No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN et al.,

Respondents.

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

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Respondent ("UT") seeks at all costs to avoid certiorari. Confronted with a meritorious Petition that raises important constitutional questions concerning the use of race in undergraduate admissions, UT disappointingly resorts to stridency over substance in its Brief in Opposition ("BIO"). UT misstates the procedural posture of this litigation, prematurely questions the monetary relief that Petitioner ultimately might recover, attempts to recast pleadings issues as jurisdictional barriers, distorts neutral factual statements into supposed concessions, and threatens to try to buy its way out of this case, but only if this Court grants review. More extremely, UT advances the peculiar proposition that its use of race is constitutional because the Equal Protection Clause prohibits only discriminatory enforcement of laws—not discriminatory laws themselves. As shown below, none of UT's contentions can withstand analysis. If anything, UT's desperate attempt to avoid certiorari underscores this case's importance and the need for the Court's review.

I. UT's Claims Of Actual Or Potential Mootness Are Meritless.

1. As the Fifth Circuit held, and UT did not contest below, Petitioner has "standing to challenge [her] rejection and to seek money damages for [her] injury." App. 4a. She has suffered an injury within the meaning of Article III, *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003), and the Court is *capable* of redressing that injury, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), through monetary relief, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007), including

nominal damages, *Carey v. Piphus*, 435 U.S. 247, 266 (1978), restitution, or recompense for other losses incurred as a consequence of UT's unconstitutional admissions program, Restatement (Second) of Torts § 903. UT does not disagree that such relief would redress Petitioner's claimed injury. BIO 11, 13.

UT questions whether Petitioner is entitled to such relief, but it is premature to debate the type and amount of damages Petitioner ultimately might recover. With UT's concurrence, the district court bifurcated liability and remedies—a fact that UT fails to mention. As the district court explained, "[r]emedy issues are likely to be much more fact intensive than liability issues," so that "[b]furcating this case into two phases—liability, followed by remedy should defendants be found liable—will conserve both scarce judicial resources and the parties' resources." Order, *Fisher v. Texas*, No. 08-263, at 2 (W.D. Tex. July 10, 2008) ("Bifurcation Order"). If Petitioner prevails here, remedies will be litigated on remand and then the district court will award appropriate monetary relief.[1] "Choices have consequences." BIO 22. UT agreed to bifurcate liability and remedies and cannot avoid that choice by couching its substantive challenges to remedies as jurisdictional issues.

2. UT nevertheless claims that monetary damages are unavailable because of supposed defects in the Second

1. Anticipating the remedies phase, UT claims that Petitioner would not have been admitted under a race-neutral system. BIO 13 n.6. This claim conflicts with the evidence adduced at the preliminary-injunction stage, where the district court found that 64 "underrepresented minority" students were admitted even though their Academic Index scores were lower than Petitioner's. *Fisher v. Texas*, 556 F. Supp. 2d 603, 607 (W.D. Tex. 2008).

Amended Complaint's ("SAC") prayer for relief. BIO 7-10. UT argues that the return of Petitioner's "application fees and all associated expenses incurred … in connection with applying for admission to UT," SAC ¶ 4, will not redress her injury because UT's use of race did not "induce[] her to apply," BIO 12. But Petitioner is seeking the return of fees and expenses on restitutionary—not inducement—grounds. Restitution is a standard form of compensatory relief that is capable of redressing Petitioner's constitutional injury. Restatement (Third) of Restitution and Unjust Enrichment § 3 ("A person is not permitted to profit by his own wrong."); *id.* §§ 44, 49.

