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

REPLY BRIEF FOR PETITIONER

BERT W. REIN
Counsel Of Record
WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
CLAIRE J. EVANS
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
brein@wileyrein.com

Attorneys for Petitioner

September 5, 2012

243022

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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REPLY BRIEF FOR PETITIONER

Respondents and their *amici* focus on defending racial diversity in higher education as a compelling government interest and on insisting that race-neutral percentage plans like the Texas Top 10% law not be constitutionally mandated alternatives to "full file" admissions. Br. for Respondents at 23-28, 31-36 (Aug. 6, 2012) ("Resp."); Br. for United States as *Amicus Curiae* at 8-17 (Aug. 13, 2012) ("U.S."). Respondents tilt at self-created windmills. Petitioner has not contested the holding of *Grutter v. Bollinger*, 539 U.S. 306 (2003), that pursuing racial diversity for educational purposes is constitutional when necessary to secure "critical mass" and narrowly tailored to that end. Nor does Petitioner seek to impose a percentage system on all universities. Petitioner's reliance on the substantial diversity produced by the Top 10% law simply recognizes that, given the Texas legislature's decision to enact it, a reviewing court cannot ignore the law's consequences when evaluating whether UT's reintroduction of racial preferences was in fact necessary and narrowly tailored to achieve the interest that *Grutter* found compelling.

Respondents' misdirected arguments cannot obscure their concessions on the matters actually at issue. Respondents have effectively abandoned any reliance on the pervasive deference that the Fifth Circuit accorded UT's use of racial preferences and have expressly abandoned "classroom diversity" as a compelling interest. Respondents instead reemphasize their interest in achieving demographic proportionality and suggest a newly minted interest in elitism dressed up as "intra-racial" diversity. But neither interest is compelling.

And Respondents cannot explain why UT's use of racial preferences is constitutionally necessary or how UT's admissions system is narrowly tailored to achieving any legitimate interest in student body diversity.

Engaging in doublespeak, Respondents contend that race is only a "factor of a factor of a factor of a factor" in the scoring of applications yet seek to credit it for *every* non-Top 10% minority admission. They argue that African-American and Hispanic (but not Asian-American) students remain underrepresented based on state population data but deny that UT is pursuing proportional representation because their system is ineffectual in achieving it. They disclaim an interest in classroom diversity but point to its purported absence as a constitutional basis for using racial preferences. They concede that UT publicly touted the diversity achieved by its prior race-neutral system but (notwithstanding its creation of one of the most racially diverse universities in the Nation) ask the Court to disregard those statements as recruiting puffery. They assure the Court that UT had a factual basis for reintroducing racial preferences but warn that judicial testing of that evidence would sound the death knell for academic freedom. Finally, they critique UT's race-neutral system because it failed to shape a student body representative of Texas yet argue that its centerpiece (the Top 10% law) is problematic because it inadequately favors minorities from affluent backgrounds.

This case is not about Respondents' dissatisfaction with the kind of minorities that UT enrolls because of the Top 10% law. That complaint—which has no connection to racial isolation in the student body—should be directed to the people of Texas and their elected representatives—not

the Court. Nor is this case about the benefits of diversity for society as a whole, businesses, the military, or the civil service. This case is instead about whether UT has proven that its reintroduction of racial preferences was necessary to meet a compelling interest and is narrowly tailored to that end. Only then could the injury that Abigail Fisher suffered when applying to UT be constitutionally tolerable. "It is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting). Racial preferences thus "may be considered legitimate only if they are a last resort to achieve a compelling interest." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring). UT's many proffered justifications for reintroducing racial preferences and using them to handicap Ms. Fisher in the admissions process do not remotely meet this standard.

