No. 11-345

In the Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Petitioner asked the Court to decide the following question:

> "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."

Pet. i.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION

After considering largely the same objections raised by petitioner and her amici here, this Court strongly embraced Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and refused to prohibit the consideration of race as a factor in admissions at the Nation's universities and graduate schools. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *see id.* at 387 (Kennedy, J., dissenting). And although the Court has made clear that any consideration of race in this context must be limited, it has been understood for decades that "a university admissions program may take account of race as one, non-predominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary." *Id.* at 387 (Kennedy, J., dissenting) (citing *Bakke*, 438 U.S. at 289-91, 315-18 (Powell, J.)); *see id.* at 322-23. The University of Texas at Austin (UT)'s highly individualized consideration of race for applicants not admitted under the State's top 10% law satisfies that demand, and meets strict scrutiny under any conception of that test not designed simply to bar the consideration of race altogether.

That conclusion follows *a fortiori* from existing precedent. UT's admissions plan was modeled on the type of plan upheld in *Grutter* and commended by Justice Powell in *Bakke*. Moreover, UT's plan lacks the features criticized in *Grutter* by Justice Kennedy—who agreed with the majority that *Bakke* is the "correct rule." *Id.* at 387 (dissenting). Justice Kennedy concluded that Michigan Law School's admissions plan used race "to achieve numerical goals indistinguishable from quotas." *Id.* at 389. Here, it is

undisputed that UT has not set any "target" or "goal" for minority admissions. JA 131a. Justice Kennedy stressed that Michigan's "admissions officers consulted … daily reports which indicated the composition of the incoming class along racial lines." *Grutter*, 539 U.S. at 391 (dissenting). Here, it is undeniable that no such monitoring occurs. JA 398a. And Justice Kennedy believed that race was "a predominant factor" under Michigan's plan. *Grutter*, 539 U.S. at 393 (dissenting). Here, petitioner argues (at 20) that UT's consideration of race is too "minimal" to be constitutional. That paradoxical contention not only overlooks the indisputably meaningful impact that UT's plan has on diversity, *infra* at 36-38, it turns on its head Justice Powell's conception of the appropriately nuanced and modest consideration of race in this special context.

Because petitioner cannot dispute that UT's consideration of race is both highly individualized and modest, she is forced to take positions directly at odds with the record and existing precedent. Her headline claim that UT is engaged in "racial balancing" (Pet. Br. 6-7, 19, 27-28, 45-46) is refuted by her own concession that UT has *not* set any "target" for minority admissions. JA 131a. Her argument that the State's top 10% law bars UT from considering race in its holistic review of applicants not eligible under that law is foreclosed by *Grutter*'s holding that percentage plans are not a complete, workable alternative to the individualized consideration of race in full-file review. 539 U.S. at 340. And her argument that, in 2004, UT had already achieved all the diversity that the Constitution allowed is based on "a limited notion of diversity" (*Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007)) rejected by

this Court—one that crudely lumps together distinct racial groups and ignores the importance of diversity among individuals *within* racial groups.

In the end, petitioner really is just asking this Court to move the goal posts on higher education in America—and overrule its precedent going back 35 years to *Bakke*. Pet. Br. 53-57. *Stare decisis* alone counsels decisively against doing so. Petitioner has provided no persuasive justification for the Court to reexamine, much less overrule, its precedent, just nine years after this Court decided *Grutter* and eliminated any doubt about the controlling force of Justice Powell's opinion in *Bakke*. And overruling *Grutter* and *Bakke* (or effectively gutting them by adopting petitioner's conception of strict scrutiny) would jeopardize the Nation's paramount interest in educating its future leaders in an environment that best prepares them for the society and workforce they will encounter. Moreover, the question that petitioner herself asked this Court to decide is the constitutionality of UT's policy under *existing* precedent, including *Grutter*. *See* Pet. i; Pet. Br. i. Because the court of appeals correctly answered that question, the judgment below should be affirmed.

STATEMENT OF THE CASE

A. UT And Its Mission

UT was founded in 1883 pursuant to a constitutional mandate to create "a University of the first class." Tex. Const. art. VII, § 10. For nearly 130 years, UT has served as the flagship public university for Texas. Not all of that history has been noble. During the first 70-plus years of its existence, UT was racially segregated by law. The first African-

American was not admitted until 1950, following the Court's landmark decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), holding that Heman Sweatt could not be excluded from the UT law school on account of his race. The vestiges of *de jure* segregation lasted for decades thereafter. UT is painfully aware of that history, and the lingering perception that "[UT] is largely closed to nonwhite applicants and does not provide a welcoming supportive environment to underrepresented minority students." SJA 14a.[1]

Over time, UT has grown into one of the largest—and finest—state universities in the United States. UT now occupies a 350-acre campus in downtown Austin—the State capital—with 17 different colleges and schools, more than 50,000 students, and 24,000 faculty and staff. In 2009, UT had the fifth largest enrollment of any university in the country. *Campuses with the Largest Enrollments, Fall 2009*, Chronicle of Higher Education, Aug. 26, 2011, at 33. UT is also proud to have a robust Reserve Officers Training Corps (ROTC) program, which has trained officers of the Nation's armed forces for more than 60 years.

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[1] Until 1969, the Texas Constitution required "separate schools … for the white and colored children." Tex. Const. art. VII, § 7 (repealed 1969). For decades after *Sweatt* and *Brown v. Board of Education*, 347 U.S. 483 (1954), discrimination persisted at Texas's public schools—including at UT—against African-Americans as well as Hispanics. *See Texas v. Hopwood*, 518 U.S. 1033 (1996) (No. 95-1773), U.S. Br. 3; *see Hopwood v. Texas*, 861 F. Supp. 551, 555-57, 572-73 (W.D. Tex. 1994) (discussing "Texas' long history of discrimination against blacks and Mexican Americans in public education," including at UT), *rev'd on other grounds and remanded by* 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). The breadth and effects of such discrimination are discussed by the amici Sweatt family members.

UT's mission—as embodied in the "Compact with Texans" required by state law—is to provide "superior and comprehensive educational opportunities" and to "contribute to the advancement of society." Its core values include: "*Leadership*"; "*Individual Opportunity*—Many options, diverse people and ideas, one University"; and "*Responsibility*—To serve as a catalyst for positive change in Texas and beyond."[2] A critical component of that mission is the responsibility to train the future leaders of Texas and, indeed, the Nation. JA 203a, 357a, 365a, 366a, 428a; SJA 23a. UT's graduates include four-star generals, top leaders in federal and state government, Fortune 500 CEOs, astronauts, Pulitzer Prize winning authors, renowned physicians, and Heisman Trophy winners. Just as important, UT's graduates go on to become doctors, engineers, teachers, business persons, lawyers, and community leaders across Texas and the country.

Consistent with its mission, UT is a highly selective institution. JA 364a. In 2008, for example, UT received some 30,000 applications—the vast majority from Texans—for 6,715 places in the entering class. *Id.* For UT, as for any comparable school, the process of selecting its student body represents a critical means of advancing its mission. Each year, UT strives to assemble a class that is exceptionally talented and well-prepared for UT's rigorous academic environment. It is also a "'major priority'" that each class be well-rounded and diverse. JA 309a, 364a-65a, 428a, 431a. UT has a "broad vision of diversity," which looks to a wide variety of individual characteristics—including "an applicant's culture; language; family;

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[2] UT, *Compact with Texans*, http://www.utexas.edu/about-ut/compact-with-texans (last visited Aug. 6, 2012).

educational, geographic, and socioeconomic background; work, volunteer, or internship experiences; leadership experiences"; special artistic or other talents, as well as race and ethnicity. JA 364a-365a, 374a. UT has set—and seeks to meet—"a 'high standard for diversity.'" JA 365a.

A diverse student body is "indispensable" (JA 309a) to UT's mission to educate and train the future leaders of Texas and America. JA 203a, 357a, 365a, 366a, 428a; SJA 23a. UT has learned through experience that diversity has invaluable educational benefits. These benefits include, but are not limited to, promoting cross-racial understanding; breaking down racial, ethnic, and geographic stereotypes; and creating an environment where students do not feel like spokespersons for their race. JA 365a-66a, 428a-29a. Diversity improves academic outcomes and better prepares students to become the next generation of leaders in an increasingly diverse society. JA 366a.

B. Efforts To Promote Diversity At UT

Appreciating the vital importance of a diverse student body to its educational mission, both UT and the State of Texas have taken important steps over the past decades to promote diversity at UT.

a. Before 1996, UT selected students using an Academic Index (AI) and race. The AI is based on an applicant's high school class rank, standardized test scores, and high school curriculum. App. 15a. Separate admissions committees reviewed minority and nonminority applicants, and "race was considered directly and was often a controlling factor in admission." App. 16a & n.46. The Fall 1996 freshman class—the last class selected with this methodology—included 266 African-American students (4.1% of the

overall class) and 932 Hispanic students (14.5%). JA 108a. That represented some progress in addressing racial isolation, but it by no means indicated that UT had achieved the full educational benefits of diversity.

b. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit held unconstitutional the University of Texas School of Law's consideration of race in admissions. In response, UT revised its admissions policy and excluded the consideration of race. The new policy adopted a Personal Achievement Index (PAI) to be used with the AI, which included a "holistic review of an applicant's leadership qualities; extracurricular activities; awards/honors; work experience; service to school or community; and special circumstances." JA 112a. "[S]pecial circumstances" included factors such as the "socio-economic status of a family," "language spoken at home," and "socio-economic status of school attended" (but not an applicant's race). JA 112-13a.

