No. 11-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Abigail Noel Fisher.

Respondents are the University of Texas at Austin; David B. Pryor, Executive Vice Chancellor for Academic Affairs in His Official Capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; James R. Huffines, as Member of the Board of Regents in His Official Capacity; Janiece Longoria, as Member of the Board of Regents in Her Official Capacity; Colleen McHugh, as Chair of the Board of Regents in Her Official Capacity; Robert L. Stillwell, as Member of the Board of Regents in His Official Capacity; James D. Dannenbaum, as Member of the Board of Regents in His Official Capacity; Paul Foster, as Member of the Board of Regents in His Official Capacity; Printice L. Gary, as Member of the Board of Regents in His Official Capacity; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; Francisco G. Cigarroa, M.D., Interim Chancellor of the University of Texas System in His Official Capacity.

Plaintiff-Appellant below Rachel Multer Michalewicz is being served as a respondent herein.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Abigail Fisher ("Petitioner") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is available at 631 F.3d 213 and is reprinted in the Appendix ("App.") at 1a-114a. The order of the United States Court of Appeals denying rehearing en banc and the opinion dissenting from the denial of rehearing en banc are available at 2011 WL 2420984 and are reprinted at App. 172a-184a. The opinion of the United States District Court for the Western District of Texas is available at 645 F. Supp. 2d 587 and is reprinted at App. 115a-171a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its decision on January 18, 2011. App. 1a. A timely petition for rehearing en banc was denied on June 17, 2011. App. 172a-184a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

Petitioner Abigail Fisher, a Caucasian female, applied for undergraduate admission to the University of Texas at Austin ("UT") in 2008. Ms. Fisher was not entitled to automatic admission under the Texas Top Ten Percent Law. She instead competed for admission with other non-Top Ten in-state applicants, some of whom were entitled to racial preference as "underrepresented minorities." Although Ms. Fisher's academic credentials exceeded those of many admitted minority candidates, UT denied her application. Having "'suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection,'" *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995)), Ms. Fisher brought this challenge to the use of race in UT's undergraduate admissions process seeking monetary and injunctive relief.

The Fifth Circuit affirmed the district court's grant of summary judgment to UT in a decision that sharply divided the Circuit bench. Judge Higginbotham, writing for the panel, acknowledged that UT's use of race was subject to strict scrutiny. He nevertheless concluded that "*Grutter*'s 'serious, good faith consideration' standard" applied, refused to "second-guess the merits of the University's decision" and "instead scrutinize[d] the University's decisionmaking process" to ensure that the

University "acted in good faith." App. 36a. The panel majority also held that strict scrutiny's "narrow-tailoring inquiry ... is undertaken with a degree of deference" in the academic context so that, under *Grutter*, "a university admissions program is narrowly tailored" so long as it avoids express quotas or specified preference points and "allows for individualized consideration of applicants of all races." App. 37a, 11a. The panel endorsed UT's "good faith" determination that the use of race would further UT's interests in having its already diverse student population mirror the racial demographics of Texas and in attaining "classroom diversity." App. 23a-24a.

Judge Garza specially concurred. He reluctantly agreed that the panel's judgment adhered to *Grutter* and wrote to protest the consequent elimination of "meaningful judicial review." App. 77a, 81a, 83a. Among other things, Judge Garza objected to the panel's decision to ratify "the University's reliance on race at the departmental and classroom levels, [which] will, in practice, allow for race-based preferences in seeming perpetuity." App. 87a. He expressed doubt that UT's system could survive "strict scrutiny before or after *Grutter*" because "[UT]'s use of race has had an infinitesimal impact" on minority enrollment and thus could not be "narrowly tailored" when "the University's highly suspect use of race provides no discernible educational impact." App. 107a-108a.

The Fifth Circuit denied rehearing en banc by a vote of nine to seven. Writing for five of the dissenting judges, Chief Judge Jones faulted the panel's finding that UT's admissions program was justified by *Grutter*. In her view, the panel decision "essentially abdicates judicial review of a race-conscious admissions program

for undergraduate [UT] students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." App. 174a. She believed that the panel had improperly extended *Grutter* by "watering down" strict scrutiny to authorize the use of race in college admissions when "a race-neutral state law (the Top Ten Percent Law) had already fostered increased campus racial diversity," and by validating UT's "unachievable and unrealistic goal of racial diversity at the classroom level to support the University's race-conscious [admissions] policy." App. 174a-175a. She warned that the decision "gives a green light to all public higher education institutions in this circuit, and perhaps beyond," to resort to race-based admissions plans "without following the narrow tailoring that *Grutter* requires." App. 175a.

As this divide shows, and as the participation of the United States and 28 other organizations as amicus curiae before the Fifth Circuit underscores, this Petition presents important constitutional questions.[1] Especially significant is the panel's interpretation of *Grutter* as a blanket endorsement of racial preference in UT's so-called "holistic" admissions program without any regard to UT having been one of the most racially diverse universities in the nation before race was considered.

If any state action should respect racial equality, it is university admission. Selecting those who will benefit from the limited places available at state universities has enormous consequences for their futures and the

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1. The United States participates as an amicus at the court-of-appeals level only at the authorization of the Solicitor General, *see* 28 C.F.R. § 0.20(c), and only in cases of great national importance.

perceived fairness of governmental action. The Fourteenth Amendment requires an admissions process untainted by racial preferences absent a compelling, otherwise unsatisfied, government interest and narrow tailoring to advance that interest without undue infringement on the rights of non-preferred applicants. This Court should grant the petition and review the Fifth Circuit's decision, which authorizes public universities to increase the use of racial admissions preferences precisely when that use should be abating.