A. Respondents failed to demonstrate the necessity of UT's use of racial preferences to achieve student body diversity.

1. Respondents agree that UT's "consideration of race" in reviewing Petitioner's application for admission "triggers strict scrutiny." Resp. 22.[1] As a result, they

1. Despite conceding—as they must—that Petitioner suffered a constitutional injury, *see Grutter*, 539 U.S. at 327, Respondents incorrectly suggest there is a standing problem based on their contention that she would not have been admitted to UT. Resp. 16-17 n.6. But the "question of [Petitioner]'s admission *vel non* is merely one of relief," not standing. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978). And because the district court bifurcated the case, the issue of relief will be litigated in the first instance on remand. Reply Br. at 2 (Dec. 20, 2011). In any

acknowledge that UT must "demonstrate both that its use of race in admissions decisions is necessary to further a compelling government interest and that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose." Resp. 22; *see also* Br. for Petitioner at 24 (May 21, 2012) ("Br.").

Although Respondents suggest the Fifth Circuit fairly applied this standard, they should know better. Respondents in fact refuse to defend the Fifth Circuit's novel "good faith" standard, conceding that "[a] university does not get deference on the ultimate question whether the means through which it pursues its compelling interest are narrowly tailored." Resp. 48. Respondents nevertheless try to rehabilitate the Fifth Circuit by arguing that it "did not defer to UT's belief that its policy was narrowly tailored." *Id.* 48-49. Respondents risk their own credibility in so arguing, as the Fifth Circuit clearly held that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably

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event, Respondents' argument contradicts their representation to the district court that UT could not evaluate whether Petitioner would have been admitted without rerunning its entire admissions process. Opp. to Mot. for Prelim. Injunction, *Fisher v. UT*, No. 08-263, at 12 (W.D. Tex. May 5, 2008) (Doc. 42). Respondents also cannot reconcile the argument with their claim that race was decisive for every minority admitted outside the Top 10% law. *See infra* at 17-18. Finally, any other "vehicle" problems were addressed at the certiorari stage and need not be repeated other than to note that Respondents have abandoned their mootness argument. They now concede that a damages claim is "still alive in this case." Resp. 17 n.6.

expert academic judgment." App. 37a. Respondents even defended the Fifth Circuit on this score in opposition to certiorari. *See* Br. in Opp. at 30 (Dec. 7, 2011). Now, in retreat from all-out deference, Respondents can say only that "this Court reviews judgments, not statements in opinions." Resp. 21-22.

Respondents also resist having to prove necessity under the "strong basis in evidence" standard. Resp. 49-50. They argue that *Grutter* did not invoke this standard. *Id*. 49. But the issue was not contested in *Grutter*. There, "the consideration of race was viewed as indispensible in more than tripling minority representation at the law school—from 4 to 14.5." *Parents Involved*, 551 U.S. at 734-35. Respondents also contend that the strong-basis-in-evidence standard has been applied only in cases involving remedial preferences. Resp. 49-50. But that is a baseless distinction, Br. of Cato Institute as *Amicus Curiae* at 5-24 (May 29, 2012), and is incompatible with "the avowed continuity in principle of the Court's decisions," App. 180a (Jones, C.J.). This requested distinction would wrongly grant the state broader license to use racial classifications in promoting diversity than in remedying proven discrimination. *Parents Involved*, 551 U.S. at 793-96 (Kennedy, J., concurring).

Respondents contend that the "strong basis in evidence" standard is too difficult to meet and would subject universities to increased judicial oversight. Resp. 50. But that is its purpose. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring) ("[A]ny racial preference must face the most rigorous scrutiny by the courts."); *see also Bakke*, 438 U.S. at 299 (Powell, J.); App. 176a (Jones, C.J.). Despite giving

lip service to the need for strict scrutiny, Respondents ultimately seek to reclaim the good-faith review of necessity that the Fifth Circuit condoned—just without defending the words "good faith." The Court should not allow UT to use racial preferences without both proving a need to do so and identifying a termination point. *See supra* at 3-4. The strong-basis-in-evidence standard ensures that racial classifications are employed only as "a last resort." *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring).[2]

2. UT has no evidentiary basis—let alone a strong one—establishing that the minority enrollment achieved by the Top 10% law and race-neutral AI/PAI evaluation generated insufficient student body diversity. Br. 34-37. Although Respondents proclaim adherence to *Bakke* and *Grutter*, they fail to apply their teaching by establishing a legitimate "critical mass" target. Instead, they accuse Petitioner of seeking to impose "an inflexible, one-size-fits-all" critical mass target on all universities. Resp. 41. Even if the "critical mass" target required by *Grutter* may

