No. 14-981

In the Supreme Court of the United States

ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*, RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RUBEN HINOJOSA, MEMBER OF CONGRESS; ROBERT C. "BOBBY" SCOTT, MEMBER OF CONGRESS; AND 83 OTHER MEMBERS OF CONGRESS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

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[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Blanket letters from the parties consenting to the filing of this brief are on file with the Clerk pursuant to Rule 37.3.

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As elected representatives, *amici* have first hand knowledge of the compelling interest that the federal, state and local governments have in promoting diversity in their programs and through their laws, regulations, policies and practices. Ours is a very diverse society that is becoming more so. It is vital for all the diverse elements of our society to participate fully in the processes of government and in government programs of interest to them. It is also vital for them to be able to work together for the common good in public and private settings. A considerable part of *amici's* time and effort as legislators and representatives is devoted to promoting these interests.

One important component of the diversity that *amici* seek to promote is racial and ethnic diversity. A number of *amici* are Hispanic, African-American, Asian-American or Pacific Islanders and/or represent large numbers of constituents who are Hispanic, African-American, Asian-American or Pacific Islanders or Native Americans. *Amici* are keenly aware that ours is a society "in which race unfortunately still matters." *Grutter v. Bollinger*,

539 U.S. 306, 333 (2003). At the same time, *amici* are deeply committed to the constitutional guarantee of equal protection of the laws for all persons. Accordingly, *amici* have a profound interest in how this case is resolved because the Court's decision will affect the legislative and policy options available to *amici* to address the needs and concerns of their constituents.

SUMMARY OF ARGUMENT

This Court, in *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) ("*Fisher I*"), reaffirmed that "obtaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'" *Id.* at 2418 (quoting *Grutter*, 539 U.S. at 325). The Court also reaffirmed that "a university's 'educational judgment that … diversity is essential to its educational mission is one to which we defer.'" *Id.* at 2419 (quoting *Grutter*, 539 U.S. at 328). The Court went on to hold a reviewing court must conduct a non-deferential review to satisfy itself that "no workable race-neutral alternatives would produce the educational benefits of diversity." 133 S.Ct. at 2420. The Court cautioned that this review must neither be "strict in theory but feeble in fact" nor "strict in theory, but fatal in fact." *Id.* at 2421 (internal quotation and citation omitted). Now the Court must articulate how this standard of review operates in practice.

Diversity is a compelling government interest in a number of other contexts beyond higher education,

including the selection of our future military leadership, the selection of leaders of Executive Branch agencies, and the selection of federal and state judges. Therefore, the standard of judicial review the Court sets in this case will impact the pursuit of diversity in a number of other public offices or programs. University leaders, and other public officials, operate in the real world, dealing with stubborn problems and hard realities. Their actions are, and should be, subject to judicial review. But that review must be fact-based and practical.

In deciding whether proffered race-neutral alternatives for achieving student body diversity are "workable," a reviewing court can and should resolve factual issues such as whether those alternatives are effective, feasible, or conflict with the university's other, legitimate admissions goals. But a court is ill-equipped to second guess a university's choice of admissions goals or its judgment about how to balance its various admissions goals against each other. These are educational judgments to which the courts defer. *See Fisher I*, 133 S.Ct. at 2419. Likewise, a court is ill-equipped to decide that "enough" diversity already exists so that a race-conscious admissions plan is unnecessary. "First Amendment interests give universities particular latitude in defining diversity." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring). And the Constitution "limit[s] the judiciary's institutional capacity to prescribe palliatives for societal ills." *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995)

(O'Connor, J., concurring). Rather, the establishment and achievement of diversity goals "are best addressed by the representative branches." *Id.*

Petitioner argues that the University of Texas at Austin ("UT") must more precisely define its diversity goal(s) and demonstrate that it has a compelling interest in those specific objectives. This argument ignores the deference owed to a university's judgment that diversity is essential to its educational mission, *Fisher I*, 133 S.Ct. at 2419, and the "particular latitude" afforded to universities to define diversity. *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring). Once a university decides to pursue a racially and ethnically diverse student body in order to achieve its educational goals, it need not demonstrate another compelling interest when it refines its diversity objective in ways that do not change the nature of that objective.