STATEMENT OF THE CASE

A. History Of UT's Admissions Program

Because approximately four times as many in-state students as can enroll in UT's freshman class apply each year, UT employs a selective admissions process. That admissions process (and its consideration of race) has changed several times in response to judicial decisions. App. 120a-121a, 125a. Before the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), UT based admission on an Academic Index ("AI") computed from high school class rank and standardized test scores adjusted by consideration of race. App. 15a. In 1996, the last year UT used this system, the entering freshman class was 18.6% African-American and Hispanic. App. 18a-19a.

After *Hopwood* struck down the University of Texas School of Law's use of race, UT eliminated race as a factor in its undergraduate admissions process and instead sought "to increase minority enrollment" through race-neutral means. App. 18a. To this end, UT incorporated a new metric—a Personal Achievement Index ("PAI")—into

its admissions process. App. 17a-18a. The PAI originally was a composite of written essay and race-neutral "personal achievement" scores, weighted by "special circumstances," some of which "disproportionately affect minority candidates, [such as] the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household." App. 121a. Under this system, the 1997 entering freshman class was 15.3% African-American and Hispanic. App. 121a-122a.

In 1997, the Texas legislature enacted a law requiring UT to admit all Texas high school seniors ranking in the top ten percent of their classes. *See* H.B. 588, Tex. Educ. Code § 51.803 (1997) (the "Top Ten Percent Law"). The law was intended, in part, to overcome *Hopwood* by ensuring admission to "a large well qualified pool of minority students."[2] App. 123a. Under the Top Ten Percent Law, UT continues to calculate AI and PAI scores for all in-state applicants, which it plots on grids (AI on the horizontal axis, PAI on the vertical). The grids are used to determine placement in particular schools and majors for applicants automatically admitted under the Top Ten Percent Law, and to determine both admission and placement in schools and majors for non-Top Ten Percent Law applicants.

UT officials lauded the impact of this race-neutral admissions process on minority enrollment and retention. By 2000, UT had returned "enrollment levels for African American and Hispanic freshman ... to those of 1996, the year before the *Hopwood* decision." And UT credited

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2. UT also uses numerous race-neutral outreach efforts and scholarship programs to increase minority applications and enrollment. App. 18a.

its race-neutral system for "helping us to create a more representative student body and enroll students who perform well academically" as evidenced by the fact that "minority students earned higher grade point averages ... than in 1996 and ha[d] higher retention rates."[3] By 2003, the race-neutral regime had "brought a higher number of freshman minority students—African Americans, Hispanics and Asian Americans—to the campus than were enrolled in 1996."[4] Admissions statistics verified UT's conclusion. In 2004, the entering freshman class was 21.4% African-American and Hispanic, thus significantly exceeding the minority enrollment rates achieved under UT's pre-*Hopwood* race preference system. App. 62a.

Notwithstanding the success of this race-neutral approach, on the very day that *Grutter* was decided, UT signaled that it would reintroduce race into its admissions process: "[t]he University of Texas at Austin will modify its admissions procedures to ... combine the benefits of the Top 10 Percent Law with affirmative action programs that can produce even greater diversity."[5] Shortly thereafter, UT investigated "whether to consider an applicant's race and

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3. Dr. Larry Faulkner, *The "Top 10 Percent Law" is Working for Texas* (Oct. 19, 2000), *available at* http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html (last visited Sept. 15, 2011).

4. *Enrollment of first-time freshman minority students now higher than before Hopwood court decision* (Jan. 29, 2003), *available at* http://www.utexas.edu/news/2003/01/29/nr_diversity (last visited Sept. 15, 2011).

5. *The University of Texas at Austin reacts to the Supreme Court's affirmative action decisions* (June 23, 2003), *available at* http://www.utexas.edu/news/2003/06/23/nr_affirmativeaction (last visited Sept. 15, 2011).

ethnicity" in admissions "in accordance with the standards enunciated in" *Grutter*. App. 21a. Finding "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population" and a lack of diversity in its "classrooms," UT added race as an explicit factor in its pre-existing PAI scoring with the goal of increasing undergraduate enrollment of "underrepresented" African-American and Hispanic minorities. App. 23a (citation omitted).

Under this revised program, UT continues to admit the bulk of its class pursuant to the Top Ten Percent Law (with AI and PAI scores still affecting program placement). App. 31a. In 2008, for example, Top Ten Percent Law admissions accounted for approximately 81% of the entering class.[6] UT fills the remainder of the in-state freshman class through consideration of AI and race-affected PAI scores. *Id.*

Every UT applicant thus is given an AI and PAI score and classified by race. Race is identified on the first page of every admissions file and "reviewers are aware of it throughout the evaluation." App. 134a. Because UT uses the composite AI/PAI score both to make non-Top Ten Percent Law admission decisions and to assign incoming freshmen to schools and majors, race has an impact on

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6. During the pendency of this litigation, the Texas legislature amended the Top Ten Percent Law to limit the number of mandatory admissions to 75% of UT's overall freshman class. *See* Tex. Educ. Code § 51.803(a-1). Under this amendment, if a court ruling were to prohibit UT from considering race as a factor in admissions decisions, the 75% cap on the Top Ten Percent Law would be eliminated and the Top Ten Percent Law would become fully operative. *Id.* § 51.803(k)(1).

the ultimate disposition of each in-state application. UT officials confirmed that an applicant's race "can make a difference" in admissions decisions. App. 33a. The district court agreed. App. 163a.