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2. Respondents also argue that universities are entitled to deference on "subsidiary" factual questions that "involve [academic] judgments." Resp. 48. That may be true as to UT's "educational judgment that … diversity is essential to its educational mission." *Grutter*, 539 U.S. at 328; Br. 26. But the demonstration of necessity is not a "subsidiary" factual issue; it is a legal question that lies at the heart of the strict-scrutiny inquiry. No decision—certainly not *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010)—is to the contrary. Resp. 48. The vast differences between the issues here and in *Holder* are too numerous to comprehensively detail. But Respondents' mistaken belief that UT's admissions process is entitled to the same deference as the Executive's management of national security and foreign affairs is revealing.

differ contextually, it still must be determined in order to safeguard the rights of *all* applicants and permit judicial review of the need for and means by which diversity is pursued. Critical mass may differ from school to school. But, as in physics, it is always ascertainable. UT never even attempts to establish how much "fissile material" is needed to sustain a "nuclear chain reaction" on its own campus. *Id.*

Respondents also argue that developing a numerical target for critical mass would be racial balancing. Resp. 40. But establishing objective guideposts—so race will be used only when necessary—is not racial balancing so long as the enrollment goal is based on the educational benefits of diversity and not a desire to reserve a "certain fixed number or proportion of opportunities … exclusively for certain minority groups." *Grutter*, 539 U.S. at 335; *Bakke*, 428 U.S. at 323 (Powell, J.) ("[T]here is some relationship between numbers and achieving the benefits to be derived from a diverse student body[.]"). UT's failure to identify even a range of minority enrollment that would constitute "critical mass" precludes it from constitutionally justifying racial preferences.

UT likely declined to establish objective guideposts because, as its own data and public statements show, its race-neutral system satisfied any legitimate critical-mass goal. Br. 35-36. Respondents sidestep this data by arguing that Petitioner wrongly "lumps together" distinct minority groups. Resp. 42. But it is the Court that adopted "underrepresented" minorities in the aggregate as the relevant category, *Grutter*, 539 U.S. at 336; *id.* at 375 & n.12 (Thomas, J., concurring in part and dissenting in part); *Parents Involved*, 551 U.S. at 733-74, given the

constitutional problems arising from micro-managing critical mass for all minority groups, *see infra* at 16-17. Respondents also discount UT's many public statements touting the success of its race-neutral system as a recruiting ploy. Resp. 42 n.8. But UT cannot so easily abandon its public statements, which are verified by its own "hard data." *Id.* 41.

Respondents would rather attack the wisdom of the Top 10% law, *id.* 31-36, than confront the fact that UT has "approve[d] gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic," App. 182a (Jones, C.J.). But "context matters" in evaluating whether racial preferences are necessary to enroll "meaningful numbers" of minority students. *Grutter*, 539 U.S. at 327, 318. Try as it might, UT cannot "ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texan freshman." App. 55a. Because the Top 10% law (in conjunction with the other aspects of UT's "full file" race-neutral admissions system) enrolled a critical mass of underrepresented minorities, UT had no constitutionally legitimate need to reintroduce racial preferences to further increase minority enrollment.

3. In the courts below, Respondents gave only two reasons for why there was insufficient minority enrollment at UT: the lack of so-called "classroom diversity" and the misalignment of its student body with the demographics of Texas. Br. 27-30. Respondents now have abandoned classroom diversity as a compelling interest and agree that critical mass must be measured against the enrolled freshman class. Resp. 25, 39. Respondents thus continue

to lean heavily on their asserted demographic interest to justify UT's use of racial preferences. *Id.* 30-31, 45-46.