Petitioner contends that, in order to facilitate judicial review, UT must define exactly what type(s) of racial diversity it is seeking and exactly what its goals are. But these demands conflict with the Court's mandate that a race-conscious admissions program cannot operate as a quota system. Further, petitioner asks the Court to second-guess the judgment of UT and rule that no race-conscious component is needed in the admissions program

because the race-neutral Top 10% Law[2] already yields an incoming class that is approximately 20% African–American and Hispanic (in a state where minorities comprise half of the school-age population). Petitioner's argument ignores the deference that this Court's precedents give to a university in selecting its student body, s*ee Grutter*, 539 U.S. at 328-29, and in defining its diversity goals. Moreover, petitioner fails to explain how this Court (or a lower court) is supposed to determine when "enough" diversity has been achieved, so that a race-conscious admissions program is unnecessary. On the facts of this case, there is no basis for invalidating UT's judgment that its compelling interest in student body diversity was not being satisfied by its existing, race-neutral admissions process.

Finally, petitioner argues that UT's race-conscious admissions program is unnecessary because it could have achieved similar gains in minority enrollment through other race-neutral means, such as uncapping the Top 10% Law, expanded outreach to minority students, or making greater use of socioeconomic preferences. None of these alternatives is workable. Uncapping the Top 10% Law would "preclude the university from conducting the individualized assessments necessary

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[2] The Top 10% Law grants automatic admission to applicants who rank in the top ten percent of their Texas high school graduating class.

to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340. And UT has already expanded its outreach programs to attract more minority students and employed socioeconomic preferences in its admissions process. Yet these steps, even combined with the Top 10% Law, did not produce a student body that remotely approached UT's diversity goal. Petitioner's arguments are nothing more than wishful speculation. UT is not required to exhaust "every *conceivable* race-neutral alternative" that petitioner can invent. 133 S.Ct. at 2420 (emphasis in the original; citation omitted).

ARGUMENT

I. ATTAINING DIVERSITY IS A COMPELLING GOVERNMENT INTEREST IN A NUMBER OF CONTEXTS

This Court, in *Fisher I*, reaffirmed that "obtaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'" 133 S.Ct. at 2418 (quoting *Grutter*, 539 U.S. at 325). Racial diversity on campus helps all races. A leading study found that interacting with peers of other racial groups outside a classroom setting improved intellectual engagement, self-motivation, citizenship and cultural engagement, and academic skills like critical thinking, problem solving, and writing – for students of all races. Patricia Gurin, Eric Dey,

Sylvia Hurtado, and Gerald Gurin "Diversity and Higher Education: Theory and Impact on Educational Outcomes," 72 *Harvard Educational Review* 330 (September 2002). Another study found that students who interacted with racially and ethnically diverse peers showed significant gains in cognitive skills, such as critical thinking and problem solving. Nicholas A. Bowman, "College Diversity Experiences and Cognitive Development: A Meta-Analysis," 80 *Review of Educational Research* 4 (March 2010). Furthermore, the advantageous effects of a student's college diversity experience persist long after graduation, as shown in another recent study. Nicholas A. Bowman, Jay W. Brandenberger, Patrick L Hill, Daniel K. Lapsley, "The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation," 52 *Journal of College Student Development* 729 (November-December 2011).

Diversity is a compelling government interest in a number of other contexts as well. *Grutter* noted that a "highly qualified, racially diverse officer corps … is essential to the military's ability to fulfill its principle mission to provide national security." 539 U.S. at 331 (quoting Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5). This compelling interest requires the service academies and the ROTC to use limited race-conscious recruiting and admissions policies to achieve an officer corps that is both highly qualified and racially diverse. *Id.*

Grutter also recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." 539 U.S. at 332. Moreover, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

Both the legislative and executive branches of the federal government share these views. Both branches have taken a series of steps in recent years to increase diversity in the public sector. In 2010 the House of Representatives launched a bipartisan initiative to increase racial diversity among congressional staff after an internal assessment revealed that only 13 percent of House chiefs of staff were minorities versus 35 percent of the United States population. *See* Jordy Yager, "House Leaders launch program aimed at increasing racial diversity of staffers," The Hill (2010), *http://thehill.com/homenews/house/91921-house-leaders-launch-racial-diversity-program*.

Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010) created 20 Offices of Minority and Women Inclusion at the various financial regulatory agencies, including the Treasury, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the 12 Federal Reserve banks and the newly created Consumer Financial Protection

Bureau. These offices are charged with monitoring the diversity at the agencies as well as at any contractors or subcontractors.

Other federal agencies independently have undertaken the promotion of diversity in their ranks to increase their effectiveness. For example, the Central Intelligence Agency states that "[i]n order for the CIA to meet our mission of protecting our national security interests, we need to employ a workforce as diverse as America itself--the most diverse nation on earth." Central Intelligence Agency's Mission Statement Regarding Diversity, https://www.cia.gov /careers/diversity/index.html. Toward that end, the CIA "review[s] the Agency's diversity achievements in light of benchmarks that are meaningful to meeting mission requirements." *Id.*

In 2011, the President issued an Executive Order establishing a coordinated government-wide initiative to promote diversity and inclusion throughout the federal workforce. Exec. Order No. 13583, 76 Fed. Reg. 52847 (Aug. 23, 2011).

The importance of diversity is evident in the staffing of the most senior level of the Executive Branch -- the presidential Cabinet. Presidents of both parties have recognized the need to have a diverse Cabinet that includes members of major racial and ethnic groups to head the federal agencies that comprise the Executive Branch. And Presidents of both parties have consciously taken diversity into account in choosing the members of their Cabinets.

See, e.g., Susan Page, "Bush is opening doors with a diverse Cabinet," *USA Today*, Dec. 9, 2004, available at http://www.usatoday.com/news/washington/2004-12-09-diverse-usat_x.htm.[3]

Still another example of the need for diversity is furnished by the federal and state judiciary. There is no question that diversity, including race, ethnicity and gender, has been a factor in selecting nominees for federal judgeships. "The president wants the federal courts to look like America," according to the White House counsel. John Schwartz, "For Obama, a Record on Diversity but Delays on Judicial Confirmations," The New York Times (2011), http://www.nytimes.com/ 2011/08/07/us/politics/ 07courts.html. Conservatives agree that diversity is desirable and that ethnic diversity is one factor that should be weighed with other factors in judicial selections. *See id.* President George W. Bush appointed a record number of Hispanic judges and a review of his appointments led one academic to comment in 2007 that "the second variable that comes through in the data is that clearly diversity is a big thing in

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[3] Similarly, diversity in the leadership of private corporations has become increasingly important. In December 2009, the Securities and Exchange Commission approved new disclosure rules requiring public companies, for the first time, to provide disclosure regarding the diversity of their boards of directors. Item 407(c)(2)(vi) of Regulation S-K, 17 C.F.R. § 229.407(c)(2)(vi).

this administration." Ken Herman, "Bush holds the Record on Hispanic Federal Judges Latino Advocacy Groups are Pleased; DNC Stays Mum," Chron.com (2007), http://www.chron.com/news/nation-world/article/Bush-holds-the-record-on-Hispanic-federal-judges-1541185.php.

Diversity is an explicit consideration in the appointment of state judges. Arizona has a constitutional provision requiring its judicial nominating commission to "consider the diversity of the state's population, however the primary consideration shall be merit." Ariz. Const. art. VI, § 36. Maryland has an Executive Order which provides that the nominating commission "shall consider … the importance of having a diverse judiciary." Md. Exec. Order No. 01.01.2007.08. In Missouri, the governing Supreme Court Rules direct that "the Commission shall further take into consideration the desirability of the bench reflecting the racial and gender composition of the community." Mo.Sup.Ct.R. 10.32(f) (2008).

