

No. 11-

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IN THE  
**Supreme Court of the United States**

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ABIGAIL NOEL FISHER,

*Petitioner,*

*v.*

UNIVERSITY OF TEXAS AT AUSTIN et al.,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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September 15, 2011

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**QUESTION PRESENTED**

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

**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

Petitioner in this case is Abigail Noel Fisher.

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

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

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## **PETITION FOR A WRIT OF CERTIORARI**

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

### **OPINIONS BELOW**

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

### **JURISDICTION**

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

### **CONSTITUTIONAL PROVISION INVOLVED**

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

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

U.S. Const. amend. XIV, § 1.

## INTRODUCTION

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

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

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

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

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

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

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

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

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

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

## STATEMENT OF THE CASE

### A. History Of UT's Admissions Program

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

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

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

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

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

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

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

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

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3. Dr. Larry Faulkner, *The “Top 10 Percent Law” is Working for Texas* (Oct. 19, 2000), available at [http://www.utexas.edu/president/past/faulkner/speeches/ten\\_percent\\_101900.html](http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html) (last visited Sept. 15, 2011).

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

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

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

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

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

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

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

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

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

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

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

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

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

## B. Proceedings Below

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

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

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

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

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

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

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

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

Rather than second-guess the merits of the University’s decision, a task we are ill-equipped to perform, we instead scrutinize the University’s decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the University acted in good faith, a presumption Appellants are free to rebut.

App. 36a.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **A. The Court Should Correct The Fifth Circuit’s Unwarranted Deference To UT.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This Court has never applied the highly deferential rational-basis standard to judicial review of racial classifications. Rather, an animating principle of its equal-protection decisions is that “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.” *Adarand*, 515 U.S. at 224; *see also Parents Involved*, 551 U.S. at 784 (Kennedy, J., concurring) (same). As shown below, UT’s race-based admissions program cannot survive this scrutiny.

### **B. This Court Should Correct The Fifth Circuit’s Abandonment Of Strict Scrutiny.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Given the diversity achieved by the Top Ten Percent Law and its own extensive outreach efforts, UT could not credibly claim that it reintroduced racial preference because of a failure to enroll a student body in which “underrepresented minority students do not feel isolated or like spokespersons for their race.” *Id.* at 319. UT’s use of race was by no means “necessary” to achieve this “critical mass.” *Grutter*, 539 U.S. at 327. Neither *Grutter* nor any other decision authorizes “gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic.” App. 182a (Jones, C.J.).

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

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

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

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

**CONCLUSION**

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 15, 2011

## **APPENDIX**

**APPENDIX A — OPINION OF THE UNITED  
STATES COURT OF APPEALS, FIFTH CIRCUIT,  
DATED JANUARY 18, 2011**

UNITED STATES COURT OF APPEALS,  
FIFTH CIRCUIT

631 F.3d 213, 264 Ed. Law Rep. 564

No. 09–50822.  
Jan. 18, 2011.

Abigail Noel FISHER; Rachel Multer Michalewicz,

Plaintiffs–Appellants,

v.

UNIVERSITY OF TEXAS AT AUSTIN; David B. Pryor, Executive Vice Chancellor for Academic Affairs in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; James R. Huffines, as Member of the Board of Regents in His Official Capacity; Janiece Longoria, as Member of the Board of Regents in Her Official Capacity; Colleen McHugh, as Member of the Board of Regents in Her Official Capacity; Robert L. Stillwell, as Member of the Board of Regents in His Official Capacity; James D. Dannenbaum, as Member

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of the Board of Regents in His Official Capacity; Paul Foster, as Member of the Board of Regents in His Official Capacity; Printice L. Gary, as Member of the Board of Regents in His Official Capacity; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; Francisco G. Cigarroa, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants–Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before *KING*, *HIGGINBOTHAM* and *GARZA*, Circuit Judges.

*PATRICK E. HIGGINBOTHAM*, Circuit Judge:

We consider a challenge to the use of race in undergraduate admissions at the University of Texas at Austin. While the University has confined its explicit use of race to the elements of a program approved by the Supreme Court in *Grutter v. Bollinger*,<sup>1</sup> UT’s program acts upon a university applicant pool shaped by a legislatively-mandated parallel diversity initiative that guarantees admission to Texas students in the top ten percent of their high school class. The ever-increasing number of minorities gaining admission under this Top Ten Percent Law casts a shadow on the horizon to the otherwise-plain

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1. 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

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legality of the *Grutter*-like admissions program, the Law's own legal footing aside. While the Law's ultimate fate is not the fare of this suit, the challenge to the *Grutter* plan here rests upon the intimate ties and ultimate confluence of the two initiatives. Today we affirm the constitutionality of the University's program as it existed when Appellants applied and were denied admission.

Abigail Fisher and Rachel Michalewicz, both Texas residents, were denied undergraduate admission to the University of Texas at Austin for the class entering in Fall 2008. They filed this suit alleging that UT's admissions policies discriminated against them on the basis of race in violation of their right to equal protection under the Fourteenth Amendment and federal civil rights statutes.<sup>2</sup> They sought damages as well as injunctive and declaratory relief. Proceeding with separate phases of liability and remedy, the district court, in a thoughtful opinion, found no liability and granted summary judgment to the University.

The procedural posture of this case defines the scope of our review. There are no class claims and both students deny intention to reapply to UT.<sup>3</sup> It follows that Fisher and Michalewicz lack standing to seek injunctive

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2. *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587, 590 (W.D.Tex.2009) (citing U.S. CONST. amend. XIV, § 1, and 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*).

