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

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared in numerous affirmative action cases before this Court both as direct counsel and amicus curiae including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

STATEMENT OF THE CASE

After the Fifth Circuit's 1996 decision in *Hopwood* struck down the use of race in admissions, the number of minority students at the University of Texas at Austin [hereinafter "the University"] "decreased immediately" because admitted minority students did not enroll in 1996 and fewer minority students applied in 1997. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 223 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012); *see Hopwood v.*

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[1] No counsel for either party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief. Blanket letters of consent to the filing of *amicus* briefs have been lodged by both parties with the Clerk of the Court.

Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). African American and Latino applicants "dropped by nearly a quarter," while overall applicants decreased by only 13 percent. *Fisher*, 631 F.3d at 224. Specifically, African American enrollment in 1997 was almost 40 percent less than in 1995 and Latino enrollment decreased by five percent. *Id*.

In an effort to diversify the student body, the University implemented a series of race-neutral programs, including holistic reviews of applications,[2] scholarships,[3] targeted recruiting efforts, and the Top Ten Percent Law.[4] *Proposal to Consider Race and Ethnicity in Admissions*, Dist. Ct. Dkt. No. 96, Tab 11, Ex. A, 26, 30, 31 [hereinafter "*2004 Proposal"*]. In order to holistically review applicants, the University added the Personal Achievement

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[2] In 1997, the University began to "holistically read[] files" and "broaden[ed]" review of applications to include "subjective criteria" by considering essays, awards and honors, service, work experiences, and "special circumstances that put an applicant's achievements into context." *2004 Proposal* at 30.

[3] The University created the Longhorn Opportunity Scholarship program in 1999, which provided scholarships to Top Ten Percent students from high schools with "no history of sending students to the University of Texas at Austin and with an average parental income of $35,000 or less." *2004 Proposal* at 31.

[4] In 1997, the Texas legislature enacted the Top Ten Percent law, which provided for automatic admission to the University for Texas high school seniors in the top ten percent of their class. Tex. Educ. Code § 51.803; *2004 Proposal* at 30.

Index ("PAI") to the existing Academic Index ("AI"). *Fisher*, 631 F.3d at 223. Previously, with the AI, the University had only considered an applicant's class rank, standardized test scores, and high school classes. *Id.* at 222. The addition of the PAI to the AI was "facially race-neutral" but was "designed to increase minority enrollment" by considering the applicant's socio-economic status, languages spoken, and whether the student was from a single-parent household. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 591-92 (W.D. Tex. 2009). Despite the implementation of these programs, admission of African American and Latino freshmen still "declined in real numbers and as percentages of the class" during the two-year period immediately following *Hopwood*. *2004 Proposal* at 30.

In the 2003 *Grutter* opinion, this Court held that racial diversity in higher education was a compelling government interest and upheld the University of Michigan Law School's use of race in admissions. 539 U.S. at 328, 343. In response, the University began to evaluate whether it would reintroduce the use of race in admissions under the guidelines set forth in *Grutter*. *Fisher*, 631 F.3d at 225. The University underwent a "year of study" after *Grutter* and issued a forty-page report before implementing a race-conscious admissions policy for the incoming class of 2005. *Id.* at 226; *see 2004 Proposal*. The University assessed the numbers of minority students in classrooms and surveyed the perceptions of students and faculty about the necessity of implementing race-conscious admissions. *Fisher*, 631 F.3d at 225; Walker Aff., Dist. Ct. Dkt. No. 96, Tab 11, ¶ 10 [hereinafter "Walker Aff."]

In its year of study, the University found that in Fall 2002, 90 percent of student classrooms with five to twenty-four students had zero or one African American student, 46 percent had zero or one Asian American student, and 43 percent had zero or one Latino student. *Fisher,* 631 F.3d at 225. This study looked at classes of five to twenty-four students because these were classes of "participatory size," which were "most of" the undergraduate courses and which "offered the best opportunity for robust classroom discussion[s], rich soil for diverse interactions." *Id.* The University later studied classes of ten to twenty-four students and found that 89 percent of those classes had either zero or one African American student, 41 percent had zero or one Asian American student, and 37 percent had zero or one Latino student. *Id.* These numbers meant that in Fall 2002, there were more classes with zero or one African American or Latino student than in Fall 1996. *Id.* at 241. A second study surveyed undergraduate students on their "impressions of diversity on campus and in the classroom." *Id.* at 225. Minority students "reported feeling isolated, and a majority of all students felt there was 'insufficient minority representation' in classrooms for 'the full benefits of diversity to occur.'" *Id.* (citing Walker Aff. ¶ 12).