Indeed, Respondents view this demographic interest as inoculating some of UT's most troubling practices. *See, e.g.*, Resp. 45 (deeming Asian Americans overrepresented because they "comprised about 3% of the population of Texas … yet accounted for 18% … of UT's freshman class"); *id.* 46 (stating that while Hispanics were "16.9% of the student body in 2004" they were "underrepresented at UT compared to the State"). The parties agree, then, that UT reintroduced racial preferences "based on a comparison between UT's undergraduate student body and the State's population—the primary applicant pool for UT." *Id.* 30. But "student body diversity" is an educational interest—not a representational one. A lack of proportional representation thus could never justify racial preferences. It is constitutionally forbidden racial balancing—not a compelling state interest. Br. 27-29.

Respondents counter that, under *Grutter*, paying "[s]ome attention to numbers" is not racial balancing. Resp. 30. But UT paid attention to the wrong numbers. *See infra* at 10-11. UT never determined the number of minority students needed to avoid racial isolation and unlock the educational benefits of diversity. If it had, there would be no reason to treat Asian Americans and Hispanics unequally, as they are enrolled in similar numbers. UT instead seeks only to secure a demographically proportionate number of seats in the freshman class for African Americans and Hispanics. This is patently unconstitutional. Because critical mass turns on the number of minorities required in the student body to meet *bona fide* educational goals, *Parents Involved*, 551 U.S. at 727; *Grutter*, 539 U.S. at 343,

it must be measured against the number of minorities on the university campus—not outside of it.[3]

Respondents also claim that state demographics are a "logical data point" because UT is a "flagship state university" and has a "special duty to train the future leaders" of Texas. Resp. 30, 46. But UT uses state demographics as far more than a "data point." A purported lack of diversity as measured against the Texas population was how UT determined that racial preferences "could be warranted at all under this Court's precedent." *Id.* 31. And the "flagship" and "future leaders" arguments are just repackaged versions of the societal welfare and role model interests this Court has always rejected. Br. 29; *Podberesky v. Kirwan*, 38 F.3d 147, 159 (4th Cir. 1994). At bottom, UT is no more entitled to discriminate on the basis of race to make its student body look more like Texas than the University of Idaho would be to make its student body look as homogeneous as Idaho.

UT claims that its reliance on state demographics finds support in precedent but points only to one grand jury selection case. Resp. 30 (citing *Castaneda v. Partida*,

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3. Respondents seek to treat Petitioner's statement that UT had not established a fixed critical-mass target as a concession. Resp. 29. That statement referred to UT's failure to set an educationally based critical-mass goal, *see supra* at 6-7, and did not excuse UT's use of demographics as the sole baseline for evaluating diversity, *see supra* at 8-9. Both lower courts understood the difference. App. 44a-51a; App. 148a-156a. Although UT has failed to identify a "specific number or percentage of minority student enrollment that must be achieved in order to create a 'critical mass,'" App. 156a, it has tied its interest in diversity to racial demographics.

430 U.S. 482 (1977)). But because the Fifth Amendment has a "fair cross-section of the community" requirement, Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 15.4(d), at 702-03 (3d ed. 1992), statistical deviation from the composition of the local population could signal race-based exclusion. This cross-section jury selection principle cannot carry over to the educational setting, *see Parents Involved*, 551 U.S. at 726-27 (plurality opinion), especially when it would "lead to different treatment based on a classification that tells each student he or she is to be defined by race," *id*. at 789 (Kennedy, J., concurring).

Respondents also argue that underrepresentation can be divorced from the critical-mass inquiry. Resp. 30-31. But the two concepts are inseparable. Under *Grutter*, whether a school has obtained critical mass must be based on the number of underrepresented minorities in its student body. 539 U.S. at 328-30. UT's claimed reliance on "statewide data only … to assess whether minority groups are underrepresented at the university" does not save its admissions system. Resp. 31. It conclusively establishes that UT was not pursuing the critical-mass interest that *Grutter* deemed compelling. UT instead was working from state demographics to determine whether it had achieved critical mass on its campus. *Parents Involved*, 551 U.S. at 729.