In 2007, the last admissions year before Petitioner applied to UT, the incoming "freshman class [wa]s 19.7 percent Hispanic, 19.7 percent Asian American and 5.8 percent African American." As UT proudly announced, "[t]hese [we]re record highs for each group." Yet, UT continued to use race in Petitioner's admissions cycle.[7]

UT does not attempt to measure the effect of race on admissions decisions and is unable to quantify the increase in "underrepresented" minority enrollment attributable to consideration of race. App. 104a. The available data, however, indicate that any increase has been negligible. Out of 2008's enrolled freshman class of 6,332 in-state students, 1,208 were admitted outside the operation of the Top Ten Percent Law. App. 102a-103a. Within that group, there were 58 African-American and 158 Hispanic students, some of whom were admitted based solely on AI scores. App. 103a. Moreover, UT's annual enrollment of hundreds of non-Top Ten African-American and Hispanic students before race was reintroduced into its admissions process indicates that many of the 216 non-Top Ten "underrepresented" minority students enrolled in 2008 would have been admitted without consideration of race. App. 103a.

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7. Campus 2 Counselor, News from The University of Texas at Austin, *Enrollment Figures Show Record Diversity, Increased Enrollment* (Fall 2007), *available at* http://bealonghorn.utexas.edu/counselors/hs/ctoc (last visited Sept. 15, 2011).

One measure of the impact of UT's use of race in admissions on the enrollment of "underrepresented" minorities is to compare the percentage of non-Top Ten "underrepresented" minority students enrolled in the years when race was not part of the admissions calculus to the percentage of non-Top Ten "underrepresented" minority students enrolled in 2008. From 1998 to 2004, when race was not a factor in admissions, an average of 15.2% of the non-Top Ten Texas enrollees each year were African-American or Hispanic. In 2008, 17.9% of the non-Top Ten Texas enrollees were African-American or Hispanic.[8] Even attributing this increased percentage entirely to race, race was decisive for only 33 African-American and Hispanic students—approximately 0.5% of the 6,322 in-state students enrolled in UT's 2008 freshman class and a far lower percentage of the tens of thousands of in-state applicants that year, all of whom were subjected to racial classification.[9]

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8. *Implementation and Results of the Texas Automatic Admissions Law: Report 11*, at 7 (Oct. 28, 2008), *available at* http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf (last visited Sept. 15, 2011).

9. UT likewise has not shown that its use of race has increased "classroom diversity." In fact, the evidence indicates that increasing minority enrollment does not necessarily translate into increased "classroom diversity." From 1996 through 2002, while minority enrollment was steadily increasing, "classroom diversity" decreased—that is, a higher percentage of classes had fewer than two African-American, Hispanic, or Asian-American students. For example, in the Fall of 1996, nearly 73% of all classes with five or more students had fewer than two African-American students; in the Fall of 2002, the percentage had increased to 79%. *Diversity Levels of Undergraduate Classes at [UT], 1996-2002*, at 7 (Nov. 20, 2003), *available at* http://www.utexas.edu/

B. Proceedings Below

1. Petitioner commenced this action in the United States District Court for the Western District of Texas, challenging UT's use of race in admissions as a denial of equal protection under the Fourteenth Amendment and a violation of Section 1983 of Title 42 of the United States Code. UT defended its use of race as a narrowly tailored means of pursuing greater diversity, which it deemed essential to its mission as Texas's flagship institute of higher education. App. 144a-147a. UT argued that its use of race was lawful because it had been modeled after the admissions program at the University of Michigan Law School (UMLS), which was upheld as constitutional in *Grutter*. App. 148a.

UT's admissions data showed that the combined effect of the Top Ten Percent Law and its pre-existing race-neutral AI/PAI admissions program had steadily increased minority enrollment and reliably resulted in admission of 20% or more African-American and Hispanic applicants. App. 124a. UT nevertheless claimed that it had not yet attained the "critical mass" of "underrepresented" minorities validated as a legitimate diversity goal in *Grutter* because: (1) the percentage of incoming African-American and Hispanic freshmen was below the percentage of African-Americans and Hispanics in the Texas population; and (2) a large number of its small

student/admissions/research/ClassroomDiversity96-03.pdf (last visited Sept. 15, 2011). UT acknowledged that at least "some of the increase [in these percentages] [wa]s due to the larger number of sections observed (from 4,742 in 1996 to 5,631 in 2002)," which "'spread out' [minority students] in more classes, leaving many sections with little or no representation." *Id.* at 5.

classes (courses with between 5 and 24 students) lacked "classroom diversity," *i.e.*, had fewer than two students of any minority race. App. 156a-157a.

UT argued that its use of race was "narrowly tailored" to pursue "critical mass" because: (1) as in *Grutter*, its PAI scoring was "holistic"; (2) it did not set aside specific places for African-American and Hispanic applicants or otherwise use a quota; (3) it did not award additional points or other specific advantages to African-American and Hispanic applicants; (4) it had considered in good faith and rejected alternative means of achieving a "critical mass" of "underrepresented minorities"; and (5) it was committed to review its use of race in admissions at five year intervals beginning in 2009. App. 161a-167a.

On cross-motions for summary judgment, the district court found that UT had adhered to *Grutter* and granted it summary judgment. The district court specifically held that UT's pursuit of demographically proportional African-American and Hispanic admissions was within *Grutter's* concept of "critical mass" and endorsed UT's reliance on its so-called "classroom diversity" study. App. 155a, 157a. Narrow tailoring, in the district court's view, only required UT to use a "holistic" process, avoid quotas and fixed scoring preferences, and conduct periodic review. App. 158a-159a, 167a. Per the district court, Petitioner could be right only if *Grutter* were wrong. App. 169a.

2. The Fifth Circuit affirmed. The panel acknowledged that "as UT's *Grutter*-like admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny with its requirement of narrow tailoring." App. 35a. However, the panel declared

that UT's "educational judgment in developing diversity policies is due deference," *id.*, and announced a special standard of review for university admissions programs:

> 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 decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the University acted in good faith, a presumption Appellants are free to rebut.

