

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

**BRIEF OF THE ASIAN AMERICAN LEGAL
FOUNDATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST

The Asian American Legal Foundation (“AALF”), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans.¹ Americans of Asian origin have a particular interest in use of race in public university admissions. They have historically been, and continue to be, denied access to public schools due to overt racial and ethnic prejudice as well as ostensibly well-intentioned “diversity” programs such as the program at issue here. In case after case, only strict application of the Fourteenth Amendment’s guaranty of equal protection has allowed Asian American citizens to live free of racial persecution.

As the record below shows, Asian American students suffer discrimination at the hands of the University of Texas at Austin (“UT Austin”), even though, at variance with UT Austin’s stated goal of providing a “critical mass,” Asian American students, in fact, are present in UT Austin classrooms in fewer numbers than “Hispanics,” one of the favored ethnicities.

In the very recent past, AALF’s constituents battled against similar racial discrimination by the San Francisco public school system. In *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 864 (9th Cir. 1998), San Francisco’s K-12 schoolchildren of Chinese descent sued to end a

1. Notice of this brief has been give to all parties. Letters of consent by all parties to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

consent decree that mandated racial and ethnic admissions quotas in the San Francisco public school system. After five years of litigation, and after the district court found the defendants had almost no chance of prevailing under the strict scrutiny standard mandated by this Court's decisions, the San Francisco Unified School District and the San Francisco chapter of the NAACP, on the opening day of trial, agreed to cease their use of race. *See Ho v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999).

Many of the same issues raised in *Ho* are present in the instant case. As in *Ho*, UT Austin is engaged in racial balancing without any remedial purpose. It is similarly denying applicants access solely because they are of the "wrong" race or ethnicity. And it is proclaiming that its good faith should excuse the fact that it is trammeling on applicants' civil rights. The *Ho* Plaintiffs prevailed because of this Court's rulings that strict scrutiny had to be applied to a school district's conduct. The plaintiff in the instant case failed because the Fifth Circuit Court of Appeals decided that strict scrutiny no longer applies.

Proponents of racial balancing in San Francisco derive comfort from the decision of the Fifth Circuit decision in this case that, under this Court's ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003), UT Austin is subject to a deferential "good faith" standard instead of strict scrutiny, and may continue to classify students by race for purposes of admission. If the Fifth Circuit decision is allowed to stand, school officials in San Francisco and elsewhere are almost certain to resume their racial balancing programs, because all of them understandably believe that they can meet a "good faith" standard of scrutiny.

AALF and its constituents have a keen interest in Fourteenth Amendment jurisprudence as it relates to public education. Even though it is not widely known, Chinese American schoolchildren were some of the earliest victims of “separate but equal” jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the “Chinese” school in Chinatown was “separate but equal.” 119 F. at 382. In *Gong Lum v. Rice*, 275 U.S. 78 (1927), this Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl residing in Mississippi could be denied entry to a “white” school because she was a member of the “yellow” race. *Id.* at 87.

Thus, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California’s “establishment of separate schools for children of Chinese ancestry . . . was the classic case of *de jure* segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]. . . .” *Id.* at 1216. “*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. *See Yick Wo v. Hopkins*, 118 U.S. 356.” *Lee*, 404 U.S. at 1216.

Amicus curiae AALF submits that the long history of discrimination against Chinese Americans in this country, the Chinese American experience in the *Ho* case, and present, ongoing discrimination faced by members of this historically oppressed group, provide this Court

with compelling reasons why it should grant Petitioner the requested Writ, and should not allow the equal protection rights of young citizens to be eroded in the name of racial balancing.

Accordingly, AALF and its constituents respectfully ask this Court to hear their arguments in favor of Petitioners.

INTRODUCTION

The Court should grant certiorari in order to clarify Fourteenth Amendment jurisprudence as it relates to use of race in public education. The decision by the court below, in *Fisher v. University of Texas at Austin*, 631 F. 3d 213 (5th Cir. 2011), that in the university context strict scrutiny means nothing more than applying a “good faith” standard to the school’s challenged scheme, giving deference to school officials throughout, flies in the face of all this Court’s precedents and must be checked, to prevent further erosion. As this Court has long held, government use of race is always “suspect” and viewed with “hostility”; and should be upheld only where, under strict scrutiny, it is shown to be narrowly tailored to a compelling government interest. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). In *Fisher*, the Fifth Circuit disregarded this fundamental principle in deriving a “good faith” test from this Court’s ruling in *Grutter*, and essentially used the imprimatur of this Court to establish a deferential rational-basis-like test for use of race in public education.