UT also devoted substantial efforts to developing race-neutral initiatives that it hoped would increase enrollment of underrepresented minorities. For example, UT increased its annual recruitment budget and established three new regional admissions centers to increase UT's visibility and contact with prospective students, parents, and high school administrators in geographic markets with historically few UT students. JA 400a-01a. UT also created several scholarship programs aimed at recruiting highly qualified students of all races from lower socioeconomic backgrounds, and students who would be the first in their family to attend college. JA 399a-400a; *see* JA 274a-76a.

Despite these efforts, UT experienced an immediate and serious decline in enrollment among underrepresented minorities. Compared to 1995, for

example, African-American enrollment in 1997 had dropped almost 40% (from 309 to 190 entering students) and Hispanic enrollment had dropped by 5% (from 935 to 892 entering students). App. 19a.

c. The Texas Legislature responded to *Hopwood* by enacting the top 10% law (House Bill 588), which guarantees admission to UT to any graduate of a Texas high school who is ranked in the top 10% of his or her high school class, beginning with the 1998 admissions cycle. Tex. Educ. Code § 51.803; JA 368a-69a. An acknowledged purpose of the law was to increase minority admissions given the loss of race-conscious admissions. *See* App. 20a; JA 120a; House Research Organization Daily Floor Report: HB 588 at 4-5 (Apr. 15, 1997). The top 10% law helps minority admissions, but at significant cost to educational objectives.

The top 10% law "hurts academic selectivity" by basing the admissions decision solely on class rank, without regard to other standard markers of academic achievement and potential. App. 57a n.149. Basing the admissions decision on "just a single criteria" has also undermined UT's efforts to achieve diversity in the broad sense. JA 359a. And the racial diversity that the law does add is mostly a product of the fact that Texas public high schools remain highly segregated in regions of the State—*e.g.*, with overwhelmingly Hispanic student bodies in the Rio Grande Valley, and overwhelmingly African-American student bodies in urban areas such as Dallas and Houston. That limits the diversity that can be achieved *within* racial groups and creates "damaging incentives." App. 58a.

The portion of the class admitted pursuant to the top 10% law has ranged from roughly 60 to 80%. SJA 170a. To fill the remaining seats in its freshman class,

UT used the full-file review process developed after *Hopwood*—which considered numerous individual characteristics (but not race). The odds of admission for a qualified African-American or Hispanic applicant from the second decile of their high school class declined after the top 10% law took effect, whereas the odds for a similarly situated Caucasian applicant increased. App. 20a; *see* App. 59a.

C. UT's 2004 Proposal To Consider Race

In June 2003, this Court decided *Grutter v. Bollinger*, effectively overruling *Hopwood*. Like many schools, UT re-examined its admissions policies in light of *Grutter* and its educational mission. JA 395.[3]

a. In August 2003, the Board of Regents of The University of Texas System authorized UT to reconsider its admissions policies. SJA 1a. Over the next year, UT reviewed admissions data, surveyed students, and held discussions with administrators, faculty, constitutional law experts, and others on student body diversity at UT and the possibility of considering race in full-file review of applicants not eligible under the top 10% law. JA 431a. Officials focused on UT's "overall goal of having a student body that is meritorious and diverse in a variety of educationally relevant ways." *Id.*

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[3] Petitioner notes (at 5, 34) that UT's president stated on the day *Grutter* was issued that UT "will modify its admissions procedures to comply with [*Grutter*]." App. 356a. Of course, this statement was informed by many years of experience with the top 10% law. But the more fundamental point is that only the Board of Regents could authorize UT even to consider such a change, and UT did not propose to modify its policy until after it had completed a year-long inquiry. JA 395a-97a.

The picture that emerged was alarming. Even with the top 10% law and UT's race-neutral diversity initiatives, African-American and Hispanic enrollment at best remained stagnant compared to the pre-*Hopwood* period. JA 122a. In Fall 2002, only 3.4% of the freshman class was African-American and 14.3% was Hispanic, below 1996 levels. JA 127a; SJA 25a. The numbers were 4.5% and 16.9%, respectively, in 2004. JA 127a. And underrepresentation actually worsened during this period for Hispanics, given the explosive growth of Hispanics in the State. SJA 43a.

School officials also considered diversity in classrooms at UT as "one window" into the effectiveness of UT's efforts to foster a diverse campus environment. JA 266a. It found that nearly 90% of undergraduate classes of the most common size at UT—sections with 10-24 students—enrolled zero or one African-American student in 2002, and nearly 40% of those classes enrolled zero or one Hispanic student. Defs.' Summ. J. Reply Br. 7 n.2, ECF No. 102; SJA 140a. The numbers were scarcely better for classes enrolling 25-49 students—over 70% had zero or one African-American enrolled. *Id.* Classes of this size are not only predominant at UT; they are most likely to involve the kind of discussion or exchanges where the educational benefits of diversity are realized.

In addition, UT sought feedback from the students themselves. Interviews with students "on their impressions of diversity on campus," including "in the classroom," further confirmed that diversity was wanting at UT. App. 22a; JA 267-68a, 432a.

b. In June 2004, UT proposed to alter its admissions policy to allow for the consideration of race in the context of the holistic review already conducted

for students not admitted under the top 10% law. JA 397a; SJA 23a-32a (2004 Proposal). The 2004 Proposal embraced the diversity interest that this Court found compelling in *Grutter* in all its dimensions (SJA 1a-4a), and observed that "[a] comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." SJA 23a. "This type of academic environment," the Proposal explained, "is a goal of [UT] and admission decisions must take into account this goal." *Id.*

The 2004 Proposal concluded that UT "did not have a critical mass of minority students sufficient to provide an optimal educational experience in 1996," and that that had not changed after seven years of good-faith efforts to achieve racial diversity through facially race-neutral means such as holistic admissions (not considering race), the State's top 10% law, scholarships, and aggressive recruiting efforts. SJA 23a-24a. The 2004 Proposal explained that "[c]ritical mass" simply means "an adequate representation of minority students to assure educational benefits deriving from diversity," including an environment in which students "learn that there is not 'one' minority or majority view." SJA 25a; *see* JA 264a-66a.

The 2004 Proposal stressed that the consideration of race in the process of full-file review would be individualized, SJA 26a-29a; that an applicant's race would be only one of many factors considered during the process and would not be assigned any independent weight, SJA 29a; that "[n]o specific goal will be established in terms of the numbers of students with specific characteristics who are admitted," *id.*;

and called for periodic review of the need for race-conscious admissions, SJA 32a. In August 2004, the University of Texas System (as authorized by the Board of Regents) approved UT's proposal, and it took effect for the Fall 2005 entering class. JA 432a-33a.[4]

D. UT's Holistic Review Process

UT's applicant pool is divided into applicants who are eligible for automatic admission under the top 10% law, and applicants who are not. Although most admits fall into the former category, the admission of students not eligible for the top 10% law is a critical means of pursuing UT's educational mission and an important counterpart to the top 10% law. A Texas applicant may be ineligible for the top 10% law because she was in the bottom 90% of her class (like petitioner), or because her school does not rank students (as is true of some of the best private high schools in Texas).

After the files of the non-top-10% applicants are scored, they are plotted on a matrix corresponding to the school or major for which admission is sought, with the AI score on one axis and PAI score on the other. Each cell on the matrix contains all applicants with a particular AI/PAI combination. JA 392a. After considering the number of students in each cell and the available spaces for a particular major or school, admissions officers draw a stair-step line on the matrix, dividing the cells of applicants who will be admitted from those that will be denied. JA 386a-87a.

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[4] Consistent with the 2004 Proposal, UT has reviewed its admissions policy on an annual basis. App. 24a; JA 435a. UT has not finalized its five-year review (SJA 32a), however, because any conclusions that may be drawn from the available data must be based on a careful review of the decision in this case.

For each cell, admission is an all-or-nothing proposition: all the applicants within a cell are either admitted or denied. PAI scores are fixed long before this step in the process occurs, and nameless applicants clustered within each cell are not identified by race. So, as petitioner has acknowledged, admissions officers cannot—and do not—consider the racial demographics of the cell (or the race of any applicant within it) when they draw the stair-step line dividing cells. JA 387a-89a, 411a-12a; Summ. J. Hr'g Tr. 20, ECF No. 118 (petitioner's counsel: "[T]hey use a matrix where you don't know who's who. Because once they've made a score, you become a number. So they're not doing what Michigan was doing in *Grutter*.").

An applicant's PAI score is based on two essays and a Personal Achievement Score (PAS). JA 374a. Essays are reviewed by specially trained readers, and are scored on a race-blind basis from 1 to 6. JA 374a-76a. The PAS score ranges from 1 to 6 as well, and is based on holistic consideration of six equally-weighted factors: leadership potential, extracurricular activities, honors and awards, work experience, community service, and special circumstances. JA 379a. The "special circumstances" factor is broken down into seven attributes, including socioeconomic considerations, and—as of 2005—an applicant's race. JA 380a. Race is one of seven components of a single factor in the PAS score, which comprises one third of the PAI, which is one of two numerical values (PAI and AI) that places a student on the admissions grid, from which students are admitted race-blind in groups. In other words, race is "a factor of a factor of a factor of a factor" in UT's holistic review. App. 159a.