App. 36a.

The panel extended its deferential standard to the means by which UT used race in its admission process, holding that "the narrow tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment." App. 37a. The panel viewed this Court's more rigorous application of strict scrutiny to racial preferences in state employment and contracting decisions as inapposite to state university admissions decisions. App. 38a-40a.

Further deferring to UT, the panel held that UT's decision to "reintroduce race as a factor in admissions was made in good faith" notwithstanding UT's reliance on racial demographics, rather than educational dynamics, "to determine whether UT had sufficient minority representation." App. 47a. In the panel's view, UT's "attention to the community it serves [is] consonant

with the educational goals outlined in *Grutter* and [does] not support a finding that the University was engaged in improper racial balancing during our time frame of review." App. 48a. Per the panel: "Although a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account." App. 51a.

The panel further deferred to UT's conclusion that it was not enrolling a critical mass of minorities when it reintroduced race into admissions in 2004. App. 66a-67a. The panel rejected, however, UT's argument that the state-mandated Top Ten Percent Law was "entirely irrelevant" to the legal analysis, holding that it could not "ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texas freshman." App. 55a. Thus, the panel focused on whether it was constitutional for UT to "overlay" its system of racial preferences on "the Top Ten Percent Law" given the law's "substantial effect on aggregate minority enrollment at the University." App. 62a.[10]

The panel held that Petitioner had not rebutted UT's "good faith conclusion" that the race-neutral system had not produced a critical mass of minority students because Hispanic enrollment remained "low … considering the vast increases in the Hispanic population of Texas." App. 65a.

10. Although Judge Higginbotham was highly critical of the Top Ten Percent Law, Judge King's special concurrence explained that "[n]o party challenged ... the validity or the wisdom of the Top Ten Percent Law," and she "decline[d] to join Judge Higginbotham's opinion insofar as it addresse[d] those subjects." App. 72a.

The panel also concluded that the race-neutral admissions program failed to produce "diverse classrooms" because, although it "may have contributed to an increase in overall minority enrollment, those minority students remain[ed] clustered in certain programs, severely limiting the beneficial effects of educational diversity." App. 86a. Thus, the panel held that UT "properly concluded that race-conscious admissions measures would help accomplish its goals" when added to its preexisting race-neutral system. App. 68a.

Finally, the panel rejected the argument that, under *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), UT's use of race was not justified because the race-neutral admissions program worked about as well as the race-affected admissions program given the "minimal effect" that using race had on minority enrollment levels and the disconnect between the use of race and the goal of increasing classroom diversity levels. App. 69a. The panel found that "*Parents Involved* does not support the cost-benefit analysis that Appellants seek to invoke" as the decision instead turned on the "'extreme approach'" used by the school districts in that case. *Id*. (quoting *Parents Involved*, 551 U.S. at 735). In the panel's view, *Parents Involved* "did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small." *Id*.

4. Judge Garza specially concurred at length. He characterized the panel opinion as "a faithful, if unfortunate, application of" what he considered *Grutter*'s erroneous "digression in the course of constitutional law." App. 72a. In particular, Judge Garza viewed *Grutter* as

"abandon[ing] [strict scrutiny] and substitut[ing] in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades." App. 109a. Judge Garza warned that the panel's "decision ratifies the University's reliance on race at the departmental and classroom levels, and will, in practice, allow for race-based preferences in seeming perpetuity." App. 87a. He could not "accept that the Fourteenth Amendment permits this level of granularity to justify dividing students along racial lines." *Id.*

Judge Garza also was troubled by the fact that UT's "use of race has had an infinitesimal impact on critical mass in the student body as a whole." App. 107a. He estimated the number of "underrepresented" minority students admitted on the basis of race and found that they could amount to no more than 1% of the freshman class in 2008. App. 105a. He therefore concluded that UT's use of race has been "completely ineffectual in accomplishing its claimed compelling interest." App. 106a. As a result, Judge Garza could not "find that the University of Texas's use of race is narrowly tailored where the University's highly suspect use of race provides no discernible educational impact." App. 108a. He concluded that, "[l]ike the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles." App. 114a.

5. The Fifth Circuit denied rehearing en banc by a vote of nine to seven. App. 173a. Five dissenters joined in an opinion by Chief Judge Jones. App. 174a. She lamented

that the panel "extend[ed] *Grutter* in three ways," and in so doing "abdicate[d] judicial review of a race-conscious admissions program for undergraduate [UT] students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States." *Id*. In her view, the panel's decision "in effect gives a green light to all public higher institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires." App. 175a.

Chief Judge Jones criticized the panel for deferring to UT both on the necessity of employing a race-based system to pursue diversity and whether UT's use of race was narrowly tailored. As she explained, "*Grutter* does not countenance 'deference' to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications." App. 178a. The dissent found that the "panel's 'serious, good-faith consideration' standard distorts narrow tailoring into a rote exercise in judicial deference" and that "*Grutter* nowhere countenances this radical dilution of the narrow tailoring standard." App. 180a.

The dissent also found that only "wholesale deference" to the University could result in a conclusion that the admissions plan is narrowly tailored because it led to the admission of "no more than a couple hundred out of more than six thousand new students." App. 180a-181a. "Contrary to the panel's exercise of deference, the Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment." App. 182a (citing *Parents Involved*,

551 U.S. at 734-35). Here, the "additional diversity contribution of the University's race-conscious admissions program is tiny, and far from 'indispensible.'" *Id*. Chief Judge Jones thus rejected the panel's decision "to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." *Id*.