Unbounded by any remedial purpose, the UT Austin racial balancing scheme will continue in perpetuity based solely upon the subjective “good faith” judgment of the

school's administrators. As the Fifth Circuit's decision in *Fisher* is purportedly based on this Court's ruling in *Grutter*, this "good faith" test, unless repudiated, will be applied far outside Texas. The "slippery slope" created by a rule considering only the "good faith" of the school officials and deferring to their judgment will quickly find application in all the nation's public schools, right down to the kindergarten level. The remedy fought for by AALF's Chinese American constituents in *Ho* will be endangered, along with the civil rights of all students attending or seeking to attend a public school.

Respondents' purported noble purpose should be given no weight. State officials have always argued that their classification of individuals by race was justified by an important government purpose; yet, our country's history has consistently shown that the use of race was wrong. The long history of Chinese Americans in this country amply illustrates this phenomenon. Viewed historically as faceless members of a "yellow horde," in years past, individuals of Chinese descent were often the victims of state action directed at "race" that was meant to serve the greater public good. The onus extended to Chinese American children who sought to attend public schools. *See, e.g.,* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 *Asian L.J.* 181, 207-208 (May 1998).

San Francisco and other cities flatly denied "Chinese" children the right to attend public schools. When courts ordered their admission, the State of California established separate "Chinese" schools, to which Chinese American schoolchildren were restricted by law until well

into the twentieth century. *See Ho*, 147 F.3d at 864. Even in our times, school officials who believed they were acting in good faith have sought to classify Chinese American students by race for unequal treatment. *See* David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 Harv. BlackLetter J. 39, 54 (Spring 2000).

In case after case, the single historical truth that emerges is that the rights of citizens of Chinese descent—and of all Americans—have been vindicated only by strict application of the Fourteenth Amendment's protection of individual rights, applying a "hostile" standard of "strict scrutiny" to the government's challenged use of race. The Fifth Circuit's substitution of a deferential "good faith" standard ignores what history has taught us, flies in the face of both the spirit and letter of this Court's prior rulings on the issue, and, if allowed to stand, will bring tragic consequences.

For these and other reasons set forth herein, the Court should grant the Writ of Certiorari sought by Petitioner and should clarify this important issue.

ARGUMENT**I. THIS COURT SHOULD GRANT REVIEW AND CLARIFY THAT USE OF RACE IN EDUCATION REMAINS “ODIOUS,” REQUIRING THE STRICTEST JUDICIAL SCRUTINY, WITH THE BURDEN OF JUSTIFYING THE CHALLENGED CONDUCT PLACED SQUARELY ON THE STATE.**

The Court should grant certiorari so that it can halt the erosion in Fourteenth Amendment jurisprudence threatened by the Fifth Circuit’s recent decision in *Fisher*. The Fifth Circuit’s expansion of this Court’s ruling in *Grutter v. Bollinger*, 539 U.S. 306 (2003), threatens decades of settled Fourteenth Amendment jurisprudence and endangers the civil rights of all Americans seeking access to this nation’s schools and universities.

This Court has repeatedly stated that “[c]lassifications of citizens solely on the basis of race ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’” *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Use of race “threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.” *Shaw* at 643. As this Court reemphasized in *Adarand*, rejecting the argument that the “good motives” of a state actor merit more lenient scrutiny, there are no “benign” racial classifications. 515 U.S. at 226. “[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.” *Adarand*, 515 U.S. at 224; *see*

Richmond v. J. A. Croson Co., 488 U. S. 469, 493 (1989) (“purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race”). Further, this Court has repeatedly held that the burden of proving that the challenged program is narrowly tailored to address a compelling government interest rests firmly on the proponent of the race-based program. See *Johnson v. California*, 543 U.S. 499, 505 (2005).