3. Like all Texas residents, Appellants could attend UT Austin as transfer students if they first enrolled in a participating UT system school and met the standards required by the Coordinated Admissions Program, discussed in greater detail below. Instead, Appellants permanently enrolled at other institutions.

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or forward-looking declaratory relief.<sup>4</sup> This principle is rote. To obtain forward-looking equitable remedies, a plaintiff must show she faces imminent threat of future injury.<sup>5</sup> Without that threat, these two applicants only have standing to challenge their rejection and to seek money damages for their injury.<sup>6</sup>

Our focus will be upon the process employed by UT to admit freshmen when Fisher and Michalewicz applied for the class entering Fall 2008, looking to earlier and later years only as they illuminate the rejection of these two applicants.<sup>7</sup> Our task is burdened by the reality that we are examining a dynamic program administered by a large university subject to government oversight. Indeed, the first of UT's periodic five-year reviews was to begin in the fall of 2009, a review that must engage an array of variables, including an ever-present question of whether to adjust the percentage of students admitted under the two diversity initiatives.

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4. See *DeFunis v. Odegaard*, 416 U.S. 312, 319, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (per curiam) (dismissing for lack of standing a suit that challenged a law school admissions policy because the plaintiff would “never again be required to run the gantlet of the Law School’s admissions process”).

5. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201–11, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *City of L.A. v. Lyons*, 461 U.S. 95, 105–10, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

6. See *Lyons*, 461 U.S. at 105–07, 103 S.Ct. 1660.

7. Cf. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 n. 1, 127 S.Ct. 2738, 168 L.Ed.2d 508 (relying on data from before the district court record closed, even after newer data had become available).

*Appendix A*I. *GRUTTER V. BOLLINGER*

We begin with *Grutter v. Bollinger* because UT’s race-conscious admissions procedures were modeled after the program it approved. In rejecting constitutional challenges to the University of Michigan Law School’s admissions program, *Grutter* held that the Equal Protection Clause did not prohibit a university’s “narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”<sup>8</sup> Mapping on *Grutter*, UT evaluates each application using a holistic, multi-factor approach, in which race is but one of many considerations. In granting summary judgment to UT, the district court 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*,” and “as long as *Grutter* remains good law, UT’s current admissions program remains constitutional.”<sup>9</sup> Laying aside the Top Ten Percent Law, that observation is indisputably sound.<sup>10</sup>

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8. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325.

9. *Fisher*, 645 F.Supp.2d at 612–13; *see also id.* at 613 (“If the Plaintiffs are right, *Grutter* is wrong.” (internal quotation marks omitted)).

10. In practice, the admissions systems of Michigan Law School and UT differ because UT’s automatic admission of the top ten percent of Texas high school seniors “largely dominates [its] admissions process.” *Fisher*, 645 F.Supp.2d at 595. We discuss the impact of the Top Ten Percent Law in greater detail below.

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## A

*Grutter* embraced the diversity interest articulated twenty-five years earlier by Justice Powell, who wrote separately in *Regents of the University of California v. Bakke*.<sup>11</sup> This vision of diversity encompassed a broad array of qualifications and characteristics where race was a single but important element.<sup>12</sup> The Michigan Law School designed its admissions program to achieve this broad diversity, selecting students with varied backgrounds and experiences—including varied racial backgrounds—who would respect and learn from one another.<sup>13</sup> The Court explained:

[The Law School’s] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.<sup>14</sup>

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11. 438 U.S. 265, 269, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.).

12. See *Grutter*, 539 U.S. at 325, 123 S.Ct. 2325 (citing *Bakke*, 438 U.S. at 315, 98 S.Ct. 2733 (opinion of Powell, J.)).

13. *Id.* at 314, 123 S.Ct. 2325.

14. *Id.* at 338, 123 S.Ct. 2325 (brackets and internal quotation marks omitted).

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The Law School's policy also reaffirmed its "longstanding commitment" to "one particular type of diversity, that is, racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the] student body in meaningful numbers."<sup>15</sup>

In an effort to ensure representation of minorities, the Law School sought to enroll a "critical mass" of minority students, which would result in increased minority engagement in the classroom and enhanced minority contributions to the character of the School. The *Grutter* Court endorsed this goal, holding that diversity, including seeking a critical mass of minority students, is "a compelling state interest that can justify the use of race in university admissions."<sup>16</sup>

That the concept of critical mass bears a simple but deceptive label is evidenced by the division of the Justices over its meaning. In his dissent, Chief Justice Rehnquist saw critical mass as only the minimum level necessary "[t]o ensure that the[ ] minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine

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15. *Id.* at 316, 123 S.Ct. 2325 (internal quotation marks omitted).

16. *Id.* at 325, 123 S.Ct. 2325; *see id.* at 329–30, 123 S.Ct. 2325.

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stereotypes.”<sup>17</sup> On this view, critical mass is defined only as a proportion of the student body, and the percentage that suffices for one minority group should also suffice for another group.

In contrast, Justice O’Connor, writing for the Court, explained that critical mass must be “defined by reference to the educational benefits that diversity is designed to produce.”<sup>18</sup> Her opinion recognizes that universities do more than simply impart knowledge to their students. Synthesizing, we find at least three distinct educational objectives served by the diversity she envisioned:

**1. Increased Perspectives.** Justice O’Connor observed that including diverse perspectives improves the quality of the educational process because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”<sup>19</sup> In this respect, *Grutter* echoes Justice Powell’s recognition in *Bakke* that it is “essential to the quality of higher education” that a university be able to pursue “[t]he atmosphere of speculation, excitement and creation” that is “promoted by a diverse student body.”<sup>20</sup> Indeed, diversity often brings not just excitement, but

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17. *Id.* at 380, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting).