Finally, the dissent rejected classroom diversity as a constitutional justification for racial preferences. App. 182a-184a. "The panel opinion opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be 'underrepresented.' It offers no stopping point for racial preferences despite the logical absurdity of touting 'diversity' as relevant to every subject taught" at UT and it "offers no ground for serious judicial review of a terminus of the racial preference policy." App. 183a (citation omitted). Chief Judge Jones concluded that the classroom-diversity rationale is "without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs." App. 184a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Fifth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c).

I. The Constitutional Issues In This Case Are Critically Important.

The Fifth Circuit's wholesale deference to UT's "good faith" diversity judgments shifts responsibility for ensuring equal protection from the courts to university administrators. But university administrators should have no claim to an exemption from judicial oversight when individual rights are at stake. "Because even University administrators can lose sight of the constitutional forest for the academic trees, it is the duty of the courts to scrutinize closely their 'benign' use of race in admissions." App. 176a (Jones, C.J.). Thus, "when governmental decisions 'touch upon an individual's race or ethnic background, [s]he is entitled to a judicial determination that the burden[s] he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'" *Grutter*, 539 U.S. at 323 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)); *id.* at 388 (Kennedy, J., dissenting) ("Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.").

Whether racial preference has arisen in the context of university admissions, public employment, or public contracting, this Court has not retreated from its duty to ensure that government officials honor constitutional guarantees. *See Bakke*, 438 U.S. at 289-90, 313; *Wygant*

v. Jackson Bd. of Educ., 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand*, 515 U.S. at 229-30; *Grutter*, 539 U.S. at 353; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Parents Involved*, 551 U.S. at 790. That noble tradition underlines the importance of the issues that so deeply divided the Fifth Circuit in this case.

1. The Fifth Circuit expressly substituted a good faith process-oriented review standard for the strict scrutiny constitutionally required when racial preferences foist unequal treatment on non-preferred applicants. App. 36a. Whether or not UT acted in "good faith," it should bear the burden of defining a compelling state diversity interest and proving that its means of pursuing that interest were narrowly tailored. As Chief Judge Jones explained, allowing the Fifth Circuit's departure from that standard would result in the evisceration of judicial review for every public university in Texas, Louisiana, and Mississippi (and likely beyond given the prominence of this case). App. 184a.

2. *Grutter* recognized a compelling state interest in pursuing racial diversity in admissions for educational benefit. The panel stretched that interest to include pursuit of general community interests unrelated to educational quality. No decision of this Court has ever suggested that a state university has a compelling interest in using race to further general welfare. By recognizing that interest, the Fifth Circuit went far outside this Court's nuanced delineation of the permissible goal of student body diversity in *Grutter*. Validating a compelling state interest in aligning racial demographics and the UT student population could affect admissions in public universities throughout the country. UT's amici

themselves have emphasized that the Fifth Circuit's decision is an "important precedent" that will "guid[e] those institutions that choose to pursue [diversity]." Brief Amicus Curiae of American Council of Education, et al., *Fisher v. Univ. of Texas at Austin*, No. 09-50822 (5th Cir. filed Mar. 15, 2010), at 32.[11]

3. UT's reliance on non-academic, societal interests to justify its reintroduction of race into the undergraduate admissions process is particularly troublesome given the Top Ten Percent Law's demonstrated success in increasing undergraduate minority enrollment. That law is the primary means by which Texas high school students are admitted to UT and its impact has been impressive. Since 2004, African-American and Hispanic students have accounted for over 25% of UT's Top Ten admits, and the number of minority freshmen, including Asian-American students, has been over 40% and increasing during this time. UT recently announced that it is now a majority-minority university: "[n]early 52% of the incoming freshmen were African American, Asian American, Hispanic, mixed race, or international students."[12]

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11. The importance of this issue goes beyond public education. *Grutter*'s diversity rationale has been exported into other contexts, most notably into the public contracting and public employment sectors. *See, e.g.*, *Petit v. City of Chi.*, 352 F.3d 1111, 1115 (7th Cir. 2003) ("[A]s did [UMLS], the Chicago Police Department had a compelling interest in diversity ... to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.").

12. Dr. Gregory J. Vincent, Vice President for Diversity and Community Engagement, *Incoming freshman class is majority minority at UT*, The Austin Times (Jan. 19, 2011), *available at* http://theaustintimes.com/2011/01/incoming-freshmen-class-is-majority-minority-at-ut/ (last visited Sept. 15, 2011).

Not surprisingly, UT has trumpeted its racial diversity in marketing materials and in accepting accolades for building a campus environment that allows minority students to flourish.[13] Nevertheless, the panel accepted UT's "good faith" contention that the Top Ten Law and race-neutral PAI system did not produce a critical mass of minority students without first requiring UT to demonstrate a "'strong basis in evidence'" that its race-neutral regime was insufficient. App. 38a (quoting *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009)) (other citations omitted). Whether a public university can layer racial preferences over a non-racial admissions plan that ensures very substantial levels of minority enrollment is a question which itself warrants review by this Court.

4. The panel's acceptance of "classroom diversity" as a constitutional justification for using race trips an additional Constitutional alarm. Here too, the panel deferred to a novel state interest that no Court had previously recognized, let alone deemed compelling. As Judge Garza noted, treating "classroom diversity" as a compelling interest would permit virtually unlimited racial admissions gerrymandering.

5. Whatever measure of academic deference applies in reviewing a university's diversity goal, the university should still bear the burden of demonstrating that its use of race in admissions is narrowly tailored to meet that end. The panel, however, exempted UT from this obligation, merely requiring UT to show that its use of

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13. *The University of Texas at Austin ranked fifth-best producer of degrees for minority undergraduates* (July 15, 2005), *available at* http://www.utexas.edu/news/2005/07/12/rankings (last visited Sept. 15, 2011).

race was integrated into a holistic admissions program and was not based on quotas or fixed point additions. The panel stated flatly "that a *Grutter*-style admissions system standing alone" is *always* constitutional irrespective of the context in which the decision to employ race is made. App. 62a. As Chief Judge Jones explained, "the panel disturbingly implies that only procedural, not substantive, consideration of a university's race-conscious admissions program is necessary." App. 180a.