Several other states have laws that mandate diversity in the composition of the judicial nominating commission. Florida, for example, requires that "the Governor shall seek to ensure that, to the extent possible, the membership of the Commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered." Fla. Stat. Ann. § 43.291(4) (2008). Tennessee law requires the appointment of "persons who

approximate the population of the state with respect to race, including the dominant ethnic minority population, and gender." Tenn. Code Ann. § 17-4-102(b)(3) (2008). And Rhode Island provides that "[t]he governor and the nominating authorities hereunder shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the Commission." R.I. Gen. Laws § 8-16.1-2(a)(3) (2006).

In all of these contexts, diversity is being pursued to help promote "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation," including "a set of leaders with legitimacy in the eyes of the citizenry," *Grutter*, 539 U.S. at 332, and/or because diversity in the ranks of government agencies and programs increases their effectiveness. The importance of diversity in these varied contexts should inform the Court's resolution of this case because the standards it sets for judicial review of a race-conscious diversity program at a public university will impact the pursuit of diversity in a number of other public offices or programs.

II. THE COMPELLING INTEREST IN DIVERSITY REQUIRES NO ADDITIONAL JUSTIFICATION

Fisher I reaffirmed that "a university's 'educational judgment that … diversity is essential to its educational mission is one to which we defer.'" 133 S.Ct. at 2419 (quoting *Grutter*, 539 U.S. at 328). Thus, the courts below "were correct in finding that *Grutter* calls for deference to the University's

conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals." *Id.* (internal quotation marks and citations omitted).

Nonetheless, petitioner now argues that UT has not demonstrated that its interest in diversity is constitutionally permissible and substantial. According to petitioner, UT "must articulate a compelling interest in educational diversity with clarity" because "[a] reviewing court cannot perform strict scrutiny if it does not know the precise reasons why a university believes the use of race is necessary." Brief for Petitioner ("Pet. Br.") at 20. This argument flies in the face of *Fisher I*, which confirmed that the benefits of student body diversity constitute a compelling interest that a state or a public university may choose to pursue in support of its educational goals. The university need not make some additional showing to justify its decision. To the contrary, a court defers to the university's judgment that diversity is essential to its educational mission. *Fisher I*, 133 S.Ct. at 2419.

Petitioner also contends that UT has altered its goal of student body diversity by referring to classroom diversity and intra-racial diversity as part of its educational goal. Petitioner suggests that UT must prove that it has a compelling interest in these subsets of diversity, distinct from its compelling interest in student body diversity. But this Court's precedents do not support the imposition of such a burden. To the contrary, "First Amendment interests give universities particular latitude in

defining diversity." *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring). And the Court has recognized the need to develop "refined measures" of underrepresentation, such as on a job category by job category basis rather than with reference to the overall workforce. *See Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 635 (1987).[4] Once a university decides (permissibly) to pursue a racially and ethnically diverse student body in order to achieve its educational goals, it should not need to demonstrate another compelling interest when it refines its diversity objective in ways that do not change the fundamental nature of that objective.[5]

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[4] In *Grutter*, for example, the Court was advised that the service academies measure diversity within the officer corps separately from diversity within the service as a whole, and that they consider both measures in establishing their race-conscious recruiting and admissions policies to increase minority representation. *See* Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5-7.

[5] Furthermore, a university's decision to pursue intra-racial diversity is not subject to strict scrutiny because it does not distinguish between individuals based on their race. Almost all colleges and universities seek diversity among their entire student body, including among their majority/white students. They are no less entitled to seek diversity among their minority students. The rational basis for seeking such diversity is obvious.

III. *GRUTTER* ESTABLISHED A SOUND AND NARROWLY TAILORED RACE-CONSCIOUS METHOD TO ACHIEVE DIVERSITY

Given the widespread importance of diversity to federal, state, and local governments, it is vital for them to have clear and practical guidance from this Court about how they can pursue diversity in their programs in a manner that complies with the Constitution. As Justice Kennedy has noted, "[e]xecutive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).