In addition to not achieving diversity at the classroom level, the Top Ten Percent Law did not achieve diversity at the programmatic level. *Fisher*, 631 F.3d at 240. African American and Latino students enrolled in programs such as the College of Social Work in disproportionate numbers and were underrepresented in programs such as the College of Business Administration. *Id.* Almost a quarter of

the undergraduate students in the College of Social Work were Latino and more than ten percent were African American. *Id.* However, only 14.5 percent of the students in the College of Business Administration were Latino and 3.4 percent were African American. *Id.*

The 2004 Proposal found that race-neutral attempts at achieving diversity were unsuccessful at the classroom level and the University had "no reason to believe" that these methods would succeed in the future. *2004 Proposal* at 39. Therefore, under the 2004 Proposal, the University decided to retain its race-neutral admissions policies and add the "consideration of race and ethnicity" as part of the "holistic, individual assessment of each student's background." *Id.* Race is considered "as one element of the personal achievement score, which itself is only a part of the total PAI." *Fisher,* 631 F.3d at 228-29. Race is not and cannot be determinative of admissions because it can only impact "a small part of the applicant's overall admissions score." *Id.* at 228.

Plaintiff Abigail Fisher was denied admission after the 2004 Proposal went into effect and has now challenged the program, alleging that the University's use of race in admissions denied her equal protection under the Fourteenth Amendment and violated her rights under 42 U.S.C. § 1983. Petition for Writ of Certiorari at 11, *Fisher v. Univ. of Tex. at Austin*, (No. 11-345), 2011 WL 4352286 (U.S. Sept. 15, 2011) [hereinafter "Petition for Certiorari"]. The district court granted summary judgment for the University, finding that the University complied with *Grutter* and the

requirements of strict scrutiny. *Fisher*, 645 F. Supp. 2d at 613.

The U.S. Court of Appeals for the Fifth Circuit also upheld the University's use of race as constitutional, holding that the University had complied with *Grutter*. *Fisher*, 631 F.3d at 247. The University's admissions policy furthered the compelling interest of diversity by providing educational benefits and it was narrowly tailored in its holistic, individualized consideration of applicants. *See id.* On June 17, 2011, the Court of Appeals denied plaintiff's petition for rehearing en banc. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 303 (5th Cir. 2011) (per curiam). Plaintiff petitioned for writ of certiorari, arguing that the Court of Appeals did not apply the strict scrutiny test. Petition for Certiorari at 20. Specifically, plaintiff argued that the University did not have a compelling interest in using race to achieve classroom diversity. *Id.* at 22. Plaintiff asserted that the admissions policy was not narrowly tailored because using race was unnecessary given the Top Ten Percent Law. *Id.* at 22, 34.

This Court granted certiorari to determine whether the University's race-conscious admissions plan complies with *Grutter*.

SUMMARY OF ARGUMENT

The ACLU agrees with the University that its admissions program is constitutional. We write separately to address the arguments made by the Cato Institute ("Cato") in its Brief in Support of Petitioner. Brief for the Cato Institute as Amicus Curiae Supporting Petitioner, *Fisher v. Univ. of Tex.*

at Austin, (No. 11-345), 2012 WL 1961247 (U.S. May 29, 2012) [hereinafter "Cato Brief"].

1. Cato argues that the "strong basis in evidence" formulation of strict scrutiny ought to be used here both to decide if diversity at a university is a compelling state interest, and whether the University's use of race to achieve diversity is sufficiently narrowly tailored. Cato Brief at 21-23.

This Court developed the "strong basis in evidence" formulation of strict scrutiny in cases turning on a government's factual claim that it had discriminated in the past, or could be guilty of contemporaneous discrimination if it did not use race. The Court has not imported the "strong basis in evidence" formulation into the context of admissions where a university is attempting to use race not to undo past discrimination but rather to achieve part of its core educational mission. Instead, this Court has held that strict scrutiny of a university's use of race in admissions in pursuit of a diverse student body requires that the university give good faith consideration to race-neutral means, and use race only in a holistic, time limited process for evaluating applicants. *Grutter*, 539 U.S. at 339.