No automatic advantage or value is assigned to race or any other PAS factor. JA 379a-81a. Each applicant is considered as a whole person, and race is considered "in conjunction with an applicant's demonstrated sense of cultural awareness," not in isolation. JA 397a, 130a. "Race is contextual, just like every other part of the applicant's file," JA 169a, and "[t]he consideration of race helps [UT] examine the student in 'their totality,'" JA 129a. Adding race to the mix in whole-file review "increases the chance" that underrepresented minorities will be admitted. App. 434a. But because of the contextualized way in which race is considered, it is undisputed (JA 130a) that consideration of race may benefit *any* applicant (even non-minorities)—just as race ultimately "may have no impact whatsoever" for any given applicant (even an underrepresented minority). JA 381a, 397a-98a; *see* JA 207a-09a, 285a, 434a; App. 29a, 46a.[5]

Consistent with the holistic and modest way in which race is considered, it is impossible to tell whether an applicant's race was a tipping factor for any given admit. JA 294a. But it is undisputed that "race is a meaningful factor and can make the difference in the evaluation of a student's application." App. 163a n.14; *see* JA 130a. Moreover, although petitioner claims that the consideration of race in holistic admissions has had an "'infinitesimal'" (at 10) impact on diversity at UT, the record shows otherwise. Of the 728 African-Americans offered admission to the 2008 class, 146—or 20%—were admitted through full-

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[5] For that reason, petitioner's repeated claim (at 7, 28, 46) that Asian-Americans are "discriminat[ed] against" (at 55) by UT's admissions policy is incorrect, and contradicted even by her own proposed statement of facts (JA 128a-31a). *Infra* at 44-46.

file review. SJA 158a. That figure was 15% for Hispanic students admitted. *Id.; see infra* at 36-38.

Petitioner notes (at 9) that race is listed on the front page of the application. But to be clear, the only place where race is considered in the admissions process is in the calculation of the PAS score as described above. Race plays no role in the calculation of AI. And petitioner has conceded that race has "no influence" in scoring essays, or in deciding whether to admit or deny a cell. Summ. J. Hr'g Tr. 8, 20.

E. Petitioner's Application For Admission

Petitioner, a Texas resident, applied for admission to UT's Fall 2008 freshman class in Business Administration or Liberal Arts, with a combined SAT score of 1180 out of 1600 and a cumulative 3.59 GPA. JA 40a-41a. Because petitioner was not in the top 10% of her high school class, her application was considered pursuant to the holistic review process described above. JA 40a. Petitioner scored an AI of 3.1, JA 415a, and received a PAI score of less than 6 (the actual score is contained in a sealed brief, ECF No. 52). The summary judgment record is uncontradicted that—due to the stiff competition in 2008 and petitioner's relatively low AI score—petitioner would not have been admitted to the Fall 2008 freshman class even if she had received "a 'perfect' PAI score of 6." JA 416a.

Petitioner also was denied admission to the summer program, which offered provisional admission to some applicants who were denied admission to the fall class, subject to completing certain academic requirements over the summer. JA 413a-14a. (UT discontinued this program in 2009.) Although one African-American and four Hispanic applicants with lower combined AI/PAI scores than petitioner's were offered admission to the

summer program, so were 42 Caucasian applicants with combined AI/PAI scores identical to or lower than petitioner's. In addition, 168 African-American and Hispanic applicants in this pool who had combined AI/PAI scores identical to or *higher* than petitioner's were *denied* admission to the summer program.[6]

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[6] These figures are drawn from UT's admissions data and are provided in response to petitioner's unsupported assertion (at 2) that her "academic credentials exceeded those of many admitted minority applicants." Petitioner presented a subset of this data (admitted minority students) to the district court as Plaintiffs' Exhibits 26 and 27 at the preliminary injunction hearing (the court later returned the exhibits). *See* W.D. Tex. Record Transmittal Letter (July 27, 2012), ECF No. 136. UT summarized additional data in a sealed letter brief after the hearing. ECF No. 52; JA 20a (discussing data and explaining that petitioner had not requested data regarding the applicants "who were *not* admitted to UT"). In denying a preliminary injunction, the district court stated (without citation) that 64 minority applicants with lower AI scores than petitioner were *admitted* to Liberal Arts. *Fisher v. Texas*, 556 F. Supp. 2d 603, 607 & n.2 (W.D. Tex. 2008). That statement is not binding at the merits stage. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Although the district court did not specify whether it was referring to admissions to the fall class or the summer program, that figure can only encompass admits to the summer program. As explained in the unrebutted summary judgment record, with her AI score, petitioner could not "have gained admission through the fall review process," even with a "perfect" PAI score. JA 415a-16a. Petitioner has submitted no contrary evidence (and UT is aware of none). That leaves the now-defunct summer program. The district court's statement that minority applicants with lower AI scores than petitioner were admitted does not establish that race was a factor in petitioner's denial from the summer program, because (as noted above) many more minority applicants (168) with identical or *higher* AI/PAI scores were *denied* admission to the summer program. It is thus hard to see how petitioner could establish any cognizable injury for her § 1983 damages claim—the only claim

UT did offer petitioner admission to the Coordinated Admissions Program, which allows Texas residents to gain admission to UT for their sophomore year by completing 30 credits at a participating UT System campus and maintaining a 3.2 GPA. JA 414a. Petitioner declined that offer and enrolled at Louisiana State University, from which she graduated in May.

F. Procedural History

Petitioner and another applicant—"no longer involved in this case," Pet. Br. ii—filed suit in the Western District of Texas against UT and various University officials under 42 U.S.C. § 1983, alleging, *inter alia*, that UT's 2008 full-file admissions procedures violate the Equal Protection Clause. JA 38a. They sued only on their own behalf (not on behalf of any class of applicants) and sought a declaratory judgment and injunctive relief barring UT's consideration of race and requiring UT to reconsider their own applications in a race-blind process. JA 39a. They also sought a "refund of [their] application fees and all associated expenses incurred … in connection with applying to UT." *Id.*; *see* App. 3a-4a.

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still alive in this case—or, for that matter, standing to maintain that claim. *See Texas v. Lesage*, 528 U.S. 18, 19, 21 (1999) (per curiam); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). (Petitioner's claims for injunctive relief dropped out of the case at least once she graduated from a different university in May 2012, making this issue pertinent now.) And that is just one apparent vehicle—if not jurisdictional—defect with this case. *See* Br. in Opp. 6-22; *see also* Adam D. Chandler, *How (Not) To Bring an Affirmative-Action Challenge*, 122 Yale L. J. Online (forthcoming Sept. 2012), *available at* http://ssrn.com/abstract_id=2122956 (discussing vehicle defects stemming from, among other things, the unusual manner in which this case was framed).

The district court denied petitioner's request for a preliminary injunction. The parties filed cross-motions for summary judgment and supporting statements of fact (JA 103a-51a, 363a-403a). Applying strict scrutiny (App. 139a), the court granted judgment to UT, holding that UT has a compelling interest in attaining a diverse student body and the educational benefits flowing from such diversity, and that UT's individualized and holistic review process is narrowly tailored to further that interest. App. 168-69a.

The Fifth Circuit affirmed. Like the district court, the court of appeals found that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*." App. 5a. And the court likewise took it as "a given" that UT's policy "is subject to strict scrutiny with its requirement of narrow tailoring." App. 35a. While acknowledging that *Bakke* and *Grutter* call for some deference to a university's "educational judgment," the court emphasized that "the scrutiny triggered by racial classification 'is no less strict for taking into account' the special circumstances of higher education." App. 34a, 36a. Applying strict scrutiny, the court upheld UT's admissions policy. App. 71a.

Judge Garza concurred. He recognized that the court's opinion was "faithful" to *Grutter*, but argued that *Grutter* was wrongly decided. App. 72a-73a.

SUMMARY OF ARGUMENT

UT's individualized consideration of race in holistic admissions did not subject petitioner to unequal treatment in violation of the Fourteenth Amendment.

I. Racial classifications are subject to strict scrutiny, including in the higher education context. But ever since Justice Powell's opinion in *Bakke*, this

Court has recognized that universities have a compelling interest in promoting student body diversity, and that a university may consider the race of applicants in an individualized and modest manner—such that race is just one of many characteristics that form the mosaic presented by an applicant's file.

UT's holistic admissions policy exemplifies the type of plan this Court has allowed: race is only one modest factor among many others weighed; it is considered only in an individualized and contextual way that "examine[s] the student in 'their totality,'" JA 129a; and admissions officers do not know an applicant's race when they decide which "cells" to admit in UT's process. At the same time, UT's policy *lacks* the features that Justice Kennedy found disqualifying in *Grutter*: it is undisputed that UT has not established any race-based target; race is not assigned any automatic value; and the racial or ethnic composition of admits is not monitored during the admissions cycle.

II. Petitioner's arguments that she was nevertheless subjected to unequal treatment in violation of the Fourteenth Amendment are refuted by both the record and existing precedent.

A. Petitioner's main argument is that UT's objective is not diversity, but outright "racial balancing." But the record establishes that UT has not set a "goal, target, or other quantitative objective" for minority admissions, as petitioner herself has admitted. JA 131a. UT considered demographics in determining whether minorities were *under-represented* at UT in the first place. But underrepresentation at a flagship state university like UT is naturally assessed by some attention to statewide numbers, and there is no constitutional

requirement that such a university must blind itself to obvious evidence that particular minority groups are systematically faring poorly in admissions. Moreover, the record establishes that UT does not use its admissions process to work backwards toward any demographic target—or, indeed, any target at all.