18. *Id.* at 329–30, 123 S.Ct. 2325 (opinion of the Court).

19. *Id.* at 330, 123 S.Ct. 2325 (internal quotation marks omitted).

20. 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.) (internal quotation marks omitted).

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valuable knowledge as well. “[A] student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a [university] experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”<sup>21</sup>

**2. Professionalism.** The majority pointed to “numerous studies” showing that “student body diversity ... better prepares [students] as professionals.”<sup>22</sup> The Court has “repeatedly acknowledged the overriding importance of preparing students for work and citizenship,”<sup>23</sup> and today’s students must be prepared to work within “an increasingly diverse workforce.”<sup>24</sup> Indeed, “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>25</sup> A diverse student body serves this end by “promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races.”<sup>26</sup>

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21. *Id.* at 314, 123 S.Ct. 2325.

22. *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 (internal quotation marks omitted).

23. *Id.* (internal quotation marks omitted).

24. *Id.* (internal quotation marks omitted).

25. *Id.*

26. *Id.* (internal quotation marks and brackets omitted).

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**3. Civic Engagement.** The Court recognized that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”<sup>27</sup> A diverse student body is crucial for fostering this ideal of civic engagement, because “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>28</sup> Maintaining a visibly open path to leadership demands that “[a]ccess to [higher] education ... be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”<sup>29</sup> Each member of society “must

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27. *Id.* at 332, 123 S.Ct. 2325.

28. *Id.*

29. *Id.* at 332–33, 123 S.Ct. 2325. The Court further explained:

[E]ducation [is] pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society .... [T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.” And, “[n]owhere is the importance of such

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have confidence in the openness and integrity of the educational institutions that provide this training.”<sup>30</sup> Further, efforts to educate and to encourage future leaders from previously underrepresented backgrounds will serve not only to inspire, but to actively engage with many woefully underserved communities, helping to draw them back into our national fabric.

## B

Recognizing the pursuit of diversity, including racial diversity, to be a compelling interest in higher education, *Grutter* endorsed the right of public universities to increase enrollment of underrepresented minorities. *Grutter* also cautioned that, while it accepted diversity as a compelling interest, any sorting of persons on the basis of race must be by measures narrowly tailored to the interest at stake.

As we read the Court, a university admissions program is narrowly tailored only if it allows for individualized consideration of applicants of all races.<sup>31</sup> Such consideration does not define an applicant by race but instead ensures

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openness more acute than in the context of higher education.”

*Id.* at 331–32, 123 S.Ct. 2325 (final two alterations in original; citations and some internal quotation marks omitted).

30. *Id.* at 332, 123 S.Ct. 2325.

31. *Id.* at 337, 123 S.Ct. 2325.

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that she is valued for all her unique attributes. Rather than applying fixed stereotypes of ways that race affects students' lives, an admissions policy must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.”<sup>32</sup> As the Supreme Court later summarized, “The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group.”<sup>33</sup> Thus, a university admissions policy is more likely to be narrowly tailored if it contemplates that a broad range of qualities and experiences beyond race will be important contributions to diversity and as such are appropriately considered in admissions decisions.<sup>34</sup>

Because a race-conscious admissions program is constitutional only if holistic, flexible, and individualized, a university may not establish a quota for minority applicants, nor may it evaluate minority applications “on separate admissions tracks.”<sup>35</sup> The “racial-set-aside program” rejected by Justice Powell in *Bakke* ran afoul of these related prohibitions because it reserved 16 out of 100 seats

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32. *Id.* (quoting *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733 (opinion of Powell, J.)).

33. *Parents Involved*, 551 U.S. at 722, 127 S.Ct. 2738; see also *Grutter*, 539 U.S. at 337, 123 S.Ct. 2325 (“The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”).

34. *Grutter*, 539 U.S. at 338, 123 S.Ct. 2325.

35. *Id.* at 334, 123 S.Ct. 2325 (citing *Bakke*, 438 U.S. at 315–16, 98 S.Ct. 2733 (opinion of Powell, J.)).

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for members of certain minority groups.<sup>36</sup> A university also may not award a fixed number of bonus points to minority applicants.<sup>37</sup> That was the lesson of *Grutter*'s companion case, *Gratz v. Bollinger*, in which the Court struck down the University of Michigan's undergraduate admissions program because it automatically awarded a fixed number of admissions points to all underrepresented minority applicants, resulting in a group-based admissions boost.<sup>38</sup>

Both *Bakke* and *Gratz* firmly rejected group treatment, insisting that the focus be upon individuals and that an applicant's achievements be judged in the context of one's personal circumstances, of which race is only a part. So deployed, a white applicant raised by a single parent who did not attend high school and struggled paycheck to paycheck and a minority child of a successful cardiovascular surgeon may both claim adversity, but the personal hurdles each has cleared will not be seen to be of the same height.

## C

Finally, *Grutter* requires that any race-conscious measures must have a "logical end point" and be "limited

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36. *Id.* at 322, 123 S.Ct. 2325; see *Bakke*, 438 U.S. at 289, 98 S.Ct. 2733 (opinion of Powell, J.).