In turning its back on narrow tailoring, the panel ignored the negligible increase in minority enrollment and the absence of any impact on classroom diversity arising from UT's pervasive use of race in admissions and placement. Whether *Grutter* requires deference to universities in defining a compelling government interest and then further limits narrow tailoring review to "procedural" review of the admissions plan, is a question that demands a national answer. If the panel was correct, equal-protection scrutiny of race-based admissions plans is rational-basis review by another name. If not, the panel has misread *Grutter* to create a special equal protection doctrine for universities that has no constitutional foundation.

II. Review Is Required Because The Fifth Circuit's Analysis Conflicts With This Court's Equal Protection Decisions.

A. The Court Should Correct The Fifth Circuit's Unwarranted Deference To UT.

As the Fifth Circuit's decision demonstrates, claiming to apply strict scrutiny may be very different from actually applying it. The Fifth Circuit effectively abandoned

strict scrutiny by holding that "due deference" validated UT's conclusion that racial diversity is "'essential to its educational mission,'" App. 34a (quoting *Grutter*, 539 U.S. at 328), as well as UT's determinations that: (1) the levels of minority enrollment arising from UT's pre-existing race-neutral admission program were insufficient to meet its legitimate diversity goals and (2) its use of racial preferences was narrowly-tailored to pursue that interest, App. 178a. Deference was central to the panel's analysis.

Neither *Grutter* nor any other decision condones such unlimited deference. In an unbroken line of decisions, this Court has held that governmental racial classifications demand "the most exacting judicial examination," a "rule [that] obtains with equal force regardless of the race of those burdened or benefited by a particular classification." *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citations and quotations omitted). As this Court has explained, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" and by guaranteeing "that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493. "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." *Adarand*, 515 U.S. at 226 (quotation omitted); *see also Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

Thus, for a racial classification to survive strict scrutiny, the state must first demonstrate that it is pursuing a "compelling," not merely legitimate, government interest. *See Adarand*, 515 U.S. at 227 ("[G]overnment may treat people differently because of their race only for the most compelling reasons."). Moreover, not only must the interest be constitutional, but the use of racial preference must be "necessary to further" it for that state's asserted interest to be deemed compelling. *Id.* at 237. Otherwise, "the mere recitation of a benign or compensatory purpose" would become "an automatic shield which protects against any inquiry" into the constitutionality of government action. *Croson*, 488 U.S. at 490, 495 (citations and quotations omitted).

Second, a compelling use of race must be narrowly tailored. *Grutter*, 539 U.S. at 333-43. "[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands." *Id.* at 342; *see also id.* at 333 ("Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still constrained in how it may pursue that end.") (citation and quotations omitted). Narrow tailoring demands that the use of race have more than a "minimal impact" on the compelling interest the government is trying to further, *Parents Involved*, 551 U.S. at 734, and that it not be over-inclusive, under-inclusive, or unduly extended, *see Croson*, 488 U.S. at 506; *Grutter*, 539 U.S. at 342.

Contrary to the panel's reading, *Grutter* clearly adhered to this line of decisions. To be sure, *Grutter* affords a measure of deference in defining a university's

educational interest in diversity. But *Grutter* excluded racial balancing from that deference. 539 U.S. at 330. And *Grutter* counsels no deference on whether racial preference is necessary to further a diversity goal or on the means by which diversity is pursued. *Id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer"). Indeed, this Court could not have been clearer that its "scrutiny of the interest asserted by the [Michigan] Law School [was] no less strict for taking into account complex education judgments in an area that lies primarily within the expertise of the university." *Id.* As Chief Judge Jones explained, UT is entitled to deference on its "decision that it has a compelling interest in achieving racial and other student diversity. But that is about as far as deference should go." App. 178a.

Adherence to this Court's precedent requires UT to demonstrate that the minority admission levels it is pursuing are necessary to satisfy an educational interest in racial diversity. That showing must rest on a strong basis in evidence. *See Croson*, 488 U.S. at 493; *Wygant*, 476 U.S. at 277. "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are … in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson,* 488 U.S. at 493. The panel's reliance on UT's "good faith" as a substitute for a strong basis in evidence has no support in this Court's decisions.

The panel contended that *Croson* and *Wygant* have "little purchase" in this case because they are employment-related cases and because they involved explicit quotas. App. 40a-42a. But *Croson* and *Wygant* cannot be so easily

distinguished. This Court has expressly relied on these and other employment-related rulings in articulating the mode of analysis applicable in the educational setting. *See, e.g.*, *Grutter*, 539 U.S. at 326-34; *Parents Involved*, 551 U.S. at 729-32; *Gratz*, 539 U.S. at 270. And while the particular attributes of any race-based program may impact the inquiry into narrow tailoring, *Grutter*, 539 U.S. at 336-37, they do not bear on the antecedent question whether it was "necessary" to invoke racial preferences in the first place. As Chief Judge Jones explained, the panel simply "fail[ed] to apply the avowed continuity in principle of the Court's decisions." App. 180a.