UT also argues that the Complaint fails to plead a claim for nominal or other monetary damages. But "it is not necessary to allege nominal damages." *Mitchell v. Horn*, 318 F.3d 523, 533 n. 8 (3d Cir. 2003). Regardless, Petitioner prayed for "[a]ll other relief this Court finds appropriate and just," SAC ¶ 165, and courts have consistently read residual demands to include nominal damages, *id.*; *Minn. Lawyers Mut. Ins. Co. v. Batzli*, 2011 WL 3347849, at *10 n.19 (4th Cir. Aug. 4, 2011); *Boxer X v. Donald*, 169 F. App'x 555, 559 (11th Cir. 2006), as well as compensatory damages, *Sapp v. Renfroe*, 511 F.2d 172, 176 n.3 (5th Cir. 1975); *Kursar v. TSA*, 751 F. Supp. 2d 154, 161 n.5 (D.D.C. 2010) (discussing *Doe v. U.S. Dept of Justice*, 753 F.2d 1092 (D.C. Cir. 1985)).[2]

2. UT's arguments about declaratory relief are "superfluous in light of the damages claim," *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997). However, even if just nominal damages are awarded, the judgment would still have "the effect of a declaration of legal rights and may deter future infringements or may enable the plaintiff to obtain an injunction to restrain a repetition of the wrong." Black's Law Dictionary 418 (8th ed.); 13C FPP § 3533.3.

Even if UT were correct, however, Rule 15 allows a party to amend her complaint to conform to the evidence and instructs the federal courts to "freely permit" such amendment. Fed. R. Civ. P. 15. UT argues that it is "too late for [Ms.] Fisher to amend her complaint in the district court" because the "district court ordered the parties to file all motions to amend or supplement pleadings … **by July 14, 2008**." BIO 19. But UT is wrong. The Bifurcation Order, immediately before setting out the schedule on which UT relies, provides: "[T]he parties have agreed to the following schedule for the liability phase of this case. Nothing in this scheduling order will be deemed to waive or otherwise alter the parties' rights in the remedy phase of this case." Bifurcation Order 2. The Bifurcation Order thus preserves Petitioner's ability to amend with respect to remedies on remand; for UT to argue otherwise is disingenuous.

Moreover, Rule 54(c) provides that the "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). The Rule "recognizes that the circumstances bearing on the feasibility of particular forms of relief often change between the initiation of the suit and the rendition of final judgment." 21A Oakes, Federal Procedure, Lawyers Ed. § 21.51. Thus, "the mooting of the complaint's request for injunctive relief does not require dismissal of the suit if monetary relief would be available on the claim, even if the monetary

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UT would be wise to view it in that manner going forward. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010) ("A litigant who tries to evade a federal court's judgment—and a declaratory judgment is a real judgment, not just a bit of friendly advice—will come to regret it.").

relief was not requested." 10 J. Moore, Moore's Federal Practice § 54.70[1]. "Consequently, the prayer for relief does not determine what relief ultimately will be awarded." 10 Wright, Miller & Kane, Federal Practice & Procedure ("FPP") § 2664 (3d ed.). At bottom, "[t]he liberal amendment policy of Rule 15, combined with Rule 54(c) means that a party should experience little difficulty in securing a remedy other than that demanded in the pleadings as long as the party shows he is entitled to it." *Id.* § 2662; 6 FPP § 1474 (explaining that Rule 15 amendments are "appropriate for increasing the amount of damages sought, or for electing a different remedy than the one originally requested").[3]

3. In any event, UT's entire line of argument badly confuses appropriate remedy with jurisdiction. Because "*jurisdiction* is a question of whether a federal court has the power ... to hear a case" whereas "*relief* is a question of the various remedies a federal court may make available," *Davis v. Passman*, 442 U.S. 228, 239-40, n.18 (1979), "it is not the amount claimed or the type of relief requested in the demand that determines whether the court has jurisdiction," 10 FPP § 2664; *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 561 (1968); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 352 (2008) (Ginsburg, J., concurring in part and dissenting in part). Thus, "a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 65 (1978).

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3. UT claims that Rule 54(c) is inapplicable because Petitioner has not yet obtained a "final judgment." BIO 18-19. The argument is circular. Whether Petitioner will prevail is the very question before this Court.