37. *Gratz v. Bollinger*, 539 U.S. 244, 271–72, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).

38. *Id.*

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in time.”<sup>39</sup> This durational requirement can be satisfied by sunset provisions or by periodic reviews to reconsider whether there are feasible race-neutral alternatives that would achieve diversity interests “ ‘about as well.’”<sup>40</sup> In this respect, *Grutter* is best seen not as an unqualified endorsement of racial preferences, but as a transient response to anemic academic diversity. As Justice O’Connor observed, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>41</sup>

## II. HISTORY OF THE UNIVERSITY’S ADMISSIONS POLICIES

Justice O’Connor’s vision may prove to be more aspirational than predictive. Regardless, universities will construct admissions programs wedded to their missions, which include bringing both meritorious and diverse students to campus. Each year, UT receives applications from approximately four times more students than it can enroll.<sup>42</sup> Over the past two decades, UT has repeatedly revised its admissions procedures to reflect its calculus of educational values while navigating judicial decisions and legislative mandates.

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39. *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

40. *Id.* at 339, 123 S.Ct. 2325 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986)).

41. *Id.* at 343, 123 S.Ct. 2325.

42. *Fisher*, 645 F.Supp.2d at 590.

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Until 1996, UT selected students using two metrics. The first measure, still employed today, is the Academic Index (“AI”), a computation based on the student’s high school class rank, standardized test scores, and the extent to which the applicant exceeded UT’s required high school curriculum.<sup>43</sup> Perceiving that AI alone would produce a class with unacceptably low diversity levels, UT considered a second element for admissions—race. These measures combined resulted in UT admitting more than 90% of applicants who were ranked in the top ten percent of their high school class.<sup>44</sup>

There were then no clear legal limits on a university’s use of race in admissions. The Supreme Court decided *Bakke* in 1978 but its guidance came in a fractured decision, leaving a quarter century of uncertainty.<sup>45</sup> The record

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43. *Id.* at 596.

44. Marta Tienda et al., *Closing the Gap?: Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action* 52 tbl.5 (Tex. Higher Educ. Opportunity Project Working Paper), available at <http://theop.princeton.edu/workingpapers.html>. Unlike the current Top Ten Percent Law, UT’s earlier policies did not *mandate* the admission of all top ten percent students. Thus, even though a top ranking at a predominantly minority high school would contribute to a higher AI score, the AI alone could not effectively serve as a proxy for race because, on average, minorities received lower standardized test scores.

45. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Four Justices would have held that

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does not detail precisely how race factored in admissions decisions during this time, but it is undisputed that race was considered directly and was often a controlling factor in admission.<sup>46</sup> Under this race-conscious admissions policy, the freshman class entering in Fall 1993 included 5,329 students, of whom 238 were African-American (4.5% of the overall class) and 832 were Hispanic (15.6%).<sup>47</sup>

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universities have broad authority to consider race in admissions in order to “remedy disadvantage cast on minorities by past racial prejudice.” *Id.* at 325, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Four other Justices would have held that Title VI of the Civil Rights Act of 1964 bars federally funded universities from making any admissions decisions on the basis of race. *Id.* at 417–18, 98 S.Ct. 2733 (opinion of Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ.). Justice Powell cast the decisive vote in a separate opinion—not joined in full by any other Justice—that invalidated the racial set-aside in the admissions program then before the Court, but reasoned that it would be constitutional for a university to consider race as one facet of diversity in a flexible review that treated each applicant as an individual. *Id.* at 316–19, 98 S.Ct. 2733 (opinion of Powell, J.). Because none of these positions carried the support of a majority of the Court, it was not completely clear which (if any) of these rationales was controlling. *See Grutter*, 539 U.S. at 322–25, 123 S.Ct. 2325 (2003) (recounting this history and the subsequent confusion among lower courts).

46. Records do reflect that at UT’s law school during this time, minority and nonminority applicants were reviewed by separate admissions committees and were subject to different grade and test-score cutoffs. *See Hopwood v. Texas*, 78 F.3d 932, 935–38 (5th Cir.1996).

47. Univ. of Tex. at Austin, *1998–1999 Statistical Handbook*. Minority enrollment was fairly consistent from 1989 until 1993,

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## B

Race-conscious admissions ended in 1996 with *Hopwood v. Texas*, when a panel of this court struck down the use of race-based criteria in admissions decisions at UT's law school.<sup>48</sup> A majority of that panel held that diversity in education was not a compelling government interest,<sup>49</sup> a conclusion the Texas Attorney General interpreted as prohibiting the use of race as a factor in admissions by any undergraduate or graduate program at Texas state universities.<sup>50</sup>

Beginning with the 1997 admissions cycle, UT deployed a Personal Achievement Index ("PAI") to be used with the Academic Index. In contrast to the mechanical formulas used to calculate the AI, the PAI was meant "to

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with some slight decreases in 1994 and 1995. UT publishes its *Statistical Handbook* annually, and these handbooks are cited throughout the district court record. See Univ. of Tex. at Austin Office of Admissions, *Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996–2002* (2003) (Dist. Ct. Dkt. No. 96, Tab 8, Ex. B), at 5, 6; Univ. of Tex. at Austin, *Proposal to Consider Race and Ethnicity in Admissions* (2004) (Dist. Ct. Dkt. No. 96, Tab 11, Ex. A), at 30; Univ. of Tex. at Austin Office of Admissions, *2008 Top Ten Percent Report* (Dist. Ct. Dkt. No. 94, Ex. 9), at 4 [hereinafter *2008 Top Ten Percent Report*]. Handbooks dating back to 1998 are available online at [http://www.utexas.edu/academic/ima/stat\\_handbook/](http://www.utexas.edu/academic/ima/stat_handbook/).