Indeed, under *Grutter*, the "serious, good faith consideration" standard applies only to how race-neutral alternatives should be considered in the narrow-tailoring component of strict scrutiny. *See Grutter* 539 U.S. at 339 ("Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives."). And even then, "good faith" is only an acknowledgement that the Court will not force a university to try a race-neutral approach that it has reasonably concluded to be unworkable. The *Grutter* Court's reliance on "good faith" "is not a new standard at all, but rather a way to express the classic requirement that narrow tailoring be more than a rote exercise in dismissing race-neutral alternatives." App. 180a (Jones, C.J.).[14] Universalizing the "good faith"

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14. According to the panel, the invocation of the "'serious, good-faith consideration' standard, rather than the strong-basis-in-evidence standard," in *Parents Involved* shows that the latter is inapplicable in school cases. App. 179a. But nothing in the opinion suggests that the Court was choosing between the two. Rather, the Court deployed the "good faith" concept to demonstrate that the school assignment plans under review were not narrowly tailored

standard improperly expands the deference afforded UT under *Grutter*.

Worse still, the panel "distorts narrow tailoring into a rote exercise in judicial deference." App. 180a (Jones, C.J.). The panel entirely departed constitutional bounds when it required Petitioner to rebut UT's claim that its use of race was in "good faith." App. 36a. If anything is clear, an individual suffering discrimination should not shoulder the heavy burden of proving that the government's use of race is *not* narrowly tailored: "[T]he government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests." *Johnson v. California*, 543 U.S. 499, 505 (2005) (quotation omitted). There is no authority supporting deference to UT's subjective judgment that its race-based admissions program is narrowly tailored. "*Grutter* nowhere countenances this radical dilution of the narrow tailoring standard." App. 180a (Jones, C.J.).

In fact, once deference applies to narrow tailoring, strict scrutiny is transformed into "total deference to University administrators," App. 178a (Jones, C.J.), so long as they have articulated a rational basis for the use of race. Under the Equal Protection Clause, the rational-basis standard "is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental

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for, among other reasons, giving "little or no consideration" to nonracial alternatives before employing racial preferences. *Parents Involved*, 551 U.S. at 735. The compelling-interest prong simply was not at issue.

decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (citations omitted). That test is essentially indistinguishable from the one the panel used to uphold UT's admissions plan.

This Court has never applied the highly deferential rational-basis standard to judicial review of racial classifications. Rather, an animating principle of its equal-protection decisions is that "any 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 also Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring) (same). As shown below, UT's race-based admissions program cannot survive this scrutiny.

B. This Court Should Correct The Fifth Circuit's Abandonment Of Strict Scrutiny.

UT's use of race in admissions cannot survive strict scrutiny under this Court's decisions. First, UT's reliance on Texas's racial demographics to establish a diversity goal that justified the reintroduction of racial preferences is blatant racial balancing. Second, classroom diversity is neither a compelling interest in the abstract nor supported by evidence that it is necessary for academic reasons. In any event, UT's admissions plan is not tailored to achieve classroom diversity. Third, UT did not (nor could it) present evidence that it was necessary to supplement its pre-existing race-neutral admissions plan to achieve the compelling interest in racial diversity

deemed constitutional in *Grutter*. Fourth, the negligible gains in minority enrollment that have resulted from UT's pervasive use of race in its admissions process since 2004 confirm the absence of narrow tailoring.

1. UT unconstitutionally relied on "differences between the racial and ethnic makeup of the University's undergraduate population and the state's population" to justify its reintroduction of racial preferences. App. 23a. *Grutter* defined the "compelling state interest that can justify the use of race in university admissions" in terms of "the educational benefits that [student body] diversity is designed to produce." 539 U.S. at 325, 330. Diversity so defined produces educational benefit to all students through the exchange of views reflecting differing racial perspectives. *Id*. at 319. *Grutter* does not support a concept of diversity that relies on broader social goals to justify pursuing a level of minority enrollment that mirrors racial demographics in the general population. Were it otherwise, university administrators would be accorded latitude that this Court has consistently denied to other state officials to remedy perceived societal racial imbalances. *See Croson*, 488 U.S. at 485, 505; *Wygant*, 476 U.S. at 276; *Adarand*, 515 U.S. at 220.

UT's attempt to replicate the racial demographics of Texas high schools amounts to "outright racial-balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 330; *see also Bakke*, 438 U.S. at 307 (Powell, J.). UT does not seek racial diversity to enhance the educational dialogue by keeping minority students from feeling "isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. In fact, when UT labeled Hispanics, but not Asian-Americans "underrepresented" even though "the gross number of Hispanic students attending UT

exceeds the gross number of Asian-American students attending UT," App. 156a, it conceded that the level of Asian-American minority representation suffices for educational purposes, and thereby fatally undermined any argument that its level of Hispanic enrollment is somehow educationally insufficient. *Grutter*, 539 U.S. at 343; *see also Parents Involved*, 551 U.S. at 726.[15]

The panel attempted to salvage UT's reliance on a demographic goal by suggesting that it merely represented "measured attention to the community [UT] serves" in order to "send[] a message" to that community "that people of all stripes can succeed at UT" and to sustain "an infrastructure of leaders in an increasingly pluralistic society." App. 48a, 50a, 51a. This plainly is using racial preference to advance the welfare of the society in which the university resides. The Court has consistently rejected the need to remedy societal racial imbalances as a compelling government interest. *See Croson*, 488 U.S. at 499-50; *Wygant*, 476 U.S. at 276; *Bakke*, 438 U.S. at 288-89 (Powell, J.).