B. Petitioner also errs in arguing that the State's top 10% law categorically forecloses UT from taking race into account for applicants not subject to that law. In *Grutter*, this Court flatly rejected the contention that percentage plans are a complete, workable alternative to race-conscious holistic review. That makes perfect sense. Percentage plans not only bar consideration of important academic benchmarks beyond class rank, but prevent consideration of the many different factors—including race—that create a richly diverse student body, including diversity *within* different racial groups of individuals. Accepting petitioner's argument also would have the perverse effect of discouraging universities from experimenting with percentage plans—for fear that they would then forfeit the ability to consider race in holistic review.

C. Petitioner's counter-intuitive claim that UT's consideration of race is too *modest* to be constitutional cannot be sustained. The fact that race has only a modest and nuanced role in admissions decisions is not a constitutional problem—it is the hallmark of the type of plan this Court has held out as constitutional since *Bakke*. And in any event, the limited consideration of race in holistic review unquestionably has had a meaningful impact at UT. Petitioner completely overlooks the diversity *within* racial groups that UT's holistic plan fosters. And in 2008 alone, a full 20% of all

African-American admits and 15% of all Hispanic admits secured admission through holistic review.

D. Petitioner's effort to recast UT's broad interest in diversity also fails. The record overwhelmingly establishes that UT's objective was the educational benefits of a richly diverse student body—the very interest held compelling in *Bakke* and *Grutter*. The notion that, by 2004, UT had already achieved all the diversity it was allowed to seek not only paints a dim view of the student body diversity that this Court has recognized as vital to training the Nation's future leaders, but is refuted by the record in this case. Indeed, in 2003—despite years of aggressive race-neutral efforts—diversity remained at best stagnant at 1996 levels, despite a large increase in the Hispanic applicant pool. There was also stark racial isolation in classrooms—a critical environment where the educational benefits of diversity are realized, or lost.

E. Finally, petitioner's attack on the Fifth Circuit's opinion is misguided. The Fifth Circuit made clear that strict scrutiny applied—and in a manner that was "'no less strict for taking into account' the special circumstances of higher education." App. 36a. The Fifth Circuit also recognized that certain educational judgments fall within the zone of academic freedom long recognized "as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312. But respecting such judgments on subsidiary issues is not incompatible with strict scrutiny. And the Fifth Circuit's careful and extended analysis of petitioner's contentions as to both the compelling-interest and narrow-tailoring prongs belie her claim that the Fifth Circuit abdicated its responsibility to scrutinize UT's plan. In any event, this Court reviews judgments, not

statements in opinions. And UT's plan passes strict scrutiny on the record before this Court.

III. The Court should decline petitioner's far-reaching request to reopen and overrule *Bakke* and *Grutter*. That request is outside the scope of the question presented, which asks the Court to review UT's policy under *existing* precedent, including *Grutter*. In any event, petitioner has failed to identify any special justification for taking the extraordinary step of overruling *Grutter*, just nine years after this Court decided *Grutter* and unequivocally answered any doubt about the validity of Justice Powell's opinion in *Bakke*. Abruptly reversing course here would upset legitimate expectations in the rule of law—not to mention the profoundly important societal interests in ensuring that the future leaders of America are trained in a campus environment in which they are exposed to the full educational benefits of diversity.

ARGUMENT

It is undisputed that UT's consideration of race in its holistic admissions process triggers strict scrutiny, and that "[s]trict scrutiny requires that UT demonstrate both that its use of race in admissions decisions is 'necessary to further a compelling government interest' and that 'the means chosen to accomplish the government's asserted purpose' are 'specifically and narrowly framed to accomplish that purpose.'" Pet. Br. 18-19 (quoting *Grutter*, 539 U.S. at 327, 333); *see Bakke*, 438 U.S. at 290-91 (Powell, J.). But while that inquiry is undeniably rigorous, the fact that strict scrutiny applies to UT's policy does not mean that UT's policy is in fact unconstitutional.

This Court applies strict scrutiny "to "'smoke out" illegitimate uses of race by assuring that [the

government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" *Johnson v. California*, 543 U.S. 499, 506 (2005). But here UT was pursuing the broad interest in diversity that petitioner herself recognizes is compelling (JA 74a; *see* Part II.D, *infra*) and it is common ground (JA 131a) that UT has not established "a quota system," *Bakke*, 438 U.S. at 318 (Powell, J.). It also cannot be disputed that UT's admissions policy "treats each applicant as an individual in the admissions process" and considers race only in a modest, individualized, and nuanced way. *Id.*; *see* Part I, *infra*. Especially given those incontestable features of UT's plan, it is not surprising that UT's admissions policy satisfies strict scrutiny.

I. UT'S ADMISSIONS POLICY IS A MODEL OF THE TYPE OF INDIVIDUALIZED AND HOLISTIC PLAN THAT THIS COURT HAS APPROVED SINCE *BAKKE*

1. For 35 years, this Court has upheld the "competitive consideration of race and ethnic origin" in higher education admissions as one factor in a "properly devised admissions program" designed to further the compelling state interest in assembling a diverse student body—the kind of diversity that encompasses a "broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 320, 315; *Grutter*, 539 U.S. at 325 (quoting *Bakke*). As Justice Powell emphasized in *Bakke*, and this Court reaffirmed in *Grutter*, "nothing less than the "'nation's future depends upon leaders trained through wide exposure" to ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313 (Powell, J.)).

In *Bakke*, this Court invalidated an admissions policy adopted by the Medical School of the University of California at Davis that set aside 16 out of 100 places in the class exclusively for racial minorities. But the Court also reversed the California Supreme Court's injunction against "any consideration to race," 438 U.S. at 379, holding that the "competitive consideration of race and ethnic origin" in a "properly devised admissions program" would pass strict scrutiny. *Id.* at 320. Justice Powell offered the narrowest rationale for that holding. His controlling opinion approved Harvard College's race-conscious admissions policy, which Justice Powell appended to his opinion as an example of a "properly devised" and "constitutional" plan. *Id.*

Justice Powell explained that, under the Harvard plan, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317. Because such a policy "treats each applicant as an individual"—"without the factor of race being decisive"—one "who loses out on the last available seat" would know it was because her "combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant." *Id.* at 318, 316. Even though race might tip the balance, this individualized consideration ensured that each applicant was considered "fairly and competitively" and "would have no basis to complain of unequal treatment." *Id.* at 318.

Nine years ago, in *Grutter v. Bollinger*, this Court reaffirmed Justice Powell's landmark opinion and upheld Michigan Law School's race-conscious admissions policy. After recognizing that universities for decades "have modeled their own admissions

programs on Justice Powell's views on permissible race-conscious policies," the Court reaffirmed "Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." 539 U.S. at 323, 325. In addition, the Court held that the law school's policy was narrowly tailored because it subjected each applicant to an individualized review process, in which race was only a possible plus factor. *Id.* at 334.

Justice Kennedy, in dissent, agreed with the majority that Justice Powell's opinion in *Bakke* provided "the correct rule for resolving th[e] case." *Id.* at 387. But he concluded that race was used as "an automatic factor in most instances" under the law school's policy and that the law school had in fact established "numerical goals indistinguishable from quotas." *Id.* at 389. Justice Kennedy emphasized evidence that "admissions officers consulted … daily reports which indicated the composition of the incoming class along racial lines," and concluded that there was no "individual review save for race itself" at the end stage of the admissions process. *Id.* at 391-92.

2. UT's consideration of race in its holistic admissions process bears all of the hallmarks of the individualized—and constitutional—consideration of race that Justice Powell commended in his opinion in *Bakke* without the particular features that Justice Kennedy found impermissible in *Grutter*.

As explained, under UT's policy race is but one of many factors that may be considered, including geographic diversity, socioeconomic diversity, cultural diversity, and so on. JA 313a; *see* JA 310a. No numerical value is assigned to an applicant's race or any other factor considered in determining a PAS

score. And any applicant—of any race—can benefit from UT's contextualized consideration of race. *Supra* at 14. Race is just one factor that UT considers to "examine the student in 'their totality,' 'everything that they represent, everything that they've done, everything that they can possibly bring to the table.'" JA 129a. The consideration of race along with other factors "may benefit some students, may not benefit other students, but it's not based on their race, it's based on the entire context of their file." JA 209a. Race, that is, is not a predominant factor—it "is a factor of a factor of a factor of a factor." App. 159a.

UT's admissions process also ensures that race is considered only in an individualized and holistic fashion. Race is considered only in the full-file process of assigning a PAI score; at that stage, "'whole file' readers are not making admissions decisions …, but are simply assigning a PAI score." JA 407a-08a. PAI scores are fixed long before admissions officers draw a line on the AI/PAI matrix identifying which "cells" will be admitted. *Supra* at 13. At that point, as petitioner herself has conceded, applicants are not identified by race within the cells on matrices. So admissions officers cannot—and do not—consider the race of any applicant in making the all-important decision where to draw the "'stair-step' decision line" that determines which cells will be admitted. JA 387a-89a, 411a-12a.[7]

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[7] Petitioner asserts (at 8) that "race is a factor in admission, placement, or both for every in-state undergraduate applicant." That is incorrect. Race is not considered in admitting students to UT under the top 10% law (which fills most of the class). Within UT, some programs are in such high demand that most (or all) of their slots could be filled with top 10% admits alone. But even these "impacted" programs accept 75% of their students based on

The constitutionality of UT's individualized consideration of race follows *a fortiori* from this Court's precedents, because it suffers from none of the flaws identified by Justice Powell in *Bakke* or that caused Justice Kennedy to conclude that the admissions plan in *Grutter* operated as a quota. It is undisputed that UT does not have a quota or target for any racial group. JA 131a. It is undisputed that race is neither an "automatic" nor predominant factor (to the contrary, petitioner argues (at 38-42) that it is too "minimal"). And the record establishes that "[n]o admissions officer … monitors the racial or ethnic composition of the group of admitted students at any time during the admissions process in order to determine whether an applicant will be admitted." JA 398a; *see* JA 131a, 387a-89a, 415a; App. 32a-33a, 45a.