Last, Respondents suggest the "structure" of its "admissions process makes [it] impossible" to work backwards to obtain demographic parity because "race is considered … months before the actual admissions line is drawn on the (wholly race-blind) grid." Resp. 29. But UT admits that race "can make a difference" in individual

admissions decisions. App. 33a. And for good reason. UT acknowledges that it: (1) uses race to adjust the scores of applicants before they are plotted on the grids that determine admission; and (2) decides which minority groups are to be the express beneficiaries of racial preferences based on state demographics. Resp. 12-13. State demographics thus determine who can benefit from race-enhanced PAI scores and thereby play a direct role in placing the applicant on the "grid" dividing "applicants who will be admitted from those that will be denied." *Id*. 12. That the process is insufficient to achieve UT's demographic goal may make it pointless, but not "wholly race-blind" or constitutional. *See infra* at 19-20.

4. Finally, Respondents assert a novel compelling state interest in "diversity within racial groups." Resp. 33. The argument was not pressed or passed on below and thus need not be considered. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). But, even were the Court inclined to consider it, the argument is meritless.

In Respondents' view, minority students admitted under the Top 10% law are not as "broadly diverse" or "academically excellent" as those admitted through the AI/PAI process. Resp. 33. Thus, UT sees racial preferences as a way to enroll more minority students who matriculate from "an integrated high school," are not the "first in their families to attend college," and are from more affluent "socioeconomic backgrounds" because, unlike minority students admitted under the Top 10% law, they "dispel stereotypical assumptions" instead of "reinforc[ing]" them. *Id*. 33-34. UT asserts that it does not prefer affluent minority students to those who secured admission by excelling despite life's disadvantages. But

Respondents' stated preference for the "African American or Hispanic child of successful professionals in Dallas" makes things clear. *Id.* 34. Apparently, Respondents do not believe that UT's race-neutral system failed to enroll a critical mass of minority students—they believe it failed to enroll enough of its preferred kind of minorities. *Id.* 35.

The argument is without constitutional foundation. There is no compelling interest in securing a critical mass of minority students from privileged backgrounds. Once UT enrolls a critical mass of underrepresented minority students, it is no longer necessary to discriminate among applicants on the basis of race. UT may wish to enroll a kind of minority student different from the disadvantaged students to whom the door of opportunity is opened at UT by the Top 10% law. But that is a matter left to the people of Texas and their elected representatives. *See supra* at 2-3. It is not a constitutional reason for ignoring the presence of underprivileged minorities in justifying racial preferences.

UT's pursuit of "intra-racial diversity" also conflicts with its adherence to demographic proportionality as a compelling state interest. UT claims that it needs to increase minority enrollment beyond the substantial level achieved under the race-neutral system so that it can teach its students "to lead a multicultural workforce and to communicate policy to a diverse electorate." SJA 24a. But UT has failed to demonstrate how favoring the enrollment of minority students from privileged backgrounds over minority students from less fortunate circumstances advances that interest. And UT's newly minted argument is all the more troubling given UT's conclusion that Top 10% "minority students earned higher

grade point averages" and had "higher retention rates" than minority students admitted under the pre-*Hopwood* system, thus enabling UT "to diversify enrollment … with talented students who succeed." JA 343a. But UT apparently wants to enroll minority students outside the Top 10% law *because* of their privileged background—not in spite of it. Whatever the reason, UT's preference for elite minorities has nothing to do with the interest this Court found compelling in *Grutter* and thus could never justify discrimination against other applicants.

In any event, UT's "full file" review includes consideration of the "[s]ocio-economic status of family" and the "[s]ocio-economic status of school attended." JA 430a. But that does not solve UT's purported "intra-racial diversity" problem. Race-neutral factors accommodating educational handicaps exacerbate it and, importantly, do not support preferring the hypothetical "African American or Hispanic child of successful professionals in Dallas" to Abigail Fisher. Both come from integrated schools, would not be the first in their family to attend college, come from similar communities, and (despite Respondents' cynical description of Petitioner as being in the "bottom 90% of her class," Resp. 12, and the hypothetical Dallas student as being in the "second decile of his or her high school class," *id.* 34) have indistinguishable academic credentials. The argument is revealing. UT claims an interest in allowing "students to better understand persons of different races" from "the greatest possible variety of backgrounds," *Grutter*, 539 U.S. at 330, but does not mean it. UT wants students from the same background as Abigail Fisher. It just wants them to be of a different race.