2. Under this Court's formulation of strict scrutiny in the admissions context, the University's program is constitutional. The University uses race as one limited factor in pursuit of the compelling goal of student diversity, it has given serious consideration to race-neutral alternatives, and it uses race in a non-determinative, holistic way in the applicant evaluation process.

I. THE "STRONG BASIS IN EVIDENCE" FORMULATION OF STRICT SCRUTINY DOES NOT APPLY IN THE CONTEXT OF UNIVERSITY ADMISSIONS.

Cato argues that the University should be required to make three evidentiary showings for its use of race in the admissions program to be constitutional. Cato Brief at 21. According to Cato, the University should be required to (1) "demonstrate, by empirical evidence or precedent, that its particular conception of racial diversity among students actually furthers a legitimate educational objective," (2) "present evidence that minority enrollment is sufficiently low as to necessitate the use of . . . racial classifications" and that the compelling interest is "compelling in fact in this instance," and (3) "validate[] each aspect of its use of racial preferences" with "evidence." *Id.* at 21-23. In her Petition for Certiorari, the Petitioner also argues that the University should be required to make this strong evidentiary showing. Petition for Certiorari at 29-34. ("[The University] has failed to establish under any legitimate standard, let alone a 'strong basis in evidence,' that its use of race in admissions is 'necessary' . . . ." (internal citations omitted)).

Cato grounds its argument not in this Court's decisions about the use of race in university admissions, *Grutter* and *Bakke,* but instead in decisions about when a government may use race to undo the effects of past race discrimination or to avoid engaging in contemporaneous race discrimination. *See* Cato Brief at 5-17. Those cases did require the government to show a "strong basis in

evidence" that its use of race was calculated to vindicate a compelling government interest. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) and *Shaw v. Hunt*, 517 U.S. 899. 910 (1996) (*Shaw II).* But when it decided *Grutter,* this Court did not draw on those cases and it did not use the "strong basis in evidence" formulation for what the government needed to show to satisfy strict scrutiny. And as an examination of the cases using the "strong basis in evidence" standard shows, it would have made little sense for this Court to graft that approach onto the very different context of university admissions.

The "strong basis in evidence" formulation of strict scrutiny relevantly appears in ten Supreme Court opinions. Three are contracting or employment cases in which the government said it sought to use race to undo the effects of past discrimination: *Wygant v. Jackson Board of Education,* 476 U.S. 267, 277 (1986) (plurality opinion), *Croson*, 488 U.S. at 500 and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995). Three are voting rights cases in which the government sought to justify its use of race in drawing district lines as a way to reverse the effects of past discrimination: *Shaw v. Reno*, 509 U.S. 630, 656 (1993) (*Shaw I)*, *Shaw II*, 517 U.S. at 910, 915, 916 and *Miller v. Johnson*, 515 U.S. 900, 922 (1995). Two are voting rights cases in which it was argued that the government could use race in drawing district lines in order to avoid a violation of the Voting Rights Act's ban on race discrimination: *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) and *Bush v. Vera*, 517 U.S. 952, 977-79 (1996). One is a voting rights case where the formulation is used in a concurring and dissenting opinion on the use of race

to remedy past discrimination and to avoid a violation of the Voting Rights Act. *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 519 (2006) (Scalia, J., concurring in part and dissenting in part). Finally, in a closely related context, this Court used the "strong basis in evidence" formulation in a case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k), where the government said it wished to use race to avoid disparate impact liability under Title VII: *Ricci v. DeStefano*, 557 U.S. 557, 558 (2009). [5]

The "strong basis in evidence" formulation first appears in this Court's decisions in Justice Powell's plurality opinion in *Wygant*, 476 U.S. at 277. In *Wygant*, a school district implementing an agreement with a union protected minority employees from layoffs at the expense of white teachers. *Id.* The school board initially argued that the government interest served by the policy was to provide role models for students of color and to remedy past societal discrimination. *Id.* Later, at the

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[5] The standard is also mentioned in a dissent to a denial of a petition for writ of certiorari regarding governmental racial preferences in contracting. *See Concrete Works of Colo., Inc. v. City and Cnty. of Denver*, 540 U.S. 1027, 1029-30, 1033-34 (2003) (Scalia, J., dissenting). Finally, this standard is discussed in a concurrence in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701,754 (2007) (Thomas, J., concurring), in response to the dissent's claim that Seattle's school choice program was in place to remedy prior acts of discrimination. It was not part of the majority opinion.