Like the Harvard plan approved by Justice Powell, UT's admissions policy "treats each applicant as an individual in the admissions process," and does not "foreclose[] [petitioner] from all consideration" for any seats "simply because [s]he was not the right color or had the wrong surname." *Bakke*, 438 U.S. at 318. Standing on its own, UT's modest consideration of race in the non-percentage applicant pool is constitutional

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class rank or AI alone (where race is irrelevant); their remaining slots are filled using the AI/PAI matrix process described above. JA 383a. Accordingly, depending on the program selected as the first choice, some top 10% admits in 2008 also received a full-file read (and a PAI score) to determine whether they would get their first- or second-choice program. That policy furthers UT's interests in academic selectivity and ensuring that its students enjoy the educational benefits of student body diversity. In any event, petitioner challenges only the denial of her admission to UT under holistic review. JA 38a. She has no basis to complain about UT's placement of students admitted under the top 10% law.

under this Court's existing precedent, as the court of appeals and district court held. Because petitioner's qualifications and circumstances were "weighed fairly and competitively" on a holistic and individualized basis, she has "no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.*

II. PETITIONER'S ARGUMENTS THAT UT'S ADMISSIONS POLICY NEVERTHELESS IS UNCONSTITUTIONAL LACK MERIT

Unable to challenge the individualized nature of UT's consideration of race, petitioner is forced to wage a challenge at odds with existing precedent and the record developed in this case. That effort fails.

A. Petitioner's Central "Racial Balancing" Charge Is Unfounded

The centerpiece of petitioner's brief is her claim that UT is engaged in "racial balancing." Petitioner repeatedly asserts—mostly without citation to the record—that UT's objective is to "mirror the demographics of Texas," and thus is "purely representational." Pet. Br. 19; *see id.* at 6-7, 22, 26-29, 45-46. Petitioner even argues that "mirror[ing] the demographics of Texas" is "UT's *acknowledged* goal." *Id.* at 19 (emphasis added). That is not only incorrect, it is fatally contradicted by petitioner's own concession.

The cases in which the Court has found racial balancing or the like have involved a policy that set a racial quota or target tied to demographics. *See, e.g.*, *Parents Involved*, 551 U.S. at 729; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986); *Bakke*, 438 U.S. at 307 (Powell, J.). In *Parents Involved*, the plurality explained that "working backward to achieve

a particular type of racial balance … is a fatal flaw under our existing precedent." 551 U.S. at 729. It then contrasted the plan invalidated in *Parents Involved*, which established a "defined range set solely by reference to … demographics," and the plan upheld in *Grutter*, which (the *Grutter* Court held) "did not count back from its applicant pool to arrive at the 'meaningful number' it regarded as necessary to diversify its student body." *Id.*

The record here forecloses any finding of racial balancing. Indeed, petitioner herself conceded in a proposed statement of fact that UT has *not* established a "goal, target, or other quantitative objective" for admitting minorities. JA 131a. That should end the matter. Although petitioner now argues (at 27) that UT *has* established racial "targets," petitioner—like all litigants—is bound by her own concessions. *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2983 (2010); *id.* at 2999 (Kennedy, J., concurring).

Moreover, petitioner's concession is unassailable. The record establishes that admissions officers do *not* monitor the racial composition of the class or work backwards to get to any target at any point in the process. *Supra* at 26-27. The structure of UT's admissions process makes that impossible—since race is considered only in the PAI score, and PAI scores are all determined individually, months before the actual admissions line is drawn on the (wholly race-blind) grid. *Supra* at 26. The numbers of minorities admitted under holistic review do not remotely mirror racial demographics. App. 45a. And the testimony of admissions officers confirms that UT's objective in

considering race was to achieve the educational benefits of diversity. JA 264a-65a, 178a, 309a.

So how does petitioner try to justify her racial balancing charge? She points to the determination in the 2004 Proposal that there are "underrepresented" minorities at UT, based on a comparison between UT's undergraduate student body and the State's population—the primary applicant pool for UT. *See* Pet. Br. 6-7 (citing SJA 24a-25a). But that is not evidence of racial balancing. "'Some attention to numbers'" is unavoidable in determining whether a racial group is underrepresented as a general matter, and that attention in deciding whether to consider race at all in admissions by no means "transform[s] a flexible admissions system into a rigid quota." *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323); *cf. Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring) (it is "permissible" for a school to consider its "racial makeup" and "adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.") (citing *Grutter*).

There are some 26 references to underrepresented minorities in *Grutter*, and the concept of underrepresentation as gauged by state population has been used by this Court in other areas, such as in determining racial disparities in grand jury selection. *E.g.*, *Castaneda v. Partida*, 430 U.S. 482, 494-95 & n.13 (1977). State population likewise is a logical data point in determining underrepresentation at a flagship state university—like UT—that draws the vast majority of its admits each year (about 90%) from the State it was created to serve. A university's identification of underrepresented minorities thus does not disqualify a plan under *Grutter* and *Bakke*. *See* Douglas Laycock,

The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership, 78 Tul. L. Rev. 1767, 1813-14 (2004).

UT considered such statewide data only in determining whether any race-conscious admissions policy could be warranted at all under this Court's precedent. SJA 1a. The point of considering such data was not to ensure that the university reaches some representational target; it was to assess whether minority groups are underrepresented at the university because, among other things, they are systematically faring poorly in the admissions process. Of course, a university cannot look to racial demographics—and then work backward in its admissions process to meet a target tied to such demographics. But as discussed, the record establishes that UT has not done so—and, indeed, has not established any "target" at all. JA 131a.

B. The Top 10% Law Does Not Foreclose The Individualized Consideration Of Race In UT's Holistic Review Process

Petitioner argues (at 37-38) that the top 10% law is a "'workable race-neutral alternative'" that alone forecloses UT's holistic consideration of race for non-percentage applicants. That argument is unavailing.

Applicants subject to UT's holistic admissions process are by definition not eligible for admission under the top 10% law. Petitioner has not argued that the entire undergraduate class should be mechanically selected pursuant to the top 10% law, and such a rule would impose enormous educational costs because of the shortcomings inherent in percentage plans, discussed below. Like all selective schools, UT seeks "to make the best possible use of the limited number of

places in each entering class" to advance as effectively as it can its educational mission. William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly, Sept. 26, 1977, at 7, 9. So UT seeks to maximize broad diversity within the pool of holistic admits; indeed, the individualized consideration of a wide range of factors is the central purpose of whole-file review. *Supra* at 13-14. The existence of the top 10% plan does not bar UT from doing so.

Indeed, in *Grutter* this Court specifically rejected the argument that percentage plans are a complete, workable, and constitutionally required alternative to the individualized consideration of race in holistic review. 539 U.S. at 339-40. As the Court observed, "even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 340. That conclusion is particularly salient because the Court's decision specifically identified Texas's percentage plan. *Id.*

Percentage plans have serious educational tradeoffs. UT, like many of the Nation's top universities, seeks to assemble a class that is diverse in the innumerable ways—including race—that advance its mission of educating students and preparing them to be the leaders of tomorrow. UT's holistic admissions process directly advances that compelling interest. By contrast, the percentage plan—with its single-minded focus on class rank—makes such nuanced judgments impossible. It also forecloses the consideration of other academic criteria, including the quality of the applicant's high school, the nature of her

course load, and her performance on standardized tests. *See* Laycock, *supra*, at 1817-19. This Court presumably would not select its own law clerks based solely on class rank—from any law school within a State or geographic area—without regard to other academic criteria or individualized factors.

In addition, although the top 10% law helps admit minorities, it does so largely as a result of well-known de facto segregation throughout much of Texas's secondary school system. *See supra* at 8; Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admission: A Comparative Analysis of Three States' Experiences* 14-15 (2003); Laycock, *supra*, at 1806-10. That segregation produces clusters of overwhelmingly majority-minority schools—largely confined to particular geographic areas of the State—that tend to produce large numbers of minority admits under the top 10% law. But that clustering also means that the top 10% law systematically hinders UT's efforts to assemble a class that is broadly diverse, and academically excellent, across the board—including *within* groups of underrepresented minorities.

Holistic review permits the consideration of diversity within racial groups. *Cf. Bakke*, 438 U.S. at 324 (quoting Harvard plan; contrasting an applicant who is the "'child of a successful black physician'" and one who "'grew up in an inner-city ghetto of semi-literate parents'"). And, in fact, admissions data show that African-American and Hispanic students admitted through holistic review are, on average, more likely than their top 10% counterparts to have attended an integrated high school; are less likely to be the first in their families to attend college; tend to have more varied socioeconomic backgrounds; and, on average,

have higher SAT scores than their top-10% counterparts. *See* UT, Office of Admissions, *Student Profile: Admitted Freshman Class of 2008*, at http://www.utexas.edu/student/admissions/research/AdmittedFreshmenProfile-2008.pdf.