This Court, in its seminal decision in *Bakke*, emphasized that the compelling state interest in student body diversity "is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students." *Regents of University of California v. Bakke*, 438 U.S. 265, 315 (1978). Instead, it "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important

element." *Id.* *Grutter* outlined the elements of a narrowly tailored race-conscious admissions program that comports with *Bakke*. The program cannot operate as a quota system. Instead, race or ethnicity may be considered only as a "plus" factor as part of a holistic review of each applicant's file that does not make race determinative or give it a predetermined weight, and which gives substantial weight to other diversity factors as well. *See* 539 U.S. at 334-38. *Fisher I* reiterated that admissions processes must "'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" 133 S.Ct. at 2420 (quoting *Grutter*, 539 U.S. at 337).

This is a sound method for taking account of an applicant's race (or ethnicity or gender) as part of a good-faith, lawful effort to achieve diversity goals. It is straightforward and establishes constraints that are both comprehensible and enforceable. Importantly, it can be easily applied to other situations where, in selecting among a group of qualified candidates, there is a need to consider diversity along lines of race, ethnicity or gender.

IV. THE COURT SHOULD NOT ENDORSE UNATTAINABLE PRECONDITIONS FOR EMPLOYING A RACE-CONSCIOUS DIVERSITY PROGRAM

Fisher I held that narrow tailoring also requires that a reviewing court verify that it is necessary to use race to achieve the educational benefits of

diversity. This involves an inquiry into whether sufficient diversity could be achieved without using racial classifications. "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." 133 S.Ct. at 2420.

Petitioner does not challenge the narrowly tailored *Grutter* methodology for considering race as a "plus factor" in order to promote diversity. Instead, she attempts to forestall any use of a race-conscious diversity program by arguing that the preconditions for employing such a program have not been established. But, under petitioner's logic, those preconditions would never be met. She propounds a standard of judicial review that would be "strict in theory, but fatal in fact," an outcome that the Court rejected in *Fisher I*. 133 S.Ct.at 2421.

A. UT Is Entitled To Latitude In Defining Its Diversity Goals

Petitioner argues that judicial review of a diversity program cannot be conducted without clearly defined objectives and that UT has not defined its objective with sufficient clarity. Petitioner demands that UT define exactly what type(s) of racial diversity it is seeking and exactly what its numerical goals are (by providing a "concrete target" or identifying the point at which its diversity target will be achieved). Pet. Br. at 29-30. But these demands conflict with the Court's mandate that a race-conscious admissions program cannot operate as a quota system. "A university is

not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" *Fisher I*, 133 S.Ct. at 2419. Thus, in the court below, both the majority and the dissent agreed that UT's diversity goal cannot "be defined with reference to numbers alone." Petition Appendix ("App.") 71a, n.11 (Garza, J., dissenting). As Judge Garza trenchantly put it, "Fisher effectively asks us to ratify racial quotas, which we cannot, and will not, do." *Id.*

UT has not established a specific target or other quantitative objective for the admission of minority students. Instead, UT compared its student-body demographics to state demographics and concluded that African-Americans and Hispanics are significantly underrepresented in its student body.[6] Accordingly, students in those groups may have their race considered as a diversity "plus" factor when their applications are evaluated. But admissions officers do not monitor the racial composition of the class.

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[6] Even proponents of race-neutral admissions acknowledge that public "[c]olleges should … strive to provide access proportional to the demographics of the state's school-age population." Halley Potter, "Transitioning to Race-Neutral Admissions" in *The Future of Affirmative Action* 75, 90 (Richard D. Kahlenberg ed. 2014). The U.S. Military Academy, for example, sets goals for minority enrollment based upon their representation in the national population and in the national pool of college bound people, and their representation in the Army. M*ilitary Academy: Gender and Race Disparities* 13 (Mar. 17, 1994).

UT is entitled to particular latitude in defining its diversity goals. *See Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring) ("First Amendment interests give universities particular latitude in defining diversity."). The fact that UT has not quantified its diversity goal does not frustrate meaningful judicial review of its decision to institute a race-conscious diversity program. There is ample objective evidence against which to evaluate the university's decision. In 2004 -- the last year before implementation of the current program -- the race-neutral Top 10% Law, coupled with years of aggressive minority recruitment efforts, had resulted in a group of admitted students that was 4.82% African–American and 16.21% Hispanic. App. 30a. These figures had improved only marginally since 1998. *Id.* Thus, a mere 21% of the admitted students were minorities in a state where minorities comprised almost half of the population. These facts amply support UT's decision to establish a race-conscious, "plus factor" component in its admissions program in support of its goal of reasonable student body diversity.