48. 78 F.3d 932 (1996).

49. *Id.* at 944–48.

50. See Tex. Att'y Gen. Letter Op. No. 97–001 (1997).

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identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores.”<sup>51</sup> Although facially race-neutral, the PAI was in part designed to increase minority enrollment; many of the PAI factors disproportionately affected minority applicants.<sup>52</sup>

UT also implemented other facially “race-neutral” policies that, together with the AI and PAI, remain in use today. It created targeted scholarship programs to increase its yield among minority students, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools.<sup>53</sup>

Despite these efforts, minority presence at UT decreased immediately. Although the 1996 admissions decisions were not affected by *Hopwood*, the publicity from the case impacted the number of admitted minorities who chose to enroll. In 1997, fewer minorities applied to UT than in years past. The number of African–American and Hispanic applicants dropped by nearly a quarter, while the total number of University applicants decreased by only 13%.<sup>54</sup> This decrease in minority applicants had a

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51. *Fisher*, 645 F.Supp.2d at 591.

52. *Id.* at 591–92.

53. *Id.* at 592.

54. *Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996–2002* (2003) (Dist. Ct. Dkt. No. 96, Tab 8, Ex. B), at 6.

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corresponding effect on enrollment. Compared to 1995, African–American enrollment for 1997 dropped almost 40% (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen). In contrast, Caucasian enrollment increased by 14%, and Asian–American enrollment increased by 20%.<sup>55</sup>

## C

In 1997, the Texas legislature responded to the *Hopwood* decision by enacting the Top Ten Percent Law, still in effect.<sup>56</sup> The law altered UT’s preexisting policy and mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university.

In its first year, the Top Ten Percent Law succeeded in increasing minority percentages at UT. African–American enrollment rose from 2.7% to 3.0% and Hispanic enrollment rose from 12.6% to 13.2%. However, the absolute number of minorities remained stable as a result of a smaller freshman class. Over time, both the number and percentage of enrolled Hispanics and African–Americans increased. The entering freshman

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55. 1998–1999 *Statistical Handbook*.

56. TEX. EDUC.CODE § 51.803 (1997). The Top Ten Percent Law was amended, during the course of this litigation, to cap the number of students guaranteed admission at UT Austin to 75% of the seats available to Texas residents. *Id.* § 51.803(a–1) (2010). The cap is effective starting with admissions to the Fall 2011 entering class and is currently scheduled to end with admissions to the Fall 2015 entering class.

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class of 2004, the last admitted without the *Grutter*-like plan, was 4.5% African–American (309 students), 16.9% Hispanic (1,149 students), and 17.9% Asian–American (1,218 students) in a class of 6,796 students.<sup>57</sup>

The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose. In 2004, among freshmen who were Texas residents, 77% of the enrolled African–American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students.<sup>58</sup> These numbers highlight the contribution of the Top Ten Percent Law to increasing minority enrollment, but they also reflect a trade-off implicit in the Law: the increase rested heavily on the pass from standardized testing offered by the Top Ten Percent Law. After implementation of the Law, the likelihood of acceptance for African–American and Hispanic students in the second decile of their high school class, who were without the benefits of the pass from standardized testing, declined. Meanwhile, the acceptance probability of similarly situated Caucasian students increased.<sup>59</sup>

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57. *2008 Top Ten Percent Report* at 6 tbl.1.

58. *Id.* at 8; *see also Fisher*, 645 F.Supp.2d at 593 (reporting statistics for total admitted applicants, both Texas and non-Texas residents).

59. Tienda et al., *supra* note 44, at 52 tbl.5.

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## D

*Hopwood's* prohibitions ended after the 2004 admissions cycle with the Supreme Court's 2003 decision in *Grutter*.<sup>60</sup> In August 2003, the University of Texas Board of Regents authorized the institutions within the University of Texas system to examine "whether to consider an applicant's race and ethnicity" in admissions "in accordance with the standards enunciated in" *Grutter*.<sup>61</sup>

As part of its examination, UT commissioned two studies to explore whether the University was enrolling a critical mass of underrepresented minorities. The first study examined minority representation in undergraduate classes, focusing on classes of "participatory size," which it defined as between 5 and 24 students. UT analyzed these classes, which included most of the undergraduate courses, because they offered the best opportunity for robust classroom discussion, rich soil for diverse interactions. According to the study, 90% of these smaller classes in Fall 2002 had either one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students.<sup>62</sup>

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60. 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

61. Minutes of the Board of Regents of the University of Texas at Austin, Meeting No. 969, Aug. 6-7, 2003 (Dist. Ct. Dkt. No. 94, Ex. 19, Tab A), at 4.

