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 *AMICUS CURIAE* THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL IN SUPPORT OF RESPONDENTS

DAVID MCLEAN PARKER
Interim Vice Chancellor and General Counsel
STEPHEN KEADEY
KARA ELLICE SIMMONS
MAURA O'KEEFE
THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL
222 East Cameron Avenue
110 Bynum Hall
Campus Box #9105
Chapel Hill, NC 27599

MICHAEL Y. SCUDDER, JR.
Counsel of Record
PATRICK J. FITZGERALD
LARA A. FLATH
MARIANNE H. COMBS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, IL 60606
(312) 407-0877
michael.scudder@skadden.com

LISA GILFORD
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Avenue
Los Angeles, CA 90071

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT 6

I. *GRUTTER* RESOLVED A QUESTION OF PARAMOUNT AND CONTINUING IMPORTANCE IN HIGHER EDUCATION ADMISSIONS..... 6

A. The *Grutter* Framework Recognizes The Educational Benefits Of Diversity And Imposes Rigorous Burdens. 7

B. UNC, Like Many Other Institutions, Has Relied Upon *Grutter* As Part Of Establishing And Implementing A Narrowly Tailored Race-Conscious Admissions Policy. 10

II. THE COURT SHOULD REJECT PETITIONER'S INVITATION TO APPLY THE REQUIREMENTS OF NARROW TAILORING IN WAYS THAT WOULD FORECLOSE CAREFUL AND LIMITED CONSIDERATIONS OF RACE IN HIGHER EDUCATION ADMISSIONS..... 11

A. Petitioner Invites Applications Of Narrow Tailoring Well Beyond Those Articulated in *Bakke*, *Grutter*, or *Fisher I*. 12

B. The Existing Requirements Of Narrow Tailoring Are Rigorous But Also Realistic And Should Be Preserved. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Case.....***Page(s)***

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995) 5

Dickerson v. United States,
530 U.S. 428 (2000) 10

Fisher v. University of Texas at Austin,
133 S. Ct. 2411 (2013) .....passim

Grutter v. Bollinger,
539 U.S. 306 (2003) .....passim

Regents of University of California v. Bakke,
438 U.S. 265 (1978) .....passim

INTEREST OF *AMICUS CURIAE*[1]

The University of North Carolina at Chapel Hill ("UNC" or the "University") is the Nation's first public university. Since 1795, the University has embraced its mission as a flagship public institution to provide its students with a premier education and to prepare them as the next generation of leaders within North Carolina and beyond.

UNC alumni have long pursued roles as leaders in every field of endeavor, including public life, and the University remains steadfastly committed to preparing its students to meet the broad range of complex challenges facing North Carolina, the Nation, and the world by fostering excellence in teaching, research, and service. The demands and complexities of today's multicultural society bring with them an equally unyielding commitment to diversity on the part of the University.

The preparation of informed citizens and engaged leaders requires, in the first instance, the composition of a student body marked by diversity along many dimensions, including but by no means limited to racial and ethnic backgrounds that UNC graduates will encounter throughout their careers. A diverse student body helps foster vibrant environments within classrooms and residence halls, on performing arts stages and athletic fields, and in

---

[1] Letters consenting to the filing of *amicus* briefs are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no entity other than the *amicus* made any monetary contribution to the preparation or submission of this brief.

study lounges and cafes that encourage and enable the exchange of ideas and the pursuit of solutions from many different perspectives and grounded in many different life experiences. Similarly, a diverse campus better prepares its students for participation in a diverse society and global economy.

UNC receives over 30,000 applications for undergraduate admission each year and is highly selective in its admission decisions. The University has designed and implemented its admissions practices, including its careful and limited consideration of race and ethnicity, not only to advance its institutional mission, but also in strict conformity with the Court's holding and reasoning in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and with the guidance provided by Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

As part of implementing this guidance from the Court, UNC considers race and ethnicity if an applicant chooses to provide such information, but then only as an additional, non-numeric "plus" factor in the University's comprehensive and qualitative review. The University in no way sets quotas. Race and ethnicity are viewed in the context of the entire application and against the backdrop of all contributions the student might make to the University community. UNC looks forward to the day when the narrowly tailored use of race is not necessary in its admissions process. But despite meaningful progress as a University and indeed as a Nation on matters of diversity and inclusion, that day has not yet arrived.

As a flagship public institution, UNC believes that its continued freedom to recruit and enroll a diverse student body is necessary to fulfill both its educational mission and its core responsibilities to the State of North Carolina, including serving its diverse communities and residents. Accordingly, UNC has an acute interest in the Court's decision and, specifically, what the Court chooses to say (and not say) about the constitutional framework governing the consideration of race and ethnicity in admissions decisions.