2. UT's reliance on classroom diversity as a benchmark for critical mass also finds no support in this Court's decisions. The proper base for measuring "critical mass" is the "student body," not the classroom. *Grutter*, 539 U.S. at 318, 325, 328, 329, 343. As noted above, this Court has

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15. UT's disparate treatment of Hispanics and Asian-Americans also illustrates that UT's use of race is over-inclusive. *See Croson*, 488 U.S. at 506. If Asian-Americans are "over-represented" in the freshman class, App. 155a, then Hispanics, who make up a larger portion of UT's incoming freshman classes, are as well. Employing race in admissions decisions to the benefit of Hispanic applicants and the detriment of Asian-Americans under these circumstances is not narrowly tailored.

found that an educational benefit of student-body diversity is enabling underrepresented minorities "to participate in the classroom and not feel isolated." *Id.* at 318. But identifying increased classroom participation as one of several benefits of overall student-body diversity does not endorse classroom diversity as a legal benchmark for critical mass. *Grutter* recognized that the overall comfort of being in a racially diverse campus environment should encourage minority students to participate in classroom discussions, *id.* at 318-19, not that every classroom must have a minimum number of minority students.

Even if classroom diversity were a compelling interest, and it is not, UT has no plan to achieve it. UT has set the bar for classroom diversity so high that it considers data showing that 63% of classes with 10 to 24 students contained 2 or more Hispanic students insufficient evidence of critical mass in the classroom. App. 22a.[16] To pursue classroom diversity of the levels it seeks, UT would need to take one of three steps: (1) institute a fixed curriculum to ensure that each classroom mirrored the racial makeup of the overall class; (2) require some students to enroll (or prevent others from enrolling) in specific schools or majors; or (3) make race so dominant in admissions decisions that a flood of minority students would solve the problem. UT has not expressed any interest in the first option and the other two options are

16. Further, UT's classroom diversity study is irrevocably flawed and based on cherry-picked statistics. For example, UT considers a classroom of five students sufficiently diverse only if it includes at least two African-American, two Hispanic, and two Asian-American students. It is, therefore, impossible for a five-student class (and practically impossible for many larger classes) to ever satisfy UT's standard of classroom diversity.

clearly unconstitutional. Thus, no "means" available to UT can be tailored to the "end" of classroom diversity.

UT's pursuit of classroom diversity also lacks a meaningful termination point. "[R]eliance on race at the departmental and classroom levels ... will, in practice, allow for race-based preferences in seeming perpetuity." App. 87a (Garza, J.). As Chief Judge Jones queried, "Will the University accept this 'goal' as carte blanche to add minorities until a 'critical mass' chooses nuclear physics as a major?" App. 183a. "If this is so, a university's asserted interest in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom." App. 87a. (Garza, J.).

3. Stripped of its two unconstitutional ends (racial demographics and classroom diversity), UT has failed to establish under any legitimate standard, let alone a "strong basis in evidence," *Wygant*, 476 U.S. at 277, that its use of race in admissions is "necessary" to enroll the "critical mass" of minority students that the educational benefit of diversity justifies, *Grutter*, 539 U.S. at 327. Indeed, UT has not even attempted to articulate any educational concept of "critical mass." Largely because of the Top Ten Percent Law, UT was one of the most diverse public universities in the nation prior to its 2004 reintroduction of race into admissions.[17] In 2004, UT's freshman class

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17. *See, e.g.*, *The University of Texas at Austin ranked fifth-best producer of degrees for minority undergraduates* (July 15, 2005), *available at* http://www.utexas.edu/news/2005/07/12/rankings (last visited Sept. 15, 2011).

was 21.4% African-American and Hispanic, and 17.9% Asian-American. App. 62a. UT was not remotely similar to UMLS, where minority enrollment languished at about 4% before consideration of race in admissions decisions. *Grutter*, 539 U.S. at 320.

Given the diversity achieved by the Top Ten Percent Law and its own extensive outreach efforts, UT could not credibly claim that it reintroduced racial preference because of a failure to enroll a student body in which "underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 319. UT's use of race was by no means "necessary" to achieve this "critical mass." *Grutter*, 539 U.S. at 327. Neither *Grutter* nor any other decision authorizes "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.).

4. Moreover, the "minimal effect" of UT's admissions plan is antithetical to narrow tailoring. *Parents Involved*, 551 U.S. at 733. As Judge Garza explained, there is no way to know precisely "how many of these students would not have been admitted but-for the use of race as a plus factor." App. 104a. But even if all were admitted solely because of their race, those African-American and Hispanic "students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman class." *Id.* In other words, UT "was able to obtain approximately 96% of the African-American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means." App. 107a. And unlike at UMLS, the success of a non-racial approach is not a theoretical matter—it is manifest in the record.

Accordingly, the current race-based "plan exacts a cost disproportionate to its benefit and is not narrowly tailored." App. 105a. As this Court has explained, the limited results of UT's racial preferences shows that race-neutral "means would be effective" and thus "casts doubt on the necessity of using racial classifications." *Parents Involved*, 551 U.S. at 733-34; *see also id.* at 790 (Kennedy, J., concurring) ("[T]he small number of assignments affected suggests that the schools could have achieved their stated ends through different means."). That is precisely the case here. UT has subjected tens of thousands of applicants to "disparate treatment based solely upon the color of their skin," *id.*, at 734, even though it "has had an infinitesimal impact on critical mass in the student body as a whole," App. 107a (Garza, J.), and the Top Ten Percent Law alone produces a similar level of minority enrollment. The Fifth Circuit's acceptance of this use of race cannot be left unreviewed.

III. The Court Should Grant Review To Clarify Or Reconsider *Grutter* To The Extent It Can Be Read To Justify UT's Use Of Race In Admissions.

For all the reasons identified above, the decision below conflicts with a long line of this Court's precedent, including *Grutter*. If the panel's reading of *Grutter* is correct, however, *Grutter* should be clarified or reconsidered to restore the integrity of the Fourteenth Amendment's guarantee of equal protection. *See, e.g.*, *Adarand*, 515 U.S. at 231-35.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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