Supreme Court, it argued that the policy was in place to "remedy prior discrimination" by the Jackson School District. *Id.* at 274-75, 277. The *Wygant* plurality rejected the first two interests as insufficiently compelling. *Id.* at 274-75. It then held that prior to taking race-based action to remedy past discrimination, the government must have a "strong basis in evidence" that the institution in question had been guilty of discrimination in the past. *Id*. at 277.

Since *Wygant*, this Court has applied the "strong basis in evidence" formulation of strict scrutiny to government attempts to justify the use of race in order to undo the effects of past discrimination. In *Croson*, the Court concluded that the City of Richmond did not have the kind of strong basis in evidence that would justify its requirement that contractors set aside thirty percent of their contract dollars for minority subcontractors. 488 U.S. at 500. The City simply did not make even a *prima facie* showing that anyone in the construction industry in Richmond had engaged in past discrimination that would violate either the U.S. constitution or a statute. *Id.* at 499-500. In *Adarand*, the Court applied the strong basis in evidence formulation to assess the federal government's highway contract program which provided financial incentives for hiring "subcontractors controlled by 'socially and economically disadvantaged individuals.'" 515 U.S. 200, 204 (citations omitted). The *Adarand* Court ruled that the standards applicable to state and local government—including the strong basis in evidence formulation—apply to the federal government as well. *Id.* at 222.

Relying on *Croson* and *Wygant*, this Court applied the "strong basis in evidence" formulation to situations in which the government sought to use past discrimination to justify redistricting plans where race was the predominant factor in how some lines were drawn. *See, e.g.*, *Shaw I*, 509 U.S. at 656, *Shaw II*, 517 U.S. at 910, 915, 916 and *Miller*, 515 U.S. at 922.

In both the employment/contracting cases and these voting rights cases, the government's justification for using race rests on essentially the same factual predicate: that its use of racial classifications was to remedy past racial discrimination. *See, e.g.*, *Croson,* 488 U.S. at 500; *Shaw II*, 517 U.S. at 910. In the other four cases, the government's justification for using race rests on a similar predicate. In *Vera,* the State of Texas argued that its use of race in drawing district lines was justified because the failure to do so would have resulted in a violation of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq*. 517 U.S. at 977-79. This Court struck down the districting plan, holding that the state had not shown a strong basis in evidence that without using race, it would have violated § 2. *Id.* Similarly, this Court used the "strong basis in evidence" formulation on the closely related question of assessing the government's claim that it sought to avoid disparate impact liability under Title VII. In *Ricci*, the City of New Haven refused to use the results of a promotional exam for firefighters because reliance on the exam would have given a disproportionate percentage of the promotions to whites. 577 U.S. at 579. The City argued that its refusal to certify the test results was justified by the disparate impact using the test would

have had; had it used the test, the city argued, it would have violated the disparate impact provisions of Title VII. *Id.* at 575. However, the Court found that the City had only a "good-faith belief" that it would violate the disparate impact provisions of Title VII by using the test results. *Id.* at 581. That, this Court held, was not enough; the City needed instead a "strong basis in evidence" that it would violate Title VII before decertifying the exam results. *Id.* at 584.

Strict scrutiny calls for a "strong basis in the evidence" when the government's asserted compelling state interest for the use of race is based on the claim, i.e., that it had been or would be guilty of discrimination. Were a university to seek to justify the use of race in an admissions program in order to undo the effects of past discrimination, it may be that it would have to show a strong basis in evidence that it had discriminated in the past. But that is not what the University seeks to do. Instead, the University aims to obtain a racially diverse student body in order to "promote cross-racial understanding, break down racial stereotypes, enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as 'spokespersons' for their race." *Fisher,* 645 F. Supp. 2d at 603 (quoting *Grutter*, 539 U.S. at 319-20). As this Court held in *Grutter* and a number of other cases, context matters and remedying the effects of past discrimination is not the only compelling interest that can justify a government's use of race. In the university context, "securing the educational benefits of a diverse student body" is also a compelling state interest. *Grutter*, 539 U.S. at 333.