The Fifth Circuit’s decision in *Fisher* distorts and turns the precedents set by this Court on their collective head. In *Fisher*, the Fifth Circuit has held that, under *Grutter*, UT Austin may use race in admissions because it “cannot say” UT Austin officials *did not* act in “good faith” in setting up their race-based admission program. *Fisher*, 631 F. 3d at 246. In the name of *Grutter*, the Fifth Circuit not only reduced the strict scrutiny test to a deferential good faith test, with the good faith of the state actor presumed, it placed all the burdens on the party challenging the use of race: “We presume the University acted in good faith, a presumption Appellants are free to rebut.” *Fisher*, 631 F. 3d at 231-232. Instead of requiring a “strong basis in evidence” to justify the challenged use of race, see *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986), the court required no more than the “presumed” good faith of the government actors.

The Fifth Circuit’s decision in *Fisher* is breathtaking in its audacity, going far beyond the narrow justification for use of race recognized in *Grutter*. See *Grutter*, 539 U.S. at 330 (law school had important government interest in maintaining “critical mass” of minority students). The deferential “good faith” test the *Fisher* opinion purports to derive from *Grutter* will, if not repudiated by this Court,

result in a future in which all public school officials have the power to implement racial balancing schemes, free of judicial interference. From university all the way down to kindergarten, the first lesson students learn will be that they are forever stigmatized and limited by their race. Unbounded by any remedial purpose and subject only to the whim of school officials, these programs of racial discrimination will continue in perpetuity, without end. *See Fisher*, 631 F. 3d at 254 (J. Garza, concurring).

II. UNLESS THIS COURT INTERVENES, THE EFFECTS OF THE DECISION IN *FISHER* WILL BE FELT FAR OUTSIDE OF TEXAS.

In a relevant case involving AALF's constituents, the deferential "good faith" standard discovered by the *Fisher* court will inevitably, unless checked, result in San Francisco's schoolchildren of Chinese descent again facing "benign" race-based discrimination in the city's public school system. In *Ho v. San Francisco Unified School District*, filed in 1994, San Francisco's Chinese American schoolchildren were forced to turn to the courts for redress of their Fourteenth Amendment rights, in order to halt the school district's policy of classifying and assigning them to the city's K-12 schools on the basis of their race. *See Ho*, 147 F.3d 854; *Ho*, 59 F. Supp. 2d 1021 (on remand); *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (1997) (decision giving rise to appeal in 147 F.3d 854).

In *Ho*, the plaintiff class challenged a consent-decreed-mandated racial balancing scheme imposed in *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34 (N.D. Cal. 1983). Without any finding of

a constitutional violation to remedy, the consent decree set up a racial balancing scheme with the stated goals of preventing “racial isolation” and providing “academic excellence” in the city’s schools. *See Ho*, 965 F. Supp. at 1322; *see also Ho*, 147 F.3d at 859; *San Francisco NAACP*, 576 F. Supp. at 40-42, 58. Filled with zeal for their vision of racial engineering, the proponents ignored that the San Francisco school district was already one of the most ethnically diverse in the nation.

Under San Francisco’s admissions program, nine ethnic groups were arbitrarily defined, including “Chinese.” Members of at least four of the groups were required to be present at each school; and no one group could represent more than 45 percent of the student body at any regular school or 40 percent at any alternative school. *See id.*; *see also Ho*, 147 F.3d at 856. By the time of the *Ho* challenge, the school district had enlarged the original nine arbitrary racial categories to thirteen equally arbitrary categories to take into account the growing prominence of additional racial groups in the district. *See Ho*, 147 F.3d at 858. As they were the largest racially identifiable group, the burden of this system of quotas and caps fell heaviest on students identified as “Chinese,” who were most likely to be “capped out” at their neighborhood schools or at desirable magnet schools. *See Levine, supra*, at 55-56. Also, even where preferences were not required to maintain the district’s racial quotas and caps, the district nevertheless adopted a policy of granting preferences to applicants classified as “Hispanic” or “African American,” *See Ho*, 147 F.3d at 858.