Furthermore, in November 2014, members of Petitioner's legal team, on behalf of a newly-formed association, brought lawsuits challenging the undergraduate admission policies at UNC and Harvard. These lawsuits encourage the Court to overrule *Grutter*. *See Students for Fair Admissions, Inc. v. Univ. of N.C., et al.*, No. 1:14-cv-00954 (M.D.N.C.); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, No. 1:14-cv-14176 (D. Mass.). The case against UNC is partially stayed to await the Court's decision here.

SUMMARY OF ARGUMENT

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court resolved a question of profound national importance, adopting the reasoning of Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265, 311-21 (1978), and holding that diversity is a compelling interest that can justify the narrowly tailored consideration of race in admissions decisions. UNC, in keeping with other highly selective universities, embraced the decision and has relied upon *Grutter* to establish and implement admissions practices that permit appropriate and careful considerations of race and ethnicity as part of an individualized, holistic review of applicants for undergraduate admission.

UNC's reliance on the *Grutter* framework, which the Court reaffirmed in *Fisher v. University of Texas at Austin* ("*Fisher I*"), 133 S. Ct. 2411 (2013), is substantial and linked closely with one of the ways the University has chosen to fulfill its mission of educating informed citizens and tomorrow's leaders—by admitting a diverse student body. Many events in recent years have served as important reminders that our Nation, despite path-breaking progress on some fronts, continues to face, and at times to struggle with, matters of race and inclusion that remain ever present in our communities.

In reviewing the Fifth Circuit's decision, and in keeping with the question presented, the Court should preserve and reinforce the standards of *Bakke*, *Grutter,* and *Fisher I.* While being held accountable to the rigors of strict scrutiny, and in the absence of workable race-neutral alternatives—

including ones that do not require the sacrifice of other essential factors, such as the academic qualifications of admitted students—UNC and other universities should be permitted to pursue their compelling interests in the educational benefits of diversity through race-conscious admissions practices.

The potential practical ramifications of the Court's decision are difficult to overstate. The Court should reject Petitioner's invitation, disguised as the routine application of existing standards, to change the law. Put differently, Petitioner urges the Court to raise the narrow tailoring bar to a level virtually no university would be able to clear—a result that would all but overrule *Bakke* and *Grutter*. For example, without any explanation—indeed, on the basis of pure assertion—Petitioner contends that UT-Austin had readily available a range of race-neutral alternatives that would have permitted the university to achieve its diversity objectives "with ease." Pet. Br. 47. These assertions come with no citation to authority or academic research of any kind, no discussion of the workability of the asserted alternatives, and nary a word about how UT-Austin—as a practical matter—was supposed to satisfy Petitioner's proposed standard.

Perhaps above all else, the Court has made clear across *Bakke*, *Grutter*, and *Fisher I* that there exists genuine constitutional ground between strict scrutiny standards that are impermissibly either "'fatal in fact'" or "feeble in fact." *Fisher I*, 133 S. Ct. at 2421 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)). Preserving the ground between these poles is important, for it is there that

universities are able to pursue their constitutionally compelling interest in assuring diverse student bodies so long as they carry their burden of showing that any race-conscious admissions practices adhere to the requirements of necessity, individualization, and narrow tailoring. In affirming the Fifth Circuit's decision, the Court should preserve this ability for UNC and other higher education institutions.

ARGUMENT

I. *GRUTTER* RESOLVED A QUESTION OF PARAMOUNT AND CONTINUING IMPORTANCE IN HIGHER EDUCATION ADMISSIONS

In the wake of *Bakke*, "[p]ublic and private universities across the Nation [] modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003). The "fractured decision in *Bakke*," however, left lower courts struggling with whether Justice Powell's diversity rationale was binding precedent. *Id.* at 325. The Court granted review in *Grutter* to resolve that "question of national importance," ultimately endorsing Justice Powell's reasoning and holding that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*

In *Fisher I*, the Court reiterated the framework adopted in *Grutter*, *Fisher I*, 133 S. Ct. at 2417, underscoring anew that "'the attainment of a diverse student body'" is a "compelling interest" and "'permissible goal for an institution of higher

education.'" *Id.* at 2419 (quoting *Bakke,* 438 U.S. at 311-12).

A. The *Grutter* Framework Recognizes The Educational Benefits Of Diversity And Imposes Rigorous Burdens.

The twin cornerstones the Court laid in *Grutter* are the State's compelling interest in the substantial educational benefits of diversity and the requirement that any race-conscious admissions practices undertaken to further that interest adhere to the demands of strict scrutiny. *See Grutter*, 539 U.S. at 326-28. In emphasizing these dual precepts, the Court likewise took care to stress that, "[a]lthough all government uses of race are subject to strict scrutiny, not all are invalidated by it." *Id.* at 326-27. To the contrary, "strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context"—here, higher education admissions. *Id.* at 327.