A university admissions plan is narrowly tailored to that end as long as the university has given serious, good faith consideration to race-neutral alternatives, its system uses a holistic approach to evaluating each student, it does not use quotas, and it has a logical endpoint in time. *Id.* at 337, 339, 342. Most tellingly, while a university must explain "how and when it employs" racial classifications so that the program can be measured against these criteria (*see, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 784-85 (2007) (Kennedy, J., concurring)), in *Grutter*, this Court did not insist that the law school provide evidence that diversity was essential to its educational mission; it deferred to the educators' judgment, at least absent a showing that the institution was not acting in good faith. *Grutter,* 539 U.S. at 329.

Although strict scrutiny does not require a "strong basis in evidence" for a university's holistic use of race in admissions, as the next section of this brief illustrates, the University has powerful evidence that its limited use of race in admissions is essential to reap the benefits of a diverse student body. The University attempted to achieve diversity through its holistic review of applicants, scholarships, targeted recruiting efforts, and its Top Ten Percent Law. *See 2004 Proposal* at 30, 38; Tex. Educ. Code § 51.803. Its experimentation with race-neutral policies provides ample data confirming the absence or near absence of racial diversity in classrooms and programs where discussion is likely to take place. The University's only option after seven years was to implement the modest program described. *2004 Proposal*. This data makes clear that the University's use of race is necessary and

narrowly tailored to achieve the state's interest in diversity.

That the University in fact has strong evidence to support its limited use of race in admissions is, however, no reason to alter the formulation of strict scrutiny that this Court announced in *Grutter*. The distinctly different way this Court formulated the application of strict scrutiny in the educational diversity cases as opposed to the "strong basis in evidence" cases reflects two critical considerations. First, achieving diversity in education is not an effort to correct the consequences of past discrimination; it is instead an aspiration for the future. It looks not to what was or was not done, but to what the University hopes to achieve; it rests not on a factual premise, but lies instead at the heart of the University's mission. *See Grutter,* 539 U.S. at 329. Second, as this Court explained in *Grutter,* universities "occupy a special niche in our constitutional tradition." *Id*. Universities provide the training ground for a large number of our leaders, and our "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 324 (quoting *Bakke,* 438 U.S. at 313). "'[Education]'", according to this Court, "'is the very foundation of good citizenship.'" *Id.* at 331 (quoting *Brown v. Bd. of Educ.,* 347 U.S. 483, 493 (1954)). To perform those crucial roles of training leaders and providing the basis for good citizenship, the First Amendment accords universities expansive freedom of speech and autonomy to make judgments about how to educate, including who to include in a student body. *Grutter*, 539 U.S. at 329.

The proper application of strict scrutiny to university admissions was set out by this Court in *Grutter*.[6]

II. THE UNIVERSITY'S PLAN MEETS THE REQUIRMENTS OF STRICT SCRUTINY.

Securing the educational benefits of diversity is a compelling interest. Cato does not question that those benefits are the university's goal. Nor does it suggest that the University is not acting in good faith. The first part of strict scrutiny—the presence of a compelling state interest—is therefore established. *See Grutter,* 539 U.S. at 327-29.

Under *Grutter* and *Parents Involved* the second part of the analysis, narrow tailoring, requires a university to: (1) give "serious, good faith consideration" to "workable race-neutral alternatives;" (2) use an "individualized, holistic" process for considering candidates and not use quotas; and (3) create a program with a "logical end point." *Grutter*, 539 U.S. at 334-42; *see also Parents*

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[6] Moreover, importing the "strong basis in evidence" formulation to university admissions would require that every university in the country separately prove that diversity is a compelling state interest rather than permitting them to rely upon this Court's holding in *Grutter*. The Court's "legitimacy requires, above all, that [it] adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds." *Vera*, 517 U.S. at 985. Such a requirement would undermine the "long established precedent . . . integrated into the fabric of the law" created by both *Grutter* and *Bakke*. *Adarand*, 515 U.S. at 233.