Petitioner asks the Court to second-guess the judgment of UT and rule, in essence, that the Top 10% Law produces "enough diversity" so that it precludes UT from using any race-conscious component as part of its admissions process. She argues that "UT's own admissions statistics demonstrate that UT effectively achieved critical mass [in diversity] no later than 2003," Pet. Br. at 46, when the group of admitted students was 3.89%

African–American and 15.60% Hispanic. App. 30a. Petitioner's argument contravenes this Court's precedents that give deference to a university's academic decisions, including the selection of its student body, s*ee Grutter*, 539 U.S. at 328-29, and afford particular latitude to a university in defining its diversity goals. *See Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring).

Furthermore, petitioner fails to explain the basis of which this Court – or any court – is supposed to conclude that an incoming class that is 3.89% African–American and 15.60% Hispanic constitutes "enough" diversity in a state where minorities comprise half of the population. In fact, courts are ill-equipped to establish diversity goals or to decide how much diversity is enough. "The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills." *Missouri v. Jenkins*, 515 U.S. at 112 (O'Connor, J., concurring). Rather, such issues "are best addressed by the representative branches." *Id.* Courts, for their part, are suited to review diversity objectives established by the legislative or executive branches and to determine whether the announced need for a race-conscious program is supported by the evidence, whether the program operates as a forbidden quota, or whether (as discussed in the following section) there is a viable race-neutral alternative that should instead have been employed. The case may come where a court must decide whether the existing

underrepresentation of minorities is simply too small to justify the adoption of a race-conscious diversity program. But this is not that case.

B. UT Established The Absence Of Workable Race-Neutral Alternatives

Finally, petitioner contends that UT has not met its burden of demonstrating that available, workable race-neutral alternatives do not suffice to achieve its diversity goal. Petitioner asserts that "UT could have achieved similar gains through a number of race-neutral means, such as expanded outreach, uncapping the Top 10% Law, or making greater use of socioeconomic preferences." Pet. Br. at 24; *see also id*. at 47.

Fisher I held that, "[a]lthough '[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,' strict scrutiny does require a court to examine with care, and not defer to, a university's 'serious, good faith consideration of workable race-neutral alternatives.'" 133 S.Ct. at 2420 (emphasis in the original; citation omitted). But the Court cautioned that judicial review must neither be "strict in theory but feeble in fact" nor "strict in theory, but fatal in fact." *Id.* at 2421 (internal quotation and citation omitted). Now the Court must articulate how this standard of review operates in practice.

In particular, the Court must elucidate the parameters of a reviewing court's inquiry into whether a given race-neutral alternative is

"workable." There are various reasons why a particular alternative may not be workable: it may be ineffective; it may be infeasible; or it may undercut the university's other, legitimate admissions goals. These are all factual issues that a court is well-suited to resolve.

But, for the reasons already discussed, a court is ill-equipped to second guess a university's choice of admissions goals or its judgment that a particular race-neutral method of achieving diversity is unworkable because of the toll that method would exact on the university's other legitimate goals, such as academic selectivity or achieving diversity along lines of gender, geography, skill sets and career interests. An admission lottery, for example, would be an effective, race-neutral means of achieving diversity. But this Court, in *Grutter*, rejected a lottery as a workable alternative to a race-conscious diversity program because it "would effectively sacrifice all other educational values, not to mention every other kind of diversity." 539 U.S. at 340. Narrow tailoring does not "require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.* at 339. Accordingly, a reviewing court must give deference to the university's choice of admissions goals and to the university's judgment that a particular race-neutral method of achieving diversity is unworkable because of the (demonstrable) toll it would exact on other legitimate goals.