These students have great potential for serving as a "bridge" in promoting cross-racial understanding, as well as in breaking down racial stereotypes. *See* App. 57a n.149. The African-American or Hispanic child of successful professionals in Dallas who has strong SAT scores and has demonstrated leadership ability in extracurricular activities but falls in the second decile of his or her high school class (or attends an elite private school that does not rank) cannot be admitted under the top 10% law. Petitioner's position would forbid UT from considering such a student's race in holistic review as well, even though the admission of such a student could help dispel stereotypical assumptions (which actually may be *reinforced* by the top 10% plan) by increasing diversity within diversity.

That is not to say that a minority applicant with a less disadvantaged socioeconomic background is preferred. To the contrary, as noted, UT has made specific efforts to recruit minorities of all socioeconomic backgrounds. *Supra* at 7. The point is that just as broad diversity is essential to UT's educational mission, so is the presence of minority students with different backgrounds and perspectives. As this Court has observed, "failing to account for the differences between people of the same race" not only compromises diversity in the broad sense, it does a "disservice" to the goal of becoming "'a society that is no longer fixated on race.'" *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 434 (2006).

The Constitution permits UT to conclude that holistic review—including its modest consideration of race—for the remaining admissions decisions is a critical counterpart to the top 10% law in order to compensate for the various ways in which the single-criterion percentage plan otherwise distorts and limits the overall diversity of the class. That conclusion fits comfortably within strict scrutiny review. Race-neutral methods are not "workable" if they would have a significant "detrimental effect" on a university's mission. *Croson*, 488 U.S. at 509-10. And they are not genuine "alternative[s]" unless they would serve the university's compelling interest "'about as well'" as the race-conscious plan. *Wygant*, 476 U.S. at 280 n.6. The top 10% law comes up short on both yardsticks.

Petitioner argues (at 51-52) that UT's adoption of the policy at issue was not a "last resort." But the record overwhelmingly establishes that UT acted in good faith and only after considering many race-neutral alternatives, including recruiting, scholarships, and other measures. *Supra* at 7. As the district court put it, "[t]o argue that UT has failed to give serious, good faith consideration to race-neutral alternatives is to ignore the facts of this case." App. 164a; *see* SJA 24a. For years, UT went deep into the playbook for race-neutral alternatives in this context, and yet levels of underrepresented minorities at UT remained stagnant, at best. The Constitution did not place the self-defeating burden on UT to continue even further down that unpromising path before trying the modest race-conscious measure at issue here.

Petitioner's argument also creates perverse incentives. It would discourage universities from experimenting with percentage plans or similar

alternatives—and thus would impede the ultimate goal of ending race-conscious admissions. Under petitioner's approach, the adoption of a race-neutral measure like a percentage plan for a portion of the admissions class would effectively preclude a university from engaging in race-conscious holistic review for the remaining part of the class. Experimentation is critical in this area. *See* William G. Bowen & Derek Bok, *The Shape of the River* 286 (1989). Experimentation with percentage plans should not be reduced to an all-or-nothing proposition.

C. The Modest Manner In Which Race May Impact Holistic Admissions Is A Constitutional Virtue, Not A Vice

Petitioner argues (at 38-42) that UT's consideration of race in holistic admissions is too modest to pass muster. That argument is flawed as both a doctrinal and factual matter. As a doctrinal matter, in the kind of individualized and holistic review of applicants commended in *Bakke* and *Grutter* race does not predominate but instead plays only a nuanced and limited role in the admissions process. *See* Part I, *supra*; *Grutter*, 539 U.S. at 337; *Bakke*, 438 U.S. at 318 (Powell, J.); *see also Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) (race may be "one, nonpredominant factor" in such a system). The nuanced and modest impact of race under UT's holistic review plan is thus a constitutional virtue, not a vice.

Petitioner's reliance (at 38) on *Parents Involved* is misplaced. The plan at issue there used a crude "white/non-white" classification in pursuit of a fixed target based on the racial composition (in white/non-white terms) of the district. 551 U.S. at 723. Race was not considered simply as "one factor weighed with

others in reaching a decision, as in *Grutter*"—it was "*the* factor." *Id.* And the plan merely "'shuffle[d] a few handfuls of different minority students'" around to get a specified range of minority enrollment based on district-wide demographics. *Id.* at 734. In *that* context—the "extreme approach" of assigning students to different districts based on "a binary conception of race"—the Court observed that the "minimal impact" of the challenged classification was a reason to conclude that other, less burdensome means would have been just as (or more) effective. *Id.* at 735. UT's individualized consideration of race in holistic admissions is entirely different, its purposes could not be accomplished in any other way, and as discussed, in this context the goal is for race to play a modest role.

In any event, UT's nuanced consideration of race has a significant impact on advancing UT's diversity objective. It is undisputed that "the consideration of race in admissions does increase the level of minority enrollment," and the evidence shows that "race is a meaningful factor and can make a difference in the evaluation of a student's application." App. 163a n.14; JA 113a. Moreover, petitioner's efforts to trivialize the number of minority admits from the holistic pool is based on only a one-dimensional view of diversity that ignores UT's objective to assemble a student body that is broadly diverse—including within different minority groups. As discussed, that diversity itself has invaluable educational benefits. *Supra* at 34.

The raw numbers of underrepresented minorities admitted under holistic review also completely belie petitioner's claim (at 9, 39) that the consideration of race has had a "negligible"—nay, "infinitesimal"—impact on diversity at UT. Petitioner states (at 39)

that UT "classif[ied] 29,501 applicants by race" (a claim that is inaccurate, *see supra* n.7) and "enrolled 216 African-American and Hispanic students" evaluated through holistic review. But looking at minority *enrollment* masks the impact of the admissions policy; UT competes with Ivy League and other top schools for many holistic admits—and does not always win that battle. The relevant benchmark therefore looks to the minorities *admitted*. And in 2008, a full 20% of all African-American admits were offered admission through full-file review, as were 15% of all Hispanic students offered admission. SJA 158a.

Petitioner also argues (at 39) that UT's consideration of race was likely "not decisive for many of the 216" African-American and Hispanic admits who ultimately enrolled. That may well be right—but only because it is precisely what you would expect to get when admissions decisions are made on an individualized basis, taking race into account only in context, and as a non-predominant factor. UT has carefully followed this Court's teachings to ensure that race is only one factor among many in a process that respects the individual dignity of each applicant. In petitioner's view, those instructions were not a road map to the safe harbor recognized by *Bakke* and *Grutter*, but a trap leading to unconstitutionality.

D. UT Had A Sufficient Basis To Conclude That Adding Race To Its Holistic Review Promoted Its Compelling Interest In Diversity

Although UT decided to add race to holistic review to advance the same broad diversity interest that this Court held compelling in *Grutter* and *Bakke*, petitioner

argues that UT lacked a compelling interest to consider race in holistic admissions. Not so.

1. Petitioner first tries to recharacterize the interest pursued by UT. Pet. Br. 26-30. Her main claim (at 27) is that UT's objective was simple "racial demographics." As discussed (Part II.A, *supra*), that argument is meritless. As a fall back, petitioner argues (at 29) that UT's "only other interest" was "classroom diversity." That argument also fails. UT did consider diversity in the classroom as "*one* window" into whether its students were realizing the educational benefits of diversity. JA 226a (emphasis added). But UT's objective was far broader than the interest in "classroom diversity" attacked by petitioner.

UT has made clear that its objective is the educational benefits flowing from a richly diverse class—an interest that this Court found compelling in *Grutter* and *Bakke*. SJA 1a, 3a-4a. That includes an "academic environment" in which there is "a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." SJA 23a. An obvious way of promoting that objective is fostering diversity in the classroom—one of the most important places where ideas are exchanged. But UT's diversity interest extends beyond the classroom to the existence of "a *student body* that permits all students to experience concrete benefits from diversity." JA 428a-29a (emphasis added). The record is replete with evidence that UT pursued this broader objective—and seeks diversity "spread across the university in all the things that [it does]." JA 266a; *see*, *e.g.*, JA 159a, 204a-05a, 210a-11a, 264a-65a, 309a, 364a-65a, 396a, 428a.

However it is parsed, UT's broad diversity interest is unquestionably compelling under *Grutter*, 539 U.S. at 322-36, and *Bakke*, 438 U.S. at 311-15 (Powell, J.). *See Parents Involved*, 551 U.S. at 722-23. Indeed, this interest in diversity is if anything even more compelling here than in *Grutter* or *Bakke*, because it has been argued that the educational benefits of diversity are all the more salient in the undergraduate setting than the graduate school setting. *Bakke*, 438 U.S. at 313 (Powell, J.). Likewise, ensuring a diverse student body is especially important at a flagship state university like UT, which "bear[s] a special responsibility in ensuring that 'the path to leadership be visibly open to talented and qualified individuals.'" SJA 3a (quoting *Grutter*, 539 U.S. at 332).

2. Petitioner argues (at 34) that UT's interest in diversity is suspect because UT has not defined the "percentage" of minorities that will meet its objective. But reducing racial diversity to a fixed percentage itself "would amount to outright racial balancing." *Grutter*, 539 U.S. at 329-30. Moreover, this argument overlooks the whole point of diversity in this context. As Justice Powell explained, the interest that is compelling is "not an interest in simple ethnic diversity" tied to a "specified percentage of [minorities in] the student body"; rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315.