Involved, 551 U.S. at 783 (Kennedy, J., concurring). For a court to verify that the process is holistic, the University needs to explain "how and when it employs" race, *Parents Involved*, 551 U.S. at 784-85 (Kennedy, J., concurring).

A. The University Gave Serious Good Faith Consideration to Race-Neutral Alternatives.

The University is not required to "exhaust[] . . . every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. But prior to implementing a race-conscious admissions policy, a university or school district must consider workable race-neutral alternatives. *Id.*; *Parents Involved*, 551 U.S. at 704.

The University has a long and deep history of attempting to achieve diversity without race-conscious policies. For seven years, following *Hopwood* and prior to reintroducing race in its admissions program in 2004, the University used only the race-neutral Top Ten Percent Law and other race-neutral means, such as scholarships, for deciding whom to admit. During that time, it gathered statistics and other information on the impact of the race-neutral policies on student diversity. *See Fisher*, 631 F.3d at 225. After conducting its study in 2004, the University concluded that it had not achieved a sufficient number of underrepresented students in many of its classrooms and programs, and therefore it was not adequately providing the educational benefits of diversity to its students. *See 2004 Proposal* at 32-33. It was only after its 2004 study, for the incoming class of 2005, that the University reintroduced race into its admissions process as a "factor of a factor of a

factor of a factor" in its PAI index. *Fisher*, 645 F. Supp. 2d at 608.

B. The University's Decision that Classroom and Program Diversity is Part of its Educational Mission is Entitled to Deference.

Although conceding that the University's aim of diversity at the classroom level appears closely tied to the legitimate goals of promoting cross-racial understanding and diminishing the force of stereotypes about the existence of minority viewpoints, Cato suggests that the University has not justified its goal of diversity at the department level. *See* Cato Brief at 33 (The University "asserts an interest in achieving a 'critical mass' within every classroom and every major. . . [and its] goal may actually be more closely tailored to the aim of 'encourag[ing] underrepresented minority students to participate in the classroom and not feel isolated.' But it is impossible to extract from that generalization any firm sense of necessity . . . ." (second alteration in original) (internal citations omitted)).

Public universities have an interest in achieving a diverse student body in order to promote cross-racial understanding, break down racial stereotypes and achieve classroom discussion that is "livelier, more spirited, and simply more enlightening and interesting." *Grutter*, 539 U.S. at 328, 330 (opinion of O'Connor, J.) (internal quotations omitted).

It is difficult to see how the University could obtain the benefits of diversity without a program calculated to bring about diversity at the classroom

level. With the enrollment figures described in the 2004 Proposal,[7] the one or two students in each classroom could hardly help but be "spokes[people] for their race" despite this Court's acknowledgement that the educational benefits of diversity are not achieved when this occurs. *Grutter*, 539 U.S. at 380; *see Bakke*, 438 U.S. at 316, 323. "[I]f [a university] is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers." *Bakke*, 438 U.S. at 323 (third alteration in original). "[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no minority viewpoint but rather a variety of viewpoints among minority students." *Grutter*, 539 U.S. at 319-20 (internal quotation marks and citation omitted).

The University's efforts to achieve diversity at the classroom level rest on its judgment about how it can in fact realize the benefits of diversity. It is, therefore, a quintessentially educational judgment that is entitled to deference under this Court's decisions about academic freedom. As this Court has held, the wisdom of university officials should determine who a university will teach, what will be taught, how it will be taught, and who may be admitted to study. Those educators are in a better position to make those determinations than are the

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[7] *See supra* "Statement of Facts."

courts. The academic freedom of American universities is both essential to their missions and "almost self-evident." *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957)(plurality opinion). In academic freedom cases at both the secondary and university level, the Court has refused to second-guess educators about academic policy and how best to carry it out. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2976, 2988 (2010) ("[J]udges lack the on-the-ground expertise and experience of school administrators" and should not "'substitut[e] their own notions of sound educational policy for those of the school authorities which they review.'") (quoting *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 206 (1982)). *See also Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 273 (1988) (noting the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."). *See, e.g.*, *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."). This Court should then defer to the University's judgment that diversity at the

classroom level is essential to reap the educational benefits of a diverse student body.