UT wrongly argues that *DeFunis v. Odegaard*, 416 U.S. 312 (1974), is to the contrary. Unlike here, the trial court in *DeFunis* granted an injunction requiring the University of Washington Law School to admit DeFunis and the injunction remained in place while the case was appealed. *Id.* at 314-16. That case was moot because DeFunis had been awarded all the relief the Court was capable of providing him. He was scheduled to graduate from his chosen law school and thus had no possible financial injury or claims for "compensation for the higher tuition costs or lost future income incurred by attending another university," BIO 13. Because Petitioner was denied the education that she sought by injunction in this lawsuit, UT acknowledges the Court *is* capable of awarding such compensatory relief. Accordingly, there is no jurisdictional barrier here to invoking Rule 54(c).[4]

UT relies on *Fox v. Board of Trustees of the State University of New York*, 42 F.3d 135 (2d Cir. 1994), to argue that Petitioner should not be permitted to obtain the benefit of Rule 54(c). BIO 10 n.3, 19. But *Fox* was premised on the fact that the government defendants, having answered a plea for relief that sought *only* equitable relief, would be prejudiced because they had not had an opportunity to raise an immunity defense to a damages claim. 42 F.3d at 141. At most, *Fox* reflects the exception to Rule 54(c), where a "plaintiff's failure to demand the appropriate relief has prejudiced his adversary." 10 FPP § 2664. Indeed, *Fox* acknowledges that a request for

4. Nominal damages may also be appropriate in this case, unlike in *DeFunis* where injunctive relief fully vindicated DeFunis's rights. *E.g., Cummings v. Connell*, 402 F.3d 936, 945 (9th Cir. 2005) ("Nominal damages exist as a purely symbolic vindication of [a] constitutional right.").

nominal damages should be read into a complaint that, like Petitioner's, includes a request for monetary relief. *Id.* at 142. Petitioner expressly prayed for money damages, App. 4a, and UT answered on the merits, Ans. to Second Am. Compl., *Fisher v. University of Texas*, No. 08-263 (W.D. Tex. Aug. 22, 2008).

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997), likewise is distinguishable. As in *Fox*, the complaint in that case alleged only equitable claims against government officials. *Id.* at 49-51. Perhaps more importantly, the parties there had colluded in presenting a request for nominal damages in order to keep the case alive. *Id.* at 71. The Court's conclusion that the dispute had become "friendly or feigned," *id.*, has no application to this case.

4. Finally, UT claims that it might moot the case by tendering $100 (to cover Petitioner's application fee and housing deposit) "rather than incur the massive expenses of litigating this case to conclusion in this Court." BIO 3. But only when "an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever" must an appeal be dismissed as moot. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). Indeed, the principal case UT relies on confirms that the "entire claim is not mooted simply because the specific relief it sought has been rendered moot" if "the party seeking relief" can "demonstrate that the court's adjudication would affect it in some way." *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011). Because nominal and other unquantified compensatory damages would remain available to Petitioner, tendering $100 would not moot the case. *Supra* at 2-5.

In any event, the Court should not be deterred by UT's bluster. UT has been litigating this dispute for three-and-half years. If UT believes that tendering $100 would moot this case, it would not have incurred the significant expense of an appeal, opposition to en banc review, and its BIO. UT now merely threatens payment in an attempt to avoid further review, while preserving the decision below as precedent. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (requiring vacatur if case is mooted by prevailing party). UT should not be permitted to benefit from such gamesmanship.

II. UT Cannot Deny The Importance Of The Petition.

1. This case presents fundamental constitutional issues affecting university admissions programs nationwide. Those important issues were squarely presented below and engendered lengthy decisions at every stage of this case. As Chief Judge Jones lamented, the decision below "in effect gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires." App. 175(a).