B. Respondents failed to demonstrate that UT's use of racial preferences in admissions is narrowly tailored.

1. Respondents incorrectly argue that the process-oriented question of "holistic" review and the avoidance of express quotas and fixed preferential scoring are the sole determinants of narrow tailoring. Resp. 19, 23, 25-28. The narrow-tailoring inquiry is far broader. Because "context matters," the Court must "carefully examine" UT's use of race to ensure a precise "fit" between a legitimate diversity interest and the means chosen to achieve it. *Grutter*, 539 U.S. at 327. The narrow tailoring inquiry ensures that: the use of racial preferences is materially advancing the compelling interest; a non-racial approach would not work as well; the racial classification is not over-inclusive; and the university is implementing racial preferences in an individualized way. Br. 37-38. UT's use of a "full file" review process does not meet any of these criteria no matter how holistic its admissions machinery may or may not be.

2. While Respondents have abandoned any effort to defend "classroom diversity" as a compelling state interest, *supra* at 8, they still argue that the lack of classroom diversity is a "red flag" indicating that UT's use of race is narrowly tailored, Resp. 43. Respondents cannot invoke an interest that UT has not even tried to advance, cannot constitutionally further, Br. 43-44; U.S. 25 ("[C]lassroom representation … would likely be unattainable."), and that UT agrees is not compelling, to justify racial preferences as narrowly tailored. UT's use of race must be narrowly tailored to achieve *a compelling state interest*.

Respondents also concede that UT's pursuit of demographic proportionality is not narrowly tailored. In Respondents' own words, "[t]he numbers of minorities admitted under holistic review do not remotely mirror racial demographics." Resp. 29. Respondents appear to view this as evidence that UT is not pursuing demographic proportionality. Yet all it really demonstrates is that UT is pursuing that illegitimate goal ineffectually. Indeed, the rapid increase in Texas's minority population guarantees that it would take decades of massive preference for UT to align the student body to state demographics, making narrow tailoring nearly impossible. *See Grutter*, 539 U.S. at 342-43. Worse still, the admitted inadequacy of UT's admissions system in achieving demographic parity shows that UT's reintroduction of racial preferences was tailored only to public posturing.

Given Respondents' objection to so-called "lump[ing] together" of racial groups, *supra* at 7-8, UT could effectively pursue demographic proportionality only by making race a determinative criterion for admission, using different enrollment targets for different racial groups, and continuing to provide racial preferences to some minorities and not others. This process necessarily would condone discrimination between and among minority groups—a practice this Court has rejected. *See Grutter*, 539 U.S. at 375 (Thomas, J., concurring in part and dissenting in part). UT also would need to more finely tune its system and abandon the "crude White/Black/Hispanic calculus that is the measure of the University's race conscious admissions program." App. 175a (Jones, C.J.). For example, "[t]he catch-all category of Asian Americans includes individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and

other backgrounds comprising roughly 60% of the world's population." Br. of the Asian American Legal Foundation and the Judicial Education Project as *Amici Curiae* at 27-31 (May 29, 2012). Surely not all of these ethnic groups are demographically overrepresented at UT. Yet UT "lumps" them "together" and denies preference to all Asian Americans. That imprecise approach is not even remotely tailored to UT's asserted demographic interest.

3. In reality, UT's racial preferences are making miniscule progress toward any diversity goal—compelling or otherwise—given the negligible effect their reintroduction had on minority enrollment. Br. 38-42 (citing *Parents Involved*, 551 U.S. at 733-35, 745-46, 790). Respondents seek to evade *Parents Involved*, claiming the "modest impact" of racial preference on UT's student body diversity is "a virtue, not a vice" and that UT has avoided using a "crude white/non-white classification." Resp. 36-37. As explained above, however, UT's racial classifications are only slightly less crude. Moreover, the Court's concern in *Parents Involved* was more fundamental. There is something odious about labeling tens of thousands of applicants by race without significant benefit. To be constitutionally justified, the results must "outweigh the cost of subjecting" all of these "students to disparate treatment based solely on the color of their skin." *Parents Involved*, 551 U.S. at 734. The negligible results attributable to UT's racial preferences themselves indicate that UT "could have achieved [its] stated ends through [race-neutral] means." *Id.* at 790 (Kennedy, J., concurring).