The named plaintiffs’ stories amply illustrate the discrimination:

- Brian Ho was five years old. He was turned away from his two neighborhood kindergartens because the schools had accepted the maximum allowed percentage of “Chinese” schoolchildren. He was assigned to a school in another neighborhood. *See Levine, supra*, at 61.
- Patrick Wong, then fourteen years old, applied for admission to Lowell High School, a selective magnet school. He was rejected because his index score was below the minimum required for “Chinese” applicants. However, his score was high enough that he would have been admitted to Lowell had he been a member of any other racial or ethnic group. He was then rejected at three other high schools because such schools had already “capped out” for “Chinese” students. *Id.*
- After moving into a San Francisco neighborhood, Hillary Chen, then eight years old, was not allowed to transfer into any of three elementary schools near her new home because all three schools had accepted the maximum number of “Chinese” schoolchildren allowed under the district’s scheme. *Id.*

After five years of vigorous litigation, the *Ho* case settled on the first day of trial with the defendants agreeing to (i) cease using race to assign students to the city’s schools and (ii) end the mandatory requirement of self-classification by race on student enrollment forms. *See Ho*, 59 F. Supp 2d at 1025 (approving settlement). Settlement in *Ho* would never have been reached if the district court and the Ninth Circuit (on an interlocutory appeal from the district court’s denial of plaintiffs’ request for dissolution of the consent decree) had not emphasized

to defendants that (i) under this Court's decisions in cases such as *Croson* and *Adarand*, the school district's goal of diversity did not justify its use of race, and (ii) at trial the school district would have to prove, under strict scrutiny, a past constitutional violation tied to its present use of race—a burden defendants were extremely unlikely to carry. *See Ho*, 59 F. Supp. 2d at 1024-25 (noting burdens placed by Ninth Circuit's ruling and district court's prior finding that “defendants had shown little likelihood of prevailing at trial”).

If the Fifth Circuit's ruling in *Fisher* is allowed to stand, essentially substituting in the pedagogical context a deferential “good faith” standard in place of strict scrutiny—a rule it purportedly derives from this Court's decision in *Grutter*—there is every likelihood that the San Francisco school district will again try to implement a race-based student assignment program, in spite of the *Ho* settlement and in spite of a new state law prohibiting use of race. Indeed, San Francisco school officials who favor use of race debate the issue every time a new case surfaces offering them support. *See e.g.*, Bob Egelko, Heather Knight, *SCHOOLS, Justices Take Cases On Race-Based Enrollment*, San Francisco Chronicle, at B-1 (June 6, 2006) (“If the Supreme Court upholds the Seattle system . . . Prop. 209 is a moot point. . . Federal laws would override a state initiative.” (quoting board member Mark Sanchez).)

III. THE EXPERIENCE OF CHINESE AMERICAN STUDENTS IN *HO* DEMONSTRATES THAT ONLY HARM CAN FLOW FROM A RULE ALLOWING PUBLIC SCHOOLS TO IMPLEMENT RACIAL BALANCING POLICIES.

As this Court has explained, “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities.” *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

In *Ho*, as in the instant case, school officials claimed that classifying students by race would bring them educational benefits. After the filing of the *Ho* case, however, even proponents of San Francisco’s racial balancing scheme were forced to admit that no discernable benefits had been produced. One of the more telling indictments was issued by a Grand Jury convened to investigate the success of the program. *See Grand Jury Report*, The San Francisco Unified School District (San Francisco Civil Grand Jury Report, 1996-97) at <http://sfsuperiorcourt.org/index.aspx?page=286> (last checked Oct. 18, 2011). After extensive investigation, the Grand Jury concluded that racial balancing had achieved nothing but racial balancing: “Fourteen years of experience with the Consent Decree have established that while it has met its goal of *de facto* desegregation, it has been a failure at accomplishing its primary purpose of achieving academic excellence for all ethnic groups.” *Id.* at VI (Conclusion). The Grand Jury in particular found that racial balancing had not produced benefits for Hispanic and African American students, who were, in San Francisco as with UT Austin, the focus of the racial balancing scheme. *See id.* at IV.

While mandated racial balancing in San Francisco's schools did not produce discernable benefits, it caused visible harm. Validating this Court's warnings in *Croson* and *Rice*, San Francisco schoolchildren were stigmatized by their classification by race. *See Croson*, 488 U.S. at 493. After the *Ho* case was filed, newspapers widely reported the shame and anger felt by children targeted by the racial quotas. As stated by the parent of one "Chinese" youth turned away because of his ethnicity, "He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?" Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, at C-2 (Feb. 14, 1999).