The Court found the "educational benefits" of diversity to be "substantial" and the University of Michigan Law School's decision to pursue those benefits to reflect an academic judgment warranting deference and a presumption of good faith. *Id.* at 328-30; *see also id.* at 329 (quoting Justice Powell's reasoning in *Bakke*, 438 U.S. at 312, that "'[t]he freedom of a university to make its own judgments as to education includes the selection of its student body'"). "[N]umerous studies," Court emphasized, "show that student body diversity promotes learning

outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Grutter*, 539 U.S. at 330 (internal quotations and citations omitted). So, too, did the Court agree with the view of "major American businesses" that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.*

The Court's overarching determination on the benefits of diversity was plain: "In 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.* at 332. UNC pursues this precise objective in undergraduate admissions. To prepare its students as leaders and citizens, the University invests substantially to help them understand the diverse communities in which they will live, lead, and serve. In furtherance of this mission, it is essential for the University to offer its students the opportunity to learn and live alongside qualified students of different backgrounds, including ones of different race and ethnicity.

Grutter also provided clear, practical, and itemized guidance on the demands of the narrow tailoring component of strict scrutiny. A permissible race-conscious admissions program must adhere to the following requirements:

- *No Quotas*: Avoid any "quotas" and instead consider race or ethnicity "only as a 'plus' factor," without "'insulating the individual from comparison with all other candidates

for the available seats,'" *id.* at 334 (quoting *Bakke*, 438 U.S. at 317);

- *Individualized Assessment:* Use a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment," while ensuring that an applicant's race or ethnicity are not the "defining feature of his or her application," *id.* at 337;
- *Fair Consideration of Race-Neutral Alternatives:* Show a "serious, good faith" judgment that the adoption of "workable race-neutral alternatives" would not permit the university to achieve its diversity objectives, *id.* at 339; and
- *Ongoing Review and Improvement:* Undergo "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity," as continued progress as a Nation on matters of race should bring a day when the consideration of race in higher education admissions is no longer necessary, *id.* at 342-43.

In *Fisher I*, the Court reinforced each of these elements of strict scrutiny and narrow tailoring, while stressing that a university bears the burden of offering "sufficient evidence" to "prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Fisher I*, 133 S. Ct. at 2421.

B. UNC, Like Many Other Institutions, Has Relied Upon *Grutter* As Part Of Establishing And Implementing A Narrowly Tailored Race-Conscious Admissions Policy.

In designing and implementing its undergraduate admissions practices, UNC has gone to great lengths to embrace the principles and burdens Justice Powell first articulated over thirty-five years ago in *Bakke* and the Court adopted in *Grutter* and underscored in *Fisher I*. The *Grutter* framework is clear and defined by sufficient precision and constitutional balance. It affords appropriate deference to a university's assessment of the educational benefits of diversity while requiring good-faith consideration of workable race-neutral alternatives, and holding the institution to demonstrate affirmatively its proper consideration of race and ethnicity in the evaluation of applicants. UNC has relied upon the *Grutter* framework, invested substantially in complying fully with it, and believes existing standards strike the proper balance of interests in an area of overarching importance to the University's public mission—the admission and education of a diverse student body.

Stability in the law is important. *Cf. Dickerson v. United States*, 530 U.S. 428, 443 (2000) (emphasizing that "even in constitutional cases, [stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification" (internal quotation marks omitted)). UNC understands, and has fully complied with, the constitutional imperative of ensuring the restricted consideration of race and

ethnicity in the evaluation of applicants while also periodically revisiting whether an effective race-neutral alternative exists that would allow the University to achieve its diversity objectives without compromising other important admissions criteria.

The costs of moving away from the *Grutter* framework would be substantial to UNC and numerous other universities, including UT-Austin, likewise committed to good-faith implementation of appropriately limited race-conscious admissions practices. The educational and societal benefits of diversity are massive, and the necessity of preserving a means for universities to pursue that interest in admissions practices are as important today as ever before across the Nation, including in Chapel Hill.

II. THE COURT SHOULD REJECT PETITIONER'S INVITATION TO APPLY THE REQUIREMENTS OF NARROW TAILORING IN WAYS THAT WOULD FORECLOSE CAREFUL AND LIMITED CONSIDERATIONS OF RACE IN HIGHER EDUCATION ADMISSIONS

As part of affirming the framework announced in *Grutter* and reiterated in *Fisher I*, the Court should reject Petitioner's invitation to change the existing standards and tighten the screws of strict scrutiny in a way that risks foreclosing the consideration of race in a university's pursuit of diversity.

A. Petitioner Invites Applications Of Narrow Tailoring Well Beyond Those Articulated in *Bakke*, *Grutter*, or *Fisher I*.

Petitioner broadly asserts that UT-Austin had available "numerous other available race-neutral means of achieving the same result [of diversity]." Pet. Br. 47. But Petitioner ignores that diversity—a compelling state interest—is only one goal that a university may seek to achieve through complex, multi-factored admissions decisions.

