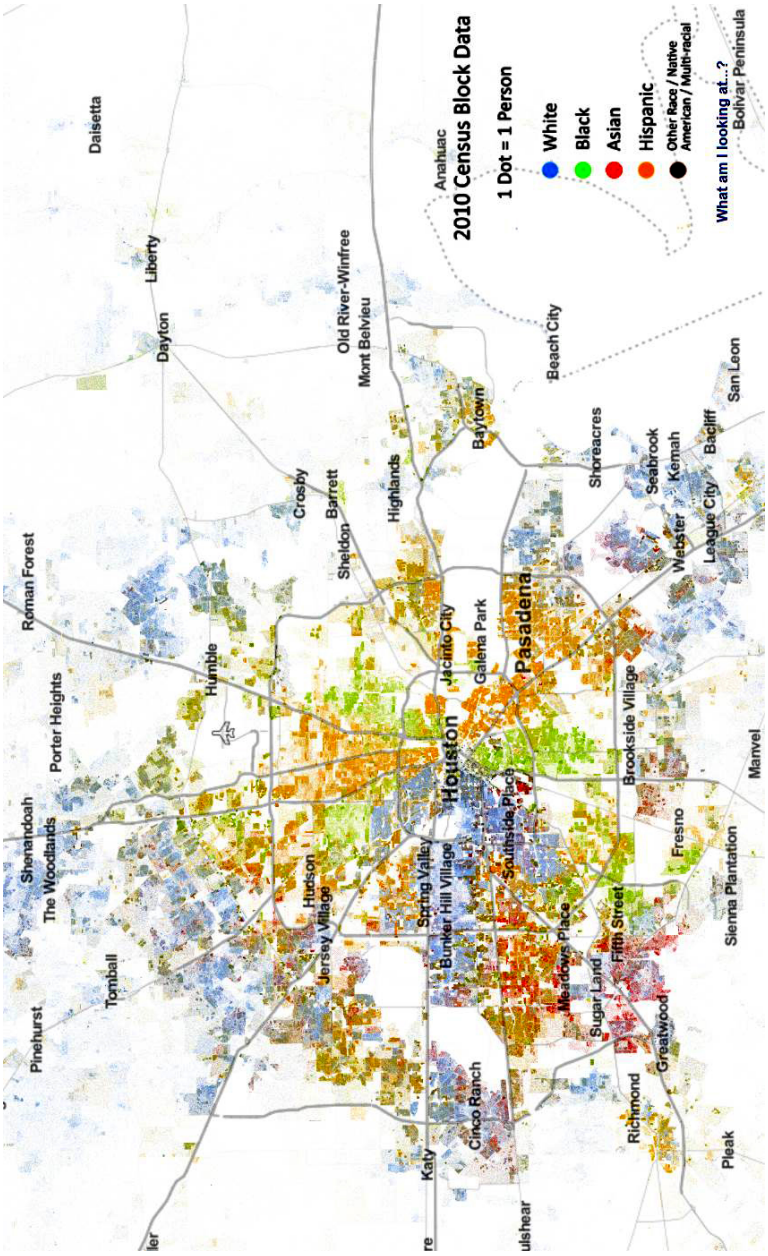
ADDENDUM

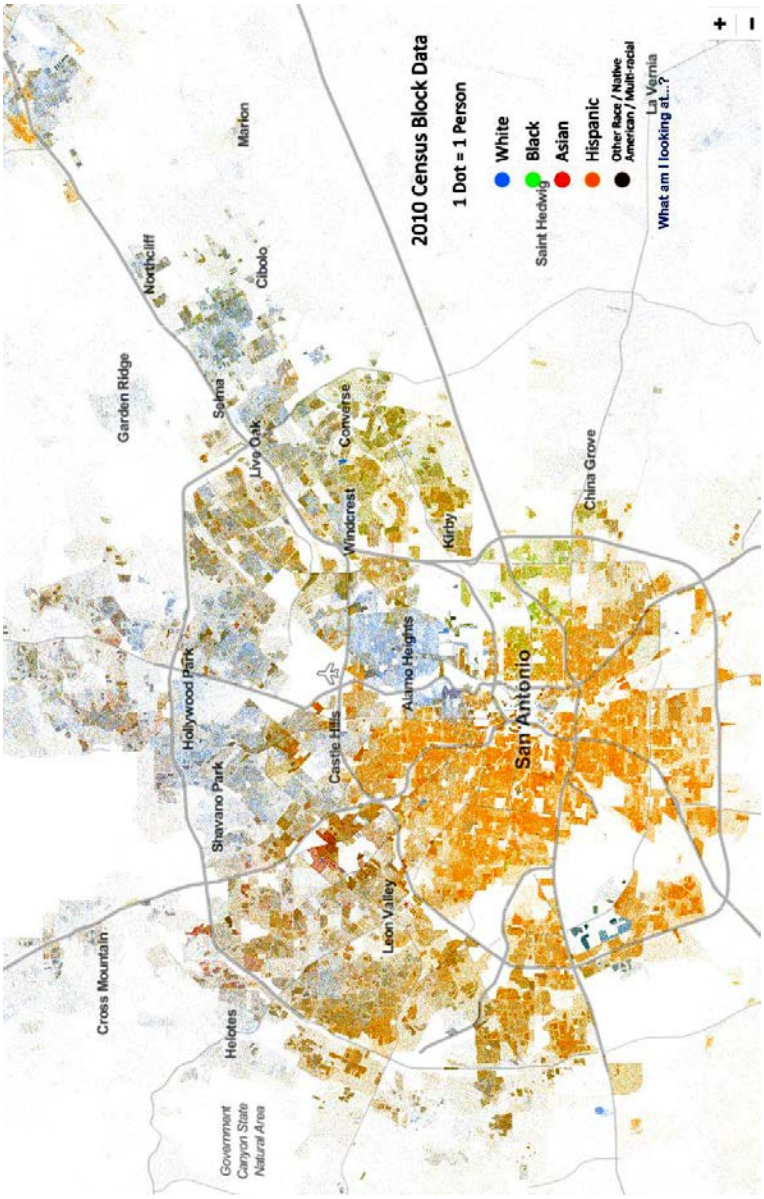
TABLE OF CONTENTS

Page

[Source for Maps: Demographics Research Grp., Weldon Ctr. for Public Serv., Univ. of Va., *2010 Racial Dot Map*, CooperCenter.org (July 2013), http://demographics.coopercenter.org/DotMap/index.html., cited at Pet. App. 34a n.101.]


2010 Census Block Data
1 Dot = 1 Person
White
Black
Asian
Hispanic
Other Race / Native American / Multi-racial
Arkansas
Oklahoma
Texas
New Mexico
Dallas
San Antonio
Houston
Juarez
Chihuahua
Ciudad Delicias
Hidalgo del Parral
Monclova
Piedras Negras
Nuevo Laredo
Reynosa
Matamoros
Apodaca
San Nicolás de los Garza
Gómez Palacio
Santa Fe
Albuquerque
Amarillo
Lubbock
Abilene
Waco
Austin
Corpus Christi
Ciudad Acuña


2010 Census Block Data
1 Dot = 1 Person
White
Black
Asian
Hispanic
Other Race / Native American / Multi-racial
What am I looking at...?
Houston
Pasadena
Baytown
Beach City
Anahuac
Bolivar Peninsula
Daisetta
Liberty
Dayton
Old River-Winfree
Mont Belvieu
Crosby
Barrett
Highlands
Sheldon
Roman Forest
Porter Heights
Humble
Jacinto City
Galena Park
Shoreacres
Seabrook
Kemah
Bacliff
San Leon
Webster
League City
Brookside Village
Manvel
Fresno
Sienna Plantation
Shenandoah
The Woodlands
Hudson
Jersey Village
Spring Valley
Bunker Hill Village
Southside Place
Meadows Place
Sugar Land
Fifth Street
Tomball
Pinehurst
Cinco Ranch
Katy
Greatwood
Richmond
Pleak


2010 Census Block Data
1 Dot = 1 Person
White
Black
Asian
Hispanic
Other Race / Native American / Multi-racial
What am I looking at...?
Saint Hedwig
La Vernia
China Grove
Kirby
Converse
Windcrest
Live Oak
Selma
Marion
Cibolo
Northcliff
Garden Ridge
Hollywood Park
Shavano Park
Castle Hills
Alamo Heights
San Antonio
Leon Valley
Cross Mountain
Helotes
Government Canyon State Natural Area