As Lee Cheng, Secretary of AALF, testified in a written statement for hearings held by the U.S. House of Representatives, Sub-Committee on the Constitution: "Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong." Lee Cheng, *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), at <http://judiciary.house.gov/legacy/274.htm> (last checked Oct. 18, 2011).

Another insidious byproduct of San Francisco's racial balancing plan was "rampant dishonesty," as parents of all races attempted to misreport children's racial identity to gain admission to desired schools. *See Michael Dorgan, Desegregation or Racial Bias?*, San Jose Mercury, at 1A

(June 5, 1995). “[S]ome black families in Bayview-Hunter’s Point have gone so far as to take Hispanic surnames to protect their children from busing.” *Id.* at 10A. “People know if they want to go to a particular school that has a lot of Caucasians, they should put down something other than Caucasian, and they do.” *Id.* at 10A (quoting School Board President Dan Kelly).

In Texas, as in California, stigmatization will result from UT Austin’s racial balancing program, however well-intentioned. There, as in California, student applicants will feel shame, frustration and anger because they are singled out for unequal treatment on account of their race. Aspiring students will be encouraged to lie about their race, to gain a coveted place at the school. The university may realize its goal of racial balancing; but, otherwise, only harm will result. The same will be true everywhere else that this new rule derived from *Grutter* finds application.

IV. DEMONSTRATING THAT ITS ONLY GOAL IS RACIAL BALANCING, UT AUSTIN DISCRIMINATES AGAINST ASIAN AMERICANS, EVEN THOUGH THEY ARE LESS REPRESENTED IN ITS CLASSROOMS THAN “HISPANICS,” A FAVORED RACIAL CATEGORY.

UT Austin’s pretense that its racial discrimination is motivated by the desire to achieve a “critical mass” of underrepresented minorities is belied by the fact that it grants no preferences to Asian Americans even though they are less well represented in UT Austin classrooms than Hispanics, a racial category granted preference in the admissions process. Indeed, in earlier

statements, the university candidly admitted that its post-*Grutter* “proposal to [reconsider] race in the admission process” reflected nothing more than a desire to mirror state racial demographics: “[S]ignificant differences between the racial and ethnic makeup of the University’s undergraduate population and the state’s population prevent the University from fully achieving its mission.” *Proposal to Consider Race and Ethnicity in Admissions* at 24 (June 25, 2004) at http://www.utexas.edu/student/admissions/about/admission_proposal.pdf (last visited Oct. 18, 2011) (hereinafter “2004 Proposal”).

The manner in which UT Austin treats individual Asian applicants for admission vis-a-vis their Hispanic counterparts confirms that the university’s true objective bears little resemblance to the interest in diversity the majority in *Grutter* narrowly permitted. It is uncontested that UT Austin gives Hispanic applicants a preference because of their race but does not afford a similar preference to applicants of Asian ancestry; this despite the fact that “the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT.” *Fisher v. University of Texas at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009). The disparate treatment of Asian applicants is incompatible with UT Austin’s ostensible pursuit of a “critical mass” of minority students and any accompanying educational benefits. *See Grutter*, 539 U.S. at 330.

In reality, UT Austin has no serious interest in obtaining a critical mass of Hispanic or Asian students. True to its word, the university seeks instead to make the racial composition of its student body mirror the racial

composition of the state of Texas. *See* 2004 Proposal at 24. That unlawful objective fully explains UT Austin’s decision to prefer Hispanics over similarly situated Asian applicants. In 2008, the university’s student body was composed of roughly 20% Hispanics and 19% Asians while those groups respectively represented 36% and 3.4% of the Texas population. *Fisher*, 645 F. Supp. 2d at 606 and n. 10. Only if the university’s aim is racial balancing are Hispanics underrepresented and Asians overrepresented. By any objective standard, each of those groups has achieved the “meaningful representation” necessary to produce substantial educational benefits. *Grutter*, 539 U.S. at 319. UT Austin’s stated mission of pursuing “racial balance for its own sake” does not comport with the Equal Protection Clause. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

V. BECAUSE THE UNIVERSITY ALREADY HAD A PROVEN RACE-NEUTRAL ALTERNATIVE, ITS RACE-BASED ADMISSIONS PROGRAM COULD NOT BE NARROWLY TAILORED EXCEPT UNDER A RADICALLY-DIFFERENT TEST.