62. *Fisher*, 645 F.Supp.2d at 593. Classes with only one student of a given minority were thought to be just as troubling as classes with zero students of that minority because a single

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A later retabulation, which excluded the very smallest of these classes and considered only classes with 10 to 24 students, found that 89% of those classes had either one or zero African-American students, 41% had one or zero Asian-American students, and 37% had either one or zero Hispanic students.<sup>63</sup> In its second study, UT surveyed undergraduates on their impressions of diversity on campus and in the classroom. Minority students reported feeling isolated, and a majority of all students felt there was “insufficient minority representation” in classrooms for “the full benefits of diversity to occur.”<sup>64</sup>

The University incorporated the findings of these two studies in its June 2004 *Proposal to Consider Race and Ethnicity in Admissions*.<sup>65</sup> The 2004 *Proposal* concluded that diverse student enrollment “break[s] down stereotypes,” “promotes cross-racial understanding,” and “prepares students for an increasingly diverse workplace and society.”<sup>66</sup> With respect to the undergraduate program in particular, the 2004 *Proposal* explained that “[a] comprehensive college education requires a

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minority student is apt to feel isolated or like a spokesperson for his or her race. *Id.* at 602–03; *see also Grutter*, 539 U.S. at 319, 123 S.Ct. 2325.

63. Lavergne Aff. (Dist. Ct. Dkt. No. 102, Tab B) ¶¶ 4–5.

64. Walker Aff. (Dist. Ct. Dkt. No. 96, Tab 11) ¶ 12.

65. Dist. Ct. Dkt. No. 96, Tab 11, Ex. A [hereinafter *2004 Proposal*].

66. *Id.* at 1 (internal quotation marks omitted); *see also Fisher*, 645 F.Supp.2d at 603.

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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.”<sup>67</sup> With one eye on *Grutter*, it observed that these objectives are especially important at UT because its “mission and ... flagship role” is to “prepare its students to be the leaders of the State of Texas”—a role which, given the state’s increasingly diverse profile, will require them “to be able to lead a multicultural workforce and to communicate policy to a diverse electorate.”<sup>68</sup>

Citing the classroom diversity study, the *2004 Proposal* explained that UT had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity. Accordingly, the *2004 Proposal* recommended adding the consideration of race as one additional factor within a larger admissions scoring index. This recommendation was presented as “an acknowledgment that the significant differences between the racial and ethnic makeup of the University’s undergraduate population and the state’s population prevent the University from fully achieving its mission.”<sup>69</sup>

After more than a year of study following the *Grutter* decision, UT adopted a policy to include race as one of many factors considered in admissions. UT has no set

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67. *2004 Proposal* at 23 (quoted in *Fisher*, 645 F.Supp.2d at 602).

68. *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602).

69. *Id.* (quoted in *Fisher*, 645 F.Supp.2d at 602).

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date by which it will end the use of race in undergraduate admissions. Rather, it formally reviews the need for race-conscious measures every five years and considers whether adequate race-neutral alternatives exist. In addition, the district court found that the University informally reviews its admissions procedures each year.<sup>70</sup>

The current policy has produced noticeable results. One magazine dedicated to diversity in higher education ranked UT “sixth in the nation in producing undergraduate degrees for minority groups.”<sup>71</sup> In an entering class that was roughly the same size in 1998 as it was in 2008, the enrollment of African–American students doubled from 165 students to 335 students. Hispanic enrollment increased approximately 1.5 times, from 762 students to 1,228 students. Asian–American enrollment also increased nearly 10%, from 1,034 students to 1,126 students.<sup>72</sup> By contrast, in 2004, the last year the Top Ten Percent Law operated without the *Grutter* plan, fall enrollment included only 275 African–Americans and 1,024 Hispanics.

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70. *Fisher*, 645 F.Supp.2d at 594.

71. *Id.* This particular ranking is somewhat limited in its significance, however, as the results are based on raw tabulations of the number of degrees conferred upon minority students. Large schools, like UT, are more likely to be ranked higher simply because they graduate a greater number of students (both minorities and non-minorities). See Victor M.H. Borden, *Top 100 Undergraduate Degree Producers: Interpreting the Data*, DIVERSE ISSUES IN HIGHER EDUC., June 12, 2008.

72. *Statistical Handbook 2004–2005*, at 22 tbl.S13A; *Statistical Handbook 2009–2010*, at 16 tbl.S12 (data for fall enrollment only). For fall and summer numbers combined, see *2008 Top Ten Percent Report* at 6.

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Because of the myriad programs instituted, it can be difficult to attribute increases in minority enrollment to any one initiative. In addition, demographics have shifted in Texas, so increases in minority enrollment likely in part reflect the increased presence of minorities statewide.

### III. THE CHALLENGED POLICY

UT's consideration of race is one part of the complex admissions process operating when Appellants were rejected. Given Appellants' challenge, we must examine the whole of the process.

#### A

UT is a public institution of higher education, authorized by the Texas Constitution and supported by state and federal funding. Accordingly, it begins its admissions process by dividing applicants into three pools: (1) Texas residents, (2) domestic non-Texas residents, and (3) international students. Students compete for admission only against other students in their respective pool. Texas residents are allotted 90% of all available seats, with admission based on a two-tiered system, beginning with students automatically admitted under the Top Ten Percent Law and then filling the remaining seats on the basis of the Academic and Personal Achievement Indices.<sup>73</sup> Because Appellants are Texas residents, their challenge focuses on the admissions procedures applied to in-state applicants.

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73. Admission decisions for domestic non-Texas residents and international applicants are made solely on the basis of their Academic and Personal Achievement Indices.