Instead of seeking any fixed percentage, UT seeks a "critical mass," which is simply a short-hand reference to the racial diversity necessary to realize the educational benefits that this Court has repeatedly

acknowledged. SJA 25a. No particular percentage of the incoming class will ensure that those benefits are realized in all educational settings—just as (to follow the analogy back to its roots) no fixed amount of fissile material guarantees a nuclear chain reaction without regard to other circumstances. Differences in the size or type of schools, in their educational missions, in the communities that universities serve, in their history of racial isolation or discrimination, and so on, may all affect the level of diversity required to realize the full educational benefits of diversity. Reducing diversity to an inflexible, one-size-fits-all percentage finds no support in *Bakke* or *Grutter*, or the real world.

That does not mean that the critical-mass determination is just an abstraction. An important part of the determination is a university's own first-hand assessment of the educational benefits flowing from student body diversity at a given point in time. Although that might seem like an amorphous determination to some, trained educators make these sorts of judgments all the time in ascertaining—and calibrating—the environment in which their students are educated. Because a diverse student body is "so essential to the quality of higher education," that judgment is entitled to some deference. *Bakke*, 438 U.S. at 312-13; *see Grutter*, 539 U.S. at 328. But UT did not simply rely on an unadorned statement of educational judgment. It based its determination that UT had not yet reached a critical mass in 2004 on hard data on minority admissions, enrollment and racial isolation at UT, as well as discussions with students about their own experiences at UT. JA 267a-68a.

3. Petitioner argues that UT already had achieved all the diversity the Constitution allowed it to seek

when it adopted the admissions policy in 2005. That argument has two major structural flaws. First, in gauging diversity, petitioner repeatedly combines individuals of different races—African-Americans and Hispanics—suggesting that the relevant measure of diversity is the sum of the percentages of *both* groups. *See* Pet. Br. 35; *see id.* at 3, 4, 5. But this Court has already rejected reliance on such "a limited notion of diversity," *Parents Involved*, 551 U.S. at 723, which lumps together distinct racial groups of individuals, and ignores the diversity that exists among individuals *within* racial groups, *Perry*, 548 U.S. at 434.

Second, petitioner apparently assumes that UT had already achieved all the diversity it was allowed in 1996—the year of *Hopwood*—because she adopts 1996 as the baseline for whether UT was permitted to do more. Pet. Br. 36. But UT by no means regarded the level of racial diversity in 1996 as a fully-realized end point. UT also appreciated that, as one Texan observed in a similar vein, the fact that "race-neutral admissions policies have resulted in levels of minority attendance for incoming students that are close to and in some instances slightly surpass those under the old race-based approach" (such as quotas) does not mean that we should be "satisfied with the current numbers of minorities on Americans' college campuses." 39 Weekly Comp. Pres. Docs. 71, 72 (2003) (President Bush's remarks on the Michigan cases). To the contrary—"[m]uch more [progress] is needed." *Id.*[8]

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[8] Similarly, the fact that UT touted existing diversity in the various materials cherry-picked by petitioner—some of which post-date 2008—in no way suggests that UT had concluded that it had already fully achieved a critical mass. And petitioner overlooks the critical importance of such materials in recruiting

The record amply supports UT's judgment—following its year-long evaluation—that it had not yet achieved all the constitutionally permissible educational benefits of diversity. Indeed, in 2003, after several years of facially race-neutral efforts to promote diversity, only 3%—a startling number—of the entering class was African-American and 14% Hispanic, at or below 1996 levels. JA 121a-22a. The figures were only slightly better in 2004. JA 127a. In other words, the levels of underrepresented minorities at UT were at best stagnant compared to 1996. And in an important sense, the situation was worse for underrepresented minorities in 2004: the odds of admission for an African-American or Hispanic in the second decile of their high school class dropped under the top 10% law, whereas the odds for a similarly situated Caucasian applicant increased. App. 20a.

At the same time, there was jarring evidence of racial isolation at UT. *Supra* at 10. The classroom is an especially important environment at a massive university like UT, where students are more dispersed and the vast majority live off campus. Of course a critical mass of underrepresented minorities is not required in "every small class." Pet. Br. 30. But the fact that African-American and Hispanic students were nearly non-existent in *thousands* of classes was a red flag that UT had not yet fully realized its constitutional interest in diversity. App. 157a. If "[a] compelling interest exists in avoiding racial isolation," *Parents Involved*, 551 U.S. at 797 (Kennedy, J.,

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minority students to join a campus community still perceived as "largely closed" and "[un]welcoming" to them. SJA 14a.

concurring), then surely a university may take account of blatant racial isolation in its classrooms.[9]

4. Petitioner argues (at 7, 28) that UT's interest in diversity cannot be compelling because UT's policy purportedly favors African-Americans and Hispanic students, while (petitioner says) penalizing other groups such as Asian-Americans. That gets both the law and the facts wrong. As a legal matter, this Court's precedents call for an examination of whether a university has reached a critical mass of "underrepresented minority students." *Grutter*, 539 U.S. at 338. As the Court has explained, "[b]y virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to [a university's] mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences." *Id.*; *id.* at 333 ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."). That explains why UT focused on underrepresented minorities in gauging critical mass in 2004.

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[9] Given the backward-looking nature of petitioner's sole-remaining damages claim, the only question here is whether UT had a sufficient basis to adopt the challenged policy in 2005 or apply it in 2008. *Supra* at 17. Petitioner's numerous references to minority enrollment at UT *after* that time period are therefore irrelevant here. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012) ("[W]e adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court.") (quoting *Sweatt*, 339 U.S. at 631).

As petitioner has recognized, Asian-Americans are not an underrepresented minority at UT when considering UT's primary applicant pool—Texas. Pls.' Mot. for Partial Summ. J. Br. 16 n.3, ECF No. 94; *see* App. 45a. In 2004, Asian-Americans comprised about 3% of the population in Texas, yet accounted for 18%—six times that figure—of UT's freshman class (and grew to 19% by 2008 under the plan at issue). App. 155a n.10; SJA 156a. Meanwhile, Asian-American applicants to UT have for years gained admission at higher rates than any other group (including Caucasians). SJA 43a, 156a. For example, 61.7% of all Asian-American applicants in 2004 gained admission. SJA 43a. In other words, unlike African-Americans and Hispanics, Asian-Americans have fared dramatically better in admissions at UT than would be expected just considering their presence in the applicant pool.

As a factual matter, petitioner's argument is based on a misconception of how the policy operates. As she has conceded, UT's holistic consideration of race can benefit any applicant, minority or not. JA 130a; *see supra* at 14. That includes Asian-Americans (JA 284a)—whose enrollment actually *increased* under the policy at issue. App. 24a. At the same time, no applicant, even an underrepresented minority, is guaranteed that race will be a tipping factor in full-file review. As this Court recognized in *Grutter*, 539 U.S. at 338, underrepresented minorities are more likely to have racial experiences that may impact an admissions decision under the contextualized way that race is considered by UT. But because the contextualized consideration of race is the same for all applicants, any

applicant—of any race—may benefit from the individualized consideration of race.[10]

For similar reasons, petitioner's argument (at 46-47) that UT's policy is unconstitutional on the ground that Hispanic students are "not underrepresented" at UT is not only wrong, but academic. Petitioner has acknowledged that Hispanics are underrepresented at UT compared to the State (UT's main applicant pool). Pls.' Mot. for Partial Summ. J. Br. 16 n.3. Although petitioner emphasizes that Hispanics were 16.9% of the student body in 2004, there were still thousands of classes at UT with zero or only one Hispanic student, and Hispanics were being admitted at a far lower rate than one would expect. *Supra* at 10. The flagship state university for Texas—with a special obligation to train the future leaders of Texas—was entitled to conclude that that was simply unacceptable.

In any event, although petitioner focuses on the level of Hispanics admissions, she does not contest that African-Americans were, and still are, severely underrepresented at UT. That undeniable fact provided a sufficient basis for UT to adopt its race-conscious admissions policy in 2004, under which the consideration of race could benefit any applicant.[11]

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[10] The Harvard plan, as well as all other holistic admissions plans of which UT is aware, consider the race of *all* applicants in full-file review, and not just that of underrepresented minorities. *See Grutter* Amherst Br. 10-11.

[11] Petitioner's suggestion that race-conscious admissions will never end at UT just renews the same basic end-point arguments that this Court rejected in *Grutter*. And this case is a particularly ill-suited vehicle in which to revisit those arguments, because petitioner's only remaining claim is her *backward-looking* damages claim, which turns on whether UT's policy was justified

E. Petitioner's Efforts To Recast And Impugn The Fifth Circuit's Articulation Of Strict Scrutiny Fail

Although the Fifth Circuit explicitly recognized that strict scrutiny applied (App. 35a), petitioner argues (at 47) that the court "abandon[ed]" strict scrutiny. That argument is based more on statements stripped of context than a fair reading of the opinion.

The Fifth Circuit not only took it as "a given" that "strict scrutiny with its requirement of narrow tailoring" applied, it stressed that "race summons close judicial scrutiny, necessary for the nation's slow march toward the ideal of a color-blind society." App. 34a-35a. The court also emphasized that "[n]arrow tailoring … requires any use of racial classifications to so closely fit a compelling goal as to remove the possibility that the motive for the classification was illegitimate racial stereotype." App. 36a. And the court made clear that "the scrutiny triggered by racial classification 'is no less strict for taking into account' the special circumstances of higher education." *Id.* (quoting *Grutter*, 539 U.S. at 328). Ultimately, the court's detailed and rigorous examination of the record and the parties' arguments on both the compelling-interest and narrow-tailoring prongs in its lengthy decision refutes petitioner's claim that the court was derelict in its duty to apply strict scrutiny.