That the Fifth Circuit was able to find UT Austin’s admissions policy “narrowly tailored” illustrates the radical nature of the new rule it purports to derive from *Grutter*. Even assuming UT Austin had a compelling government interest in diversity, under traditional notions of narrow tailoring, it still could not discriminate on the basis of race because it already possessed a proven equally efficacious, race-neutral program furthering that interest. *See Johnson*, 543 U.S. at 505; *Grutter*, 539 U.S. at 339. Under Texas’ race-neutral Top Ten Percent Law, UT Austin had already achieved a critical mass of

minority students. *See* Tex. Educ. Code § 51.803 (1997); Petitioner’s Appendix (“App.”) 123a. For instance, in 2002, without resorting to race-based discrimination, UT Austin enrolled a class that was 38% non-Caucasian, including a 17% combined African-American and Hispanic population. 2004 Proposal at 30. By 2004, the number of African-American and Hispanic students entering the freshman class had swelled to 21.4% (a 26% increase in only two years), and the total non-white population rose to nearly 43% of the incoming freshman class. App. 62a. These substantial and growing levels of minority enrollment show that UT Austin could (and did) use the Top Ten Percent Law to achieved a “critical mass” of minority representation.

In an attempt to justify using racial preferences in conjunction with the Top Ten Percent Law, UT Austin offered evidence that, in 2002, 79% of classes had one or no African-American students while 30% had one or no Hispanics. 2004 Proposal at 26. However, the university’s statistics actually demonstrate the presence of “critical mass” as defined by reference to substantial educational benefits that flow from exposure to racially diverse students. *Grutter*, 539 U.S. at 329. UT Austin’s statistics confirm that exposure to African-American and Hispanic students is all but guaranteed in university classrooms. Holding the 2002 in-class figures constant, a typical UT Austin student, over the span of a four-course semester, has a 61% probability of enrolling in a class with at least two African-Americans and a 99.2% probability of attending a class with at least two Hispanics. During a typical student’s four-year academic career, the odds approach 100% that she will take at least one class with two or more Hispanics and at least one with two or more

African-Americans.² If near certain in-class exposure to two or more African-American and Hispanic students is insufficient to promote “cross-racial understanding,” break down “racial stereotypes,” and enable students to “better understand persons of different races,” *id.* at 329, UT Austin failed to explain why that is so.

Indeed, UT Austin’s bald assertion that Hispanics are insufficiently represented was rendered all the more incredible in light of the university’s treatment of Asians. While 30% of classes in 2002 had fewer than two Hispanic students, 33% had fewer than two Asian Americans. 2004 Proposal at 26. Yet as noted *supra*, it is undisputed that UT Austin does not accord a preference to Asian applicants. Assuming UT Austin is actually pursuing the benefits of diversity recognized in *Grutter*, its program, in light of the statistics, can be explained in only one of two ways: Either UT Austin knows it already has achieved a “critical mass” of both Hispanics and Asians, without the need for use of race, or, it believes that Hispanics are somehow more valuable than Asians in promoting “cross-racial understanding,” breaking down “racial

2. Out of N classes, the probability of taking at least one class with two or more students of a particular minority group is calculated by taking one minus the probability of a single class not having two or more members of the group raised to the Nth power. Thus, over a four-course semester, the probability of a typical UT Austin student taking at least one class with two or more African-Americans is expressed by $1-(.79^4)$, or 61.049%, while the probability of the same student taking at least one class with two or more Hispanics is expressed by $1-(.3^4)$ or 99.19%. Over the span of a typical student’s four-year academic career, the 4 in the previous equations is replaced with a 32, yielding results that round to 100% for both minority groups.

stereotypes,” and enabling students to “better understand persons of different races.” *Grutter*, 539 U.S. at 329. The record below fails to reflect any evidence offered for the latter dubious proposition.