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Texas applicants are divided into two subgroups: (1) Texas residents who are in the top ten percent of their high school class and (2) those Texas residents who are not. Top ten percent applicants are guaranteed admission to the University, and the vast majority of freshmen are selected in this way, without a confessed consideration of race. In 2008, for example, 81% of the entering class was admitted under the Top Ten Percent Law, filling 88% of the seats allotted to Texas residents and leaving only 1,216 offers of admission university-wide for non-top ten percent residents.<sup>74</sup> The impact of the Top Ten Percent Law on UT's admissions has increased dramatically since it was first introduced in 1998, when only 41% of the seats for Texas residents were claimed by students with guaranteed admission.<sup>75</sup>

The remaining Texas applicants, who were not within the top ten percent of their high school graduating class, compete for admission based on their Academic and Personal Achievement Indices.<sup>76</sup> The Academic Index

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74. *2008 Top Ten Percent Report* at 8 tbl.2, 9 tbl.2b. Table 2 shows 8,984 top ten percent students were admitted in 2008. The UT Associate Director of Admissions reported that 10,200 admissions slots are available for Texas residents, leaving 1,216 slots for non-top ten percent students. *Ishop Aff.* (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

75. *Id.* at 7 tbl.1a. In 1998, out of a class that included 6,110 Texas residents, only 2,513 enrolled freshmen were admitted under the Top Ten Percent Law.

76. The district court found that, on "relatively rare" occasions, a holistic review of the entire application may result in

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is the mechanical formula that predicts freshman GPA using standardized test scores and high school class rank.<sup>77</sup> Some applicants' AI scores are high enough that they receive admission based on that score alone. Others are low enough that their applications are considered presumptively denied. If an application is presumptively denied, senior admission staff review the file and may, on rare occasions, designate the file for full review notwithstanding the AI score.<sup>78</sup>

The Personal Achievement Index is based on three scores: one score for each of the two required essays and a third score, called the personal achievement score, which represents an evaluation of the applicant's entire file. The essays are each given a score between 1 and 6 through "a holistic evaluation of the essay as a piece of writing based on its complexity of thought, substantiality of development,

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the University admitting an applicant to the fall class even though his or her AI or PAI scores fall just shy of the official cutoff. *See Fisher*, 645 F.Supp.2d at 599.

77. *Fisher*, 645 F.Supp.2d at 596. The precise formulas used to calculate an applicant's Academic Index are derived by regression analysis and vary by intended major. For instance, the formula for prospective engineering majors gives greater weight to math scores, whereas the formula for prospective liberal arts majors gives somewhat greater weight to verbal scores. *See 2004 Proposal* at 27 & n.5. The differences in these formulas are immaterial to the present case.

78. In other words, no applicant is denied admission based purely on AI score without having her file reviewed by at least one admissions reader and her individual circumstances considered.

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and facility with language.”<sup>79</sup> The personal achievement score is also based on a scale of 1 to 6, although it is given slightly greater weight in the final PAI calculation than the mean of the two essay scores.<sup>80</sup>

This personal achievement score is designed to recognize qualified students whose merit as applicants was not adequately reflected by their Academic Index. Admissions staff assign the score by assessing an applicant’s demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service. In addition, the personal achievement score includes a “special circumstances” element that may reflect the socioeconomic status of the applicant and his or her high school, the applicant’s family status and family responsibilities, the applicant’s standardized test score compared to the average of her high school, and—beginning in 2004—the applicant’s race.<sup>81</sup> To assess these intangible factors, evaluators read the applicant’s essays again, but this time with an eye to the information conveyed rather than the quality of the student’s writing. Admissions officers undergo annual training by a nationally recognized expert in holistic scoring, and senior staff members perform quality control to verify that awarded scores are appropriate and consistent. The most recent study, in 2005, found that

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79. *Fisher*, 645 F.Supp.2d at 597.

80.  $PAI = [(personal\ achievement\ score * 4) + (average\ essay\ score * 3)] / 7$ . *Id.* at 597 n. 7.

81. *Id.* at 591–92, 597.

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holistic file readers scored within one point of each other 88% of the time.<sup>82</sup>

None of the elements of the personal achievement score—including race—are considered individually or given separate numerical values to be added together. Rather, the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person and to place his or her achievements in context.<sup>83</sup> As UT’s director of admissions explained, “race provides—like [the] language [spoken in the applicant’s home], whether or not someone is the first in their family to attend college, and family responsibilities—important context in which to evaluate applicants, and is only one aspect of the diversity that the University seeks to attain.”<sup>84</sup> Race is considered as part of the applicant’s context whether or not the applicant belongs to a minority group, and so—at least in theory—it “can positively impact applicants of all races, including Caucasian[s], or [it] may have no impact whatsoever.”<sup>85</sup> Moreover, given the mechanics of UT’s admissions process, race has the potential to influence only a small part of the applicant’s overall admissions score. The sole instance when race is

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82. *Id.* at 597; see Univ. of Tex. at Austin Office of Admissions, *Inter-Rater Reliability of Holistic Measures Used in the Freshman Admission Process of the University of Texas at Austin* (Feb. 22, 2005) (Dist.Ct.Dkt. No. 94, Ex. 10).

83. *Fisher*, 645 F.Supp.2d at 597.

84. Walker Aff. (Dist. Ct. Dkt. No. 96, Tab 11) ¶ 15.

85. *Fisher*, 645 F.Supp.2d at 597.

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considered is as one element of the personal achievement score, which itself is only a part of the total PAI. Without a sufficiently high AI and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.<sup>86</sup>

## B

Although the process for calculating AI and PAI scores is common to all parts of the University, each offer of admission to UT is ultimately tied to an individual school or major. Texas residents in the top ten percent of their high school class are guaranteed admission to the University, but they are not assured admission to the individual school or program of their choice.