C. There is Ample Evidence About the Admissions Program and it Shows that Student Files are Reviewed Holistically.

The court must have information about "how and when [a school] employs" racial classifications. *Parents Involved*, 551 U.S. at 784-85 (Kennedy, J., concurring). If the explanation for a race-conscious education program is too "broad and imprecise," it fails the narrowly tailored prong of strict scrutiny. *Id.* at 785. In this case, the University has given a detailed explanation of its use of race in its 2004 Proposal, which demonstrates that the applications of students not admitted via the Top Ten Percent Law are reviewed holistically. *2004 Proposal* at 23.

Under the 2004 Proposal, the University considers race as part of an overall review of scores on two essays; leadership; extracurricular activities; work experience; service to school or community; and "special circumstances," such as socio-economic status, whether the applicant is from a single-parent household, language spoken at home, family responsibilities, and the student's SAT/ACT score in relation to the average score of students from his or her high school. Walker Aff. ¶ 14. The race of an applicant is just one of a number of factors considered in developing the PAI score, which is always considered with the AI index. *2004 Proposal* at 27-28. And the race of any student, including white and Asian American students, could be a factor. *Fisher*, 645 F. Supp. 2d at 606; *see also* Brief for Respondent at 26, *Fisher v. Univ. of Tex. at*

Austin, (No. 11-345) (Aug. 6, 2012) (describing how "any applicant—of any race—can benefit from UT's contextualized consideration of race."). The University's consideration of race as a minor factor in its admissions process is unlike the Seattle school district's reliance on "crude racial categories of white and non-white" in student assignments in *Parents Involved*. 551 U.S. at 786 (internal citations omitted).

Quotas are not narrowly tailored because they do not provide individualized, holistic consideration of applicants. *See Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.); *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting); *see also Grutter*, 539 U.S. at 334. The factors, which gave rise to the concern that a quota was in fact in operation in Michigan, are not present here. *Grutter*, 539 U.S. at 337. In the University admissions process, the race of a candidate is not "outcome determinative" and admissions personnel do not keep track of how many students are being admitted of each race. *See Fisher*, 631 F.3d at 597; *cf. Grutter,* 539 U.S. at 389 (Kennedy, J., dissenting). In fact, the University gives "serious consideration to all the ways an applicant might contribute to a diverse educational environment." *See Grutter,* 539 U.S. at 337. The admissions process at Texas is "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.'" *Id.* (quoting *Bakke,* 438 U.S. at 317 (opinion of Powell, J.)).

While the use of race has produced modest results, this is precisely because the University does not use quotas or keep track of its results. Cato criticizes the University for this, but the district court properly recognized that such a criticism is an

"attempt to force [the University] into an impossible catch-22" between the requirement that the use of race be narrowly tailored and that it "have more than a minimal effect." *Fisher*, 645 F. Supp. 2d at 609 (citing *Parents Involved*, 551 U.S. at 703). The district court and the Fifth Circuit correctly rejected the idea that any program which generates fewer students than a quota is ineffectual. As those courts explained, *Parents Involved* criticized the "minimal effect" that the use of race had on school assignments "as evidence that the school districts had failed to 'consider[] methods other than explicit racial classifications to achieve these stated goals.'" *Fisher*, 645 F. Supp. 2d at 610 (quoting *Parents Involved*, 551 U.S. at 735); *see also Fisher*, 631 F.3d at 246. But here, as explained, the evidence is clear that the University considered and employed other methods unsuccessfully for seven years. To require greater success from this program would demand that the university devise targets or set aside seats – both actions that are prohibited by this Court's jurisprudence. *Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.); *Grutter*, 539 U.S. at 394 (Kennedy, J. dissenting).

D. Texas' Program is Limited in Time

The final "narrowly tailored" requisite is that the program have "reasonable durational limits" and have a "logical end point." *Grutter*, 539 U.S. at 342. The University easily meets this requirement. Every five years, it reviews whether "racial preferences are still necessary to achieve student body diversity." *Id.*; *see Fisher*, 645 F. Supp. 2d at 611. Cato does not and cannot contest this point.

CONCLUSION

This Court developed an analysis for applying strict scrutiny to the use of race in university admissions that is sensitive both to the commands of equal protection and the mission and context of higher education. It should apply that analysis here, and not graft onto it "tests" that do not make sense in this context.

Respectfully Submitted,

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Dated: August 10, 2012.