In *Grutter*, the Court disagreed with the District Court's approach of taking the "[University of Michigan's] Law School to task for failing to consider race-neutral alternatives such as 'using a lottery system' or 'decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores.'" *Grutter*, 539 U.S. at 340 (internal citation omitted). "[T]hese alternatives," the Court emphasized, "would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." *Id*. Or, put another way, the Court rejected the view that universities must choose between "[academic] excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id*. at 339. A university, in short, is not required to pursue diversity at the expense of or by "abandon[ing] the academic selectivity that is the cornerstone of its educational mission." *Id*. at 340.

All should agree that "serious, good faith consideration of workable race-neutral alternatives" is a burden that an institution like UNC must meet

if it wishes to employ a race-conscious admissions policy. Even so, though, the Court in *Grutter* in no way mandated the adoption of percentage plans or any other available race-neutral alternative. Indeed, in response to the Solicitor General's invitation to the contrary, the Court observed that percentage 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." *Id.*

Here, by focusing solely upon whether or not race-neutral alternatives could "achieve similar gains" in racial diversity as race-conscious admissions practices, Petitioner seeks to oversimplify what *Grutter* made clear should be multi-faceted, highly-individualized decision-making and what *Fisher I* emphasized is a "complex" endeavor. *Grutter*, 539 U.S. at 325, 328, 334, 337; *Fisher I*, 133 S. Ct. at 2418. This oversimplification rests upon a view of diversity limited exclusively to race and ethnicity. The Court in *Fisher I*, however, 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 but a single though important element.'" *Fisher I*, 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 315). Endorsing Petitioner's position effectively would overturn the Court's determination in *Grutter* that a selective institution may pursue multiple, complex diversity goals so long as its means of doing so meet the requirements of strict scrutiny, including the

consideration of available and "workable" race-neutral alternatives. *Grutter*, 539 U.S. at 339.

Apart from the singular and incorrect focus on one element of diversity, Petitioner overreaches in asserting—without factual, legal, or any other form of support (for example, from education or social science research)—that a number of race-neutral alternatives would allow UT-Austin to achieve this "increase[d] racial diversity" with "ease." Pet. Br. 47. Some of the race-neutral alternatives that Petitioner proclaims could achieve increased diversity "with ease" include "expanded outreach, uncapping the Top 10% Law, or making greater use of socioeconomic preferences." *Id.* 24.

Petitioner's objective is as obvious as it is divorced from the reality and difficulty of higher education admissions. Nothing about achieving diversity is "eas[y]." Yet Petitioner assumes that if a race-neutral alternative is available, then that alternative will necessarily be "eas[y]" to implement *and successful*. Endorsing this false assumption—and its unrealistic oversimplification of the admissions process at selective institutions—would effectively create the eye of a needle so small that no university could ever successfully thread it.

B. The Existing Requirements Of Narrow Tailoring Are Rigorous But Also Realistic And Should Be Preserved.

The Court should preserve the existing framework of *Grutter* and allow universities to continue to employ race-conscious policies, once they

meet the standards articulated by the Court, including a good-faith consideration of any workable race-neutral alternatives.

UNC acknowledges that this burden rests on its shoulders: "[I]t remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admission processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" *Fisher I*, 133 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 337).

In "tak[ing]" *Bakke*, *Gratz*, and *Grutter* "as given" in *Fisher I*, 133 S. Ct. at 2413, the Court preserved the continued opportunity of institutions like UNC to satisfy this burden of showing that any race-conscious admissions practices adhere to the requirements of necessity, individualization, and narrow tailoring as part of admitting diverse student bodies. Strict scrutiny exists in the constitutional space between "fatal in fact" and "feeble in fact"—ground this Court has defined with care and balance in *Bakke*, *Grutter,* and *Fisher I*, and should continue to endorse here.

CONCLUSION

For these reasons, the Court should affirm the Fifth Circuit's judgment and, more generally, reaffirm the principles announced in *Grutter* governing a university's consideration of race in admissions decisions.

Respectfully submitted,

DAVID MCLEAN PARKER
Interim Vice Chancellor and General Counsel
STEPHEN KEADEY
KARA ELLICE SIMMONS
MAURA O'KEEFE
THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL
222 East Cameron Avenue
110 Bynum Hall
Campus Box #9105
Chapel Hill, NC 27599

MICHAEL Y. SCUDDER, JR.
Counsel of Record
PATRICK J. FITZGERALD
LARA A. FLATH
MARIANNE H. COMBS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, IL 60606
(312) 407-0877
michael.scudder@skadden.com

LISA GILFORD
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Avenue
Los Angeles, CA 90071

Counsel for Amicus Curiae

Dated: October 30, 2015