In any event, because it is beyond reasonable dispute that the race-neutral Top Ten Percent Law was already furthering any legitimate diversity interest, UT Austin’s race-based admissions policy could not be found narrowly tailored under any of this Court’s precedents. Only by finding a new rule mandating deference to the university’s judgment as to whether its program was narrowly tailored—essentially applying a form of rational basis scrutiny—was the Fifth Circuit able to find the UT Austin admission program “narrowly tailored.”

VI. THIS COURT SHOULD REVISIT ITS DECISION IN *GRUTTER*, TO CLARIFY THAT IT HAS NOT FORSAKEN MORE THAN A CENTURY OF ITS PRECEDENTS INTERPRETING THE FOURTEENTH AMENDMENT.

This Court should grant certiorari to revisit its decision in *Grutter*, to resolve ambiguities in the opinion in that case and to clarify that, contrary to the Fifth Circuit’s finding in *Fisher*, it does not sanction a deferential “good faith” rational-basis-like test for government use of race in education.

In *Fisher*, the Fifth Circuit found that, under *Grutter*, only the “good faith” of the school officials mattered, both in the initial determination by the university that it had a compelling government interest in the use of race and in the university’s crafting of a race-based plan to further

that interest: “Rather than second-guess the merits of the University’s decision, a task we are ill-equipped to perform, we instead scrutinize the University’s decision making process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires.” *Fisher*, 631 F. 3d at 231.

The Fifth Circuit expressly rejected Petitioner’s argument that the court should, at least, determine for itself whether the policy was narrowly tailored: “[T]his argument in its full flower is contradicted by *Grutter*. The majority held that, like the examination into whether the University has a compelling interest, ‘the narrow-tailoring inquiry . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.’” *Fisher*, 631 F. 3d at 232. The Fifth Circuit presumed the good faith of the school officials and placed all the burdens on the person challenging the use of race: “We presume the University acted in good faith, a presumption Appellants are free to rebut.” *Id.* Thus, while the Fifth Circuit pretended to be examining the UT Austin program under strict scrutiny, in fact, it applied something far more like the rational basis scrutiny applicable where no suspect category such as race is involved. See *Central State University v. American Assoc. of University Professors*, 526 U.S. 124, 128 (1999).

While one might be tempted to dismiss the Fifth Circuit’s misunderstanding of this Court’s decision in *Grutter* as an aberration driven by the ideologies of the judges concerned, the concurrence of Justice Garza demonstrates that more is involved. Justice Garza, while making clear he was not in favor of the UT Austin racial balancing program, nonetheless believed that he had no

choice but to vote with the majority, given this Court's ruling in *Grutter*. "I concur in the opinion because I believe today's decision is a faithful application of *Grutter*'s teachings, however flawed I may find those teachings to be." *Fisher*, 631 F. 3d at 259. "I am compelled to follow the Court's unusual deference towards public university administrators in their assessment that racial diversity is a compelling interest, as well as the Court's refashioned narrow-tailoring inquiry." *Id.* "Post-*Grutter*, universities need not inflict the least harm possible so long as they operate in good faith." 631 F. 3d at 263. "And in assessing good faith, institutions like the University of Texas need not even provide the type of metrics that allow courts to review their affirmative action programs. . . . In the world post-*Grutter*, courts are enjoined to take universities at their word. *Id.*

Because the *Fisher* majority, and even concurring Justice Garza, understand this Court's decision in *Grutter* to reverse virtually all of this Court's precedents as they relate to the use of race in the university context, there is clearly a need to revisit *Grutter*.

CONCLUSION

The use of race in public school admissions is a matter of extreme importance to all Americans. The Fifth Circuit has “decided an important federal question in a way that conflicts with relevant decisions of this Court.” *See* Rule 10(c). Worse, its decision finding that this Court, in *Grutter*, sanctioned a deferential “good faith” test for use of race by state school officials, with all the burdens on the person challenging the use of race, essentially places the imprimatur of this Court on a rule that will, unless repudiated, result in a new regime of racial discrimination in public schools throughout the nation. Accordingly, the Court should issue the Writ of Certiorari sought by Petitioner.

Respectfully submitted,

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