In this case, petitioner argues that uncapping the Top 10% Law is a workable race-neutral alternative for achieving UT's diversity goal. But it is readily apparent that this alternative would achieve racial diversity only at the expense of eliminating almost all other forms of diversity in the student body. Students with special gifts and talents who fall below the top 10% of their high school class would be excluded. A student from a poor family who works long hours to help support them, and still manages to graduate in the top 15% of his/her class, need not apply to UT.[7] *Grutter* recognized that use of a percentage plan "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. Petitioner now invites this Court – in the name of narrow tailoring -- to ride roughshod over UT's decisions about defining and balancing its admissions goals and impose on UT a Hobson's choice: either abandon the pursuit of greater racial diversity or else pursue that

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[7] The Texas legislature does not want the Top 10% Law to preempt the entire admissions process, thereby precluding any consideration of factors beyond class rank in selecting the incoming class at UT. In 1996, when the law took effect, it accounted for 42% of the seats available to Texas residents; by 2005, it accounted for 69%; by 2008, it accounted for 81%. In response, the legislature passed Texas Senate Bill 175, which authorized UT to limit automatic admissions under the Top 10% Law to no less than 75% of the incoming class. App. 41a-43a.

goal in an exclusively race-neutral fashion at the expense of all other admissions goals.

Petitioner simply ignores the evidence in contending, alternatively, that UT could attain its goal of racial/ethnic diversity by employing an expanded outreach program. The court below recounted UT's extensive efforts from 1997 onward to expand its outreach programs to attract more minority students. App. 25a-30a. These outreach efforts, combined with the Top 10% Law, produced only a modest increase in diversity so that, by 2004, African–American admitted students climbed to 4.82% and Hispanic admitted students climbed to 16.21%. "But minority representation then remained largely stagnant ...," *id.* at 30a, in a state where minorities constitute half the population.

Yet petitioner now contends that "UT could have intensified its outreach efforts to African-American and Hispanic admittees in the hopes of boosting their enrollment." Pet. Br. at 47 (emphasis added). This is mere speculation that flies in the face of all the evidence adduced below. Furthermore, petitioner's argument contravenes the Court's admonition in *Fisher I* that, "'[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative.'" 133 S.Ct. at 2420 (emphasis in the original; citation omitted). *Fisher I* did not transform judicial review of race-conscious diversity programs into a Sisyphean task where a university must disprove the feasibility of every race-neutral alternative that a challenger postulates.

Petitioner engages in similar wishful speculation when she argues, without any evidentiary support, that UT could have achieved the same boost in African-American and Hispanic enrollment by giving greater weight to socio-economic factors.[8] UT counters this contention by "point[ing] to widely accepted scholarly work concluding that 'there are almost six times as many white students as black students who both come from [socio-economically disadvantaged] families and have test scores that are above the threshold for gaining admission at an academically selective college or university.'" App. 46a. Furthermore, as petitioner acknowledges elsewhere in her brief, UT already incorporates socioeconomic factors into its admissions process and gives a preference to students with a disadvantaged background, and UT's outreach and scholarship programs target predominantly low-income student populations. Pet. Br. at 40. Thus, there is no basis for a reviewing court to conclude that giving greater weight to socio-economic factors would appreciably boost minority enrollment beyond the level being achieved before UT's institution of a race-conscious component in its admissions program.

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[8] Petitioner simply asserts that UT could have boosted minority enrollment "through any number of minor adjustments to its PAI calculus giving greater weight to socio-economic factors. Pet. Br. at 47. But she is silent about exactly what those adjustments consist of, and about how they would achieve the result she claims.

University leaders, like other public officials, must operate in the real world, dealing with stubborn problems and hard realities. Their actions are, and should be, subject to judicial review. *Fisher I* rightly insisted that the alleged need for a race-conscious diversity plan is subject to judicial review and that the university bears the burden of demonstrating that need. But this judicial review must be fact-based and practical. In deciding whether workable race-neutral alternatives for achieving diversity exist, a court should not accept mere postulations in lieu of evidence from either side – not from the university in justifying the need for a race-conscious plan and not from the party(ies) who deny the need for such a plan.

CONCLUSION

The Fifth Circuit found that "UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission—as described by *Bakke* and *Grutter*." *Id.* at 657. The record amply supports this conclusion. Accordingly, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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