Petitioner's main complaint (at 48-49) is the way in which the Fifth Circuit characterized the deference

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in 2005 or 2008. In any event, the proper application of strict scrutiny will ensure that any use of race in admissions lasts no longer than warranted. And one of the lessons of the explosive growth in Asian-American admissions in higher education in recent years is that racial barriers can be overcome.

due to a university's educational judgments, and its willingness to presume "good faith" on part of UT in pursuing educational objectives—"absent 'a showing to the contrary.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 318-19 (Powell, J.)). But in stating that it owed "a degree of deference to [UT]'s constitutionally protected, presumably expert academic judgment" (App. 37a), the Fifth Circuit did not abandon strict scrutiny. It simply recognized—as Justice Powell did in *Bakke*, 438 U.S. at 312-13, and the Court did in *Grutter*, 539 U.S. at 329-30—that subsidiary facts in the strict scrutiny analysis may involve judgments within the ambit of the academic freedom that has long been recognized "as a special concern of the First Amendment." 438 U.S. at 312; *see Parents Involved*, 551 U.S. at 792 ("First Amendment interests give universities particular latitude in defining diversity.") (Kennedy, J., concurring); *Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting) (it is appropriate to give "deference to a university's definition of its educational objective"). This Court itself has deferred to analogous factual determinations in conducting strict scrutiny in other contexts, where courts likewise lack institutional competence to make the determinations. *See, e.g.*, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010).

Of course, such deference still has its limits. A university does not get deference on the ultimate question whether the means through which it pursues its compelling interest are narrowly tailored. *Grutter*, 539 U.S. at 334-35; *see id.* at 388 (Kennedy, J., dissenting) (university is not entitled to "deference to the implementation of [its diversity] goal"). But the Fifth Circuit did not defer to UT's belief that its policy

was *narrowly tailored*. Nor did it defer to UT on whether its policy served as a disguised quota, ensured individual consideration, or relied upon race as a predominant factor in admissions. To the contrary, the court rigorously tested the policy in light of petitioner's narrow-tailoring objections. App. 43a-70a.

Petitioner also argues (at 31-34) that the Fifth Circuit erred in not extending the "strong basis in evidence" standard to this case. Here again, however, the Fifth Circuit simply followed existing precedent. Although the petitioner in *Grutter* similarly argued that a "strong basis in evidence" was required (*Grutter* Pet. Br. 24), not even the *Grutter* dissenters advanced that view. And neither *Parents Involved*, nor *Grutter*, nor *Gratz* holds that this standard applies when the interest asserted is a university's compelling interest in the educational benefits of diversity—which this Court has long recognized *is* a compelling interest that all public universities possess, so long as it is genuinely tied to their educational mission and is not a disguised quota (which, as discussed, is undisputed here).

Moreover, as the Fifth Circuit explained, the employment and government contracting cases on which petitioner relies in advocating this standard are readily distinguishable. App. 38a-42a. The only compelling interest that the Court has held could justify the consideration of race in those contexts is the "backward-looking" (App. 40a) interest in remedying past wrongs. In such cases, the Court has explained, "the necessary factual predicate is prior discrimination," so there must be "a factual determination" for the conclusion that "remedial action was necessary." *Wygant*, 476 U.S. at 277-78 & n.5 (Powell, J.). By contrast, the compelling interest

recognized by *Bakke* and *Grutter* in the higher education admissions process is the "forward-looking" interest that universities have in "obtain[ing] the educational benefits of diversity." App. 41a.

In any event, the evidence discussed establishes that UT had a "strong basis" for concluding that race-conscious admissions were necessary in 2005 to further UT's compelling interest in a diverse student body. Indeed, whereas the "strong basis in evidence" standard has been used to smoke out whether an employer has adopted a "*de facto* quota system," App. 39a, it is conceded that UT has not established any quota. A contrary conclusion would subject the Nation's finest universities and graduate schools to endless litigation over the use of race-conscious admissions policies. As a practical matter, that would be tantamount to forbidding the consideration of race in holistic admissions. But this Court has twice refused to do that. And it should reject petitioner's request to overhaul the strict scrutiny inquiry in order to achieve the same practical result here.

Strict scrutiny can be strict without being "fatal in fact." *Johnson*, 543 U.S. at 514. There is no basis to hold the Nation's universities to any higher standard in seeking to advance educational objectives that this Court itself has held are compelling.

III. THERE IS NO BASIS TO RECONSIDER OR OVERRULE EXISTING PRECEDENT

Given the obvious tension between her arguments and this Court's existing precedent, it is not surprising that petitioner ultimately finds it expedient to ask (at 53) this Court to "overrule[]" that existing precedent. That request underscores that petitioner's objective is not so much the *application* of existing precedent as

the dismantling of it. She has provided no basis for the Court to take that extraordinary step.

For starters, petitioner has not even properly presented that question. Her own question presented explicitly assumes *the validity of* existing precedent, asking "[w]hether this Court's decisions …, including *Grutter* …, permit the University of Texas at Austin's use of race in undergraduate admissions decisions." Pet. i. The question whether a decision of this Court should be overruled is quite different from (and therefore not fairly included within) the question whether a policy is lawful "under" (Pet. Br. i)—*i.e.*, according to—such precedent. *See* Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). A single sentence tacked onto the end of the petition for certiorari (at 35) states that, if the decision below is correct, *Grutter* should be overruled "to restore the integrity of the Fourteenth Amendment's guarantee of equal protection." But neither that platitude nor the back-of-the-envelope discussion of *stare decisis* at the tail-end of petitioner's merits brief properly presents the far-reaching question whether *Grutter* and *Bakke* should be overruled. *Cf. Randall v. Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring).

In any event, even when the Court would not "agree with [a decision]'s reasoning and its resulting rule" were it "addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling" the decision at a later point. *Dickerson v. United States*, 530 U.S. 428, 443 (2000). After all, "[t]he doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of 'an arbitrary discretion in the courts'

is restrained." *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., joined by Kennedy, J., concurring) (quoting *The Federalist No. 78*, at 471 (Clinton Rossiter ed., 1961)).

Although petitioner and her amici obviously believe that *Grutter* and *Bakke* are *wrong*, they have not identified any "'special justification'" (*id.*) for overruling those decisions. In *Grutter*, this Court reaffirmed Justice Powell's opinion in *Bakke*. And in the nine years since *Grutter*, this Court has never questioned *Grutter*'s core holding. To the contrary—it has relied on *Grutter* without questioning it. *Parents Involved*, 551 U.S. at 722-23. *Bakke*—as solidified by *Grutter*—has become a "long-established precedent … integrated into the fabric of the law." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233 (1995); *see also, e.g.*, *Grutter* Amherst Br. 28-29. Indeed, petitioner herself does "not challenge" a central component of *Bakke* and *Grutter*: the Court's holding that universities have a compelling interest "in promoting 'student body diversity.'" JA 74a.

Nor have the standards established in *Bakke* and *Grutter* proven to be unworkable. That is underscored by this Court's own reliance on those cases (*see Parents Involved*, 551 U.S. at 722-23), three decades of implementation of this Court's decisions by the Department of Education (*see Grutter* Resp. Br. 18-19), and the fact that *Grutter* has not produced any conflict of authority in the lower courts.

Moreover, overruling *Grutter* and *Bakke* would upset profoundly important societal interests. As the Court recognized in *Grutter*, both public and private universities across the country have been modeling their admissions policies "on Justice Powell's [opinion

in *Bakke*]" for decades. 539 U.S. at 323. The student body diversity fostered by these programs has translated into invaluable educational benefits for millions of Americans and had a vital impact on training the Nation's future leaders in all fields, including the military. The selection and education of America's future leaders in our increasingly diverse society are too important for this Court to eliminate the constitutional framework that has been used by universities for decades in pursuing that compelling objective on the basis of the skimpy, four-page argument (at 53-56) that petitioner makes here.

And, of course, the Court's "legitimacy requires, above all, that [it] adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds." *Bush v. Vera*, 517 U.S. 952, 985 (1996). It would be an abrupt—and destabilizing—step for the Court to overrule *Grutter* just nine years after this Court reconsidered and reaffirmed Justice Powell's opinion in *Bakke*. It would be all the more disruptive given that *Grutter* captured the attention of the Nation when it was decided by this Court; nothing has changed since *Grutter* (other than the composition of this Court); this case will not be considered by the full Court (because of Justice Kagan's recusal); and this case concededly does not even present the central concern (the risk of disguised quotas) that critics of the consideration of race in the higher education context have attacked.

* * * * *

UT well appreciates that the appropriate consideration of race in higher education admissions defies an easy answer. Certainly all aspire for a colorblind society in which race does not matter—and

need not be considered to ensure a diverse proving ground for the Nation's future leaders. But in Texas, as in America, "our highest aspirations are yet unfulfilled." *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring). And it remains "a fact of life in contemporary America that the perspectives of individuals are often affected by their race as by other aspects of their background." Bowen, *supra*, at 9. The Constitution did not bar UT from taking account of that fact—and considering race along with the many other characteristics applicants possess in the individualized and modest manner in which its holistic admissions policy operated in 2008, in order to seek the full educational benefits of a diverse student body.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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