Respondents also dispute that UT's use of race had minimal effect on student body diversity. After devoting

pages to praising UT's "modest" use of race, Respondents argue that it was actually decisive for *every* non-Top 10% minority student enrolled at UT. Resp. 20-21, 38. The contention is not only at odds with Respondents' "factor of a factor of a factor of a factor" theme, but it cannot be squared with UT's own admissions data. Br. 39-40; App. 101a-107a (Garza, J.); *see also* App. 33a (noting that UT could not identify any students "ultimately offered admission due to their race who would not have otherwise been offered admission"). The record demonstrates that race likely was decisive for, at most, 33 African-American and Hispanic students combined. Br. 9-10.[4] This "infinitesimal impact," App. 107a (Garza, J.), confirms that "a nonracial approach … could promote the substantial interest about as well and at a tolerable administrative expense," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 276, 280 n.6 (1986).[5]

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4. Even on Respondents' unsupported and counterfactual assumption, racial preference still only accounted for an increase of 216 students or slightly over 3% of the incoming freshman class, which is an insufficient demonstration of necessity. *See Parents Involved*, 551 U.S. at 734 (finding that the impact of race on an estimated 3% of school assignments undermined "the necessity of using racial classifications").

5. Respondents also ask the Court to judge UT's success based on admitted rather than enrolled minority students. Resp. 38. But UT cannot meet its compelling interest in student body diversity by admitting—without enrolling—qualified minority applicants. Indeed, if it only increased by 1 or 2% its enrollment yield of African-American and Hispanic students admitted under the Top 10% law, UT would have equaled the minimal impact of racial preferences on student body diversity. Br. 42-43 n.10. Allowing the Top 10% law to achieve its full effect would have an even more dramatic effect on UT's minority enrollment. *Id.* 8 n.3; *see* Br. for Current and Former Federal Civil Rights Officials

4. Respondents unpersuasively argue that their racial preference for Hispanic students is not overinclusive. Resp. 46-47. But all they offer is that Hispanics—unlike Asian Americans—are demographically underrepresented in the student body and in small classrooms, *id.*, and that argument fails for reasons addressed above, *see supra* at 8-12. Respondents never explain why Hispanics—but not Asian Americans—still feel like "spokespersons for their race," *Grutter*, 539 U.S. at 319, given their comparable enrollment numbers, *supra* at 9, and the fact that UT has received accolades as one of the Nation's "top producers of undergraduates for Hispanics," JA 320a; Br. 47. UT cannot rationalize its differential treatment of these similarly situated minority groups. Although Respondents deflect by pointing to their less robust African-American enrollment, *see* Resp. 46, UT's admissions preferences are not so limited, and the issue on appeal is not whether UT could go back to the drawing board and devise a plan meeting constitutional requirements, s*ee Croson*, 488 U.S. at 506.

5. Finally, regardless of whether UT's "full file" review is "holistic," it is unequivocally not "designed to consider each applicant as an individual" in the admissions process. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). UT does not consider "each characteristic of a particular applicant" when determining whether applicant "A" or "B" has the "background, experiences, and characteristics" that would best round out the class. *Gratz v. Bollinger*, 539 U.S.

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as *Amici Curiae* at 8-21 (May 29, 2012) (discussing other race-neutral alternatives available to universities). In any event, looking at admissions numbers would not help UT's cause given that a higher percentage of minority students were admitted through full-file review under UT's race-neutral system than under the 2008 system. SJA 158a (cited at Br. 38).