2. New federal guidelines justify her concerns. The Department of Education echoed the United States' amicus brief below by adopting a similarly permissive interpretation of *Grutter* in its "Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education," *available at* www2.ed.gov/about/offices/ list/ ocr/docs/guidance-pse-201111.html. Revoking guidance that had discouraged using race-based admissions unless absolutely necessary, the agency encourages universities

"to take proactive steps" to incorporate racial preferences in their admissions procedures. *Id.* Like the Fifth Circuit, it disclaims the applicability of *Parents Involved* to higher education. The proper interpretation of *Grutter* and other governing precedent is central to the validity of the Administration's nationwide guidance and confirms the significance of the issues presented here and the need for this Court's review.

3. That UT unabashedly grants "underrepresented" minorities preferences over Asian-Americans based on state demographics further underscores the importance of this case. BIO 31. UT's selective racial preferences give credence to the concerns of Asian-American students nationwide that their race unfairly counts against them in admissions. *Some Asians' college strategy: Don't check "Asian*," USA Today, Dec. 4, 2011, *available at* www.usatoday.com/news/education/story/2011-1203/asian-students-college applications/51620236/1.

4. UT argues that this case is idiosyncratic because of the Top 10 Percent Law. BIO 23. But the substantial levels of minority enrollment absent preference ensured by the Top 10 Percent Law are not confined to Texas or percentage plans. Moreover, the equal-protection issues at the heart of this case—questions about the level of scrutiny, critical mass, racial-demographic goals, disparate treatment of minority groups, impact on minority enrollment, and classroom diversity—are questions of importance throughout higher education. Their resolution will provide critical guidance nationwide.

5. UT also seeks to diminish this case by noting the absence of a circuit conflict. BIO 23. But Petitioner need

not assert the existence of a circuit split under Rule 10(c). This Court has not hesitated to review important equal-protection cases in the absence of a circuit split. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009); *Parents Involved*, 551 U.S. at 715, 718; *Johnson v. California*, 543 U.S. 499, 505 (2005); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 (1978).

III. UT's Cursory Attempts To Address The Petition's Merits Are Unpersuasive.

1. UT barely addresses the merits of this dispute. It merely reiterates the opinions below without any serious discussion of the Fifth Circuit's reasoning. BIO 30-34. The Petition fully explains why the panel's reasoning is incorrect and Petitioner need not repeat those arguments here. Pet. 23-35.

2. UT disingenuously attempts to narrow this dispute based on supposed "factual concessions in the district court." BIO 25. But these "concessions" are merely uncontroversial facts that lay the foundation for this legal dispute. For example, that "UT Austin added race as a factor in its admissions decisions because it views race as an important credential," *id.*, says nothing about whether that decision was unconstitutional. Similarly, that "[u]sing race in admissions helps UT achieve racial diversity," *id.* 26, reflects solely that UT uses race to increase enrollment of minorities it considers "under-represented"; it does not establish that UT's use of race survives strict scrutiny. Although there is insufficient space to debunk every supposed concession, it is worth noting that neither the

Court of Appeals nor the District Court relied on "factual concessions" even though UT tried this same tactic below.

3. Finally, UT defends *Grutter* by taking the extraordinary position that the Equal Protection Clause bans only discriminatory enforcement of laws—not discriminatory laws themselves. BIO 37-39. UT's theory would uphold a statute denying university admission to all students of a particular race or, as in *Strauder v. West Virginia*, 100 U.S. 303 (1879), prohibiting blacks from serving on a jury, provided the law were enforced evenhandedly. UT's resort to this striking pronouncement without supporting case citation underscores the need for review.

IV. UT Improperly Seeks To Limit The Scope Of This Court's Review.

Contrary to UT's contention, BIO 35-37, Petitioner has preserved the argument that *Grutter* should be reconsidered. By its express terms, the question presented invoked the full range of Fourteenth Amendment precedent, including but not limited to *Grutter*, and thus encompassed the concerns raised by both Chief Judge Jones and Judge Garza. Indeed, the Petition devotes an entire argument to this issue. Pet. 35. And the question whether *Grutter* should be reconsidered was briefed below. The issue is "fairly included" within the question presented, Rule 14.1(a), and preserved for this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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