244, 271-74 (2003). UT's matrix system bases admissions decisions on two-dimensional point scores and thus does not permit contextualized comparison of individual applicants. Resp. 13. UT officials grant preference to underrepresented minorities as a "special circumstance[]" in the initial scoring process, reduce all applicants to a numerical score, graph them on a matrix, and then draw "a stair step line dividing cells" in order to determine admission. *Id.* UT thus does not use an admissions "system where individual assessment is safeguarded through the entire process." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting). UT considers only impersonal scores at the point of admission. Resp. 13, 15, 19, 26.[6]

Nor has UT completed the periodic five-year review that it promised, *see* SJA 32a, and that this Court found essential to keeping racial preferences "limited in time," *Grutter*, 539 U.S. at 342. Three years late, Respondents dodge by claiming that UT has not "finalized its five-year review" because its conclusions "must be based on a careful review of the decision in this case." Resp.

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6. Respondents cannot sustain this point system by pointing to the "volume of applications and the presentation of applicant information [that] make it impractical … to use the admissions system upheld by the Court … in *Grutter*." *Gratz*, 539 U.S. at 275. "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." *Id.* Nor can Respondents defend UT's system by speciously arguing that race can benefit non-minority applicants. Resp. 46 n.10. Using racial classifications to increase the enrollment of African-American and Hispanic students necessarily limits enrollment of non-minority applicants.

12 n.4. But the outcome of this case cannot change the empirical results of UT's system of racial preferences. If anything, the converse is more likely to be true. UT has not "finalized" its five-year review because it has established a demographic goal that would justify the endless imposition of racial preference. UT was required to conduct this five-year review to ensure that its use of race is "'a temporary matter, a measure taken in the service of the goal of equality itself.'" *Grutter*, 539 U.S. at 342 (quoting *Croson*, 488 U.S. at 510). Empty promises are not an acceptable substitute.

C. *Stare decisis* does not require affirmance.

1. Contrary to Respondents' assertion, Resp. 50-51, the choice between clarifying or overruling *Grutter* to the extent it justifies UT's reintroduction of racial preferences is before the Court. As the lengthy opinions of Chief Judge Jones and Judge Garza demonstrate, App. 72a-114a, App. 174a-184a, Petitioner has not made it an "afterthought" or failed to discuss *stare decisis*, *see Randall v. Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring). In short, this issue was preserved below, is included within the question presented, and has been adequately briefed.

2. Respondents also are wrong on the merits of the *stare decisis* inquiry. Resp. 51-53. As an initial matter, the Court need not overrule *Grutter* to resolve this case in Petitioner's favor. Br. 22-23. Even Respondents agree that *Grutter* should be clarified to the extent it can be read to afford UT pervasive deference on the admissions system's ultimate constitutionality. Resp. 47-48. And *stare decisis* is not an impediment. The issue here is not whether *Grutter*'s recognition of a diversity interest was

an erroneous departure from this Court's precedent. The issue is how to avoid reading *Grutter*'s language discussing strict scrutiny as incompatible with "equal protection jurisprudence[] established in a line of cases stretching back over 50 years." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 232 (1995). All options for precluding that misreading are properly before the Court. Br. 53-57. Decisions like *Wygant*, *Croson*, *Adarand*, *Gratz*, and *Parents Involved* are as entitled to as much *stare decisis* weight as *Grutter*.

3. Finally, Respondents' suggestion that *Grutter* should not be clarified or overturned because it involves a "sensitive political" issue is telling. Resp. 53. Universities should not be allowed to use racial preferences "as a bargaining chip in the political process." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). As Respondents' brief makes clear, rigorous judicial review is thus essential to address the concern that UT's hasty decision to reintroduce racial preferences despite its substantial minority enrollment was not "a form of racial politics." *Croson*, 488 U.S. at 510. Indeed, absent strict scrutiny the Court cannot "demand that [universities] prove their process is fair and constitutional in every phase of implementation." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). *Grutter* should be clarified or overruled to ensure that the courts continue performing this indispensible function.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

BERT W. REIN
Counsel Of Record
WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
CLAIRE J. EVANS
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000
brein@wileyrein.com

Attorneys for Petitioner

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