Most majors and colleges in the University provide automatic admission to Top Ten Percent Law applicants, but certain “impacted majors”—including the School of Business, the College of Communication, and the Schools of Engineering, Kinesiology, and Nursing—are obligated to accept only a certain number of Top Ten Percent Law applicants.<sup>87</sup> These programs are “impacted” because they could fill 80% or more of their available spaces each year solely through operation of the Top Ten Percent Law. To avoid oversubscription and to allow these colleges and

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86. *See id.* at 608.

87. In addition, because of special portfolio, audition, and other requirements, the Top Ten Percent Law does not apply to the School of Architecture, the School of Fine Arts, and certain honors programs.

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majors to admit some non-top ten percent applicants, UT caps the percentage of students automatically admitted to these programs at 75% of the available spaces.<sup>88</sup>

Top Ten Percent Law applicants who do not receive automatic entry to their first choice program compete for admission to the remaining spaces, and if necessary to their second-choice program, on the basis of their AI and PAI scores. The admissions office places students into matrices for each preferred school or major, with students grouped by AI score along one axis and PAI score along the other axis. Liaisons for the majors then establish a cutoff line, which is drawn in a stair-step pattern. Applicants denied admission to their first-choice program are considered for their second choice, with cutoff lines readjusted to reflect the influx of those applicants. Any top ten percent applicants not admitted to either their first- or second-choice program are automatically admitted as Liberal Arts Undeclared majors. All other applicants not yet admitted to UT compete, again according to AI and PAI scores, for any remaining seats in the Liberal Arts Undeclared program.

Although this completes the admissions process for the fall portion of the freshman class, no Texas resident who submits a timely application is denied admission. Instead, those residents not admitted to the entering fall class are offered admission to either the summer program

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88. Thus, for example, the School of Business granted automatic admission only to those students who graduated in the top 4% of their high school class and selected a business major as their first choice. *Ishop Dep. (Dist. Ct. Dkt. No. 96, Tab 2)* at 32.

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or the Coordinated Admissions Program (CAP). Marginal applicants who missed the cutoff for the fall class are offered admission to the summer program, which permits students to begin their studies at UT during the summer and then join the regularly admitted students in the fall. About 800 students enroll in the summer program each year. All remaining Texas applicants are automatically enrolled in CAP, which guarantees admission as a transfer student if the student enrolls in another UT system campus for her freshman year and meets certain other conditions, including the completion of thirty credit hours with a cumulative grade point average of 3.2 or higher.

## C

The Academic Index and Personal Achievement Index now employed by UT have been in continuous use since 1997. The lone substantive change came in 2005, following the *Grutter* decision, when the Board of Regents authorized the consideration of race as another “special circumstance” in assessing an applicant’s personal achievement score.

Race—like all other elements of UT’s holistic review—is not considered alone. Admissions officers reviewing each application are aware of the applicant’s race, but UT does not monitor the aggregate racial composition of the admitted applicant pool during the process. The admissions decision for any particular applicant is not affected—positively or negatively—by the number of other students in her racial group who have been admitted

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during that year.<sup>89</sup> Thus, “it is difficult to evaluate which applicants have been positively or negatively affected by its consideration or which applicants were ultimately offered admission due to their race who would not have otherwise been offered admission.”<sup>90</sup> Nevertheless, the district court found that race “is undisputedly a meaningful factor that can make a difference in the evaluation of a student’s application.”<sup>91</sup>

## D

UT undoubtedly has a compelling interest in obtaining the educational benefits of diversity, and its reasons for implementing race-conscious admissions—expressed in the *2004 Proposal*—mirror those approved by the Supreme Court in *Grutter*. The district court found that both the UT and *Grutter* policies “attempt to promote ‘cross-racial understanding,’ ‘break down racial stereotypes,’ enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as ‘spokespersons’ for their race.”<sup>92</sup> Like the law school in *Grutter*, UT

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89. *Fisher*, 645 F.Supp.2d at 598, 609.

90. *Id.* at 597.

91. *Id.* at 597–98.

92. *Id.* at 603 (quoting *Grutter*, 539 U.S. at 319–20, 123 S.Ct. 2325). More specifically, as described in the *2004 Proposal*, one purpose of UT’s race-conscious policy is “ ‘to provide an educational setting that fosters cross-racial understanding,

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“has determined, based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”<sup>93</sup> UT has made an “educational judgment that such diversity is essential to its educational mission,” just as Michigan’s Law School did in *Grutter*.<sup>94</sup>

Considering UT’s admissions system in its historical context, it is evident that the efforts of the University have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion. That said, the use of race summons close judicial scrutiny, necessary for the nation’s slow march toward the ideal

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provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.” *2004 Proposal* at 25 (quoted in *Fisher*, 645 F.Supp.2d at 603). Another is to produce “ ‘future educational, cultural, business, and sociopolitical leaders.’ ” *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602). And because Texas’s population is uniquely diverse—“[i]n the near future, Texas will have no majority race”—“ ‘tomorrow’s leaders must not only be drawn from a diverse population[,] but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate.’ ” *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602). As the state’s flagship public institution, UT determined that it “ ‘has a compelling educational interest to produce graduates who are capable of fulfilling the future leadership needs of Texas.’ ” *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602).

93. *Fisher*, 645 F.Supp.2d at 603 (quoting *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325).

94. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325.

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of a color-blind society, at least as far as the government can see.

## IV. STANDARD OF REVIEW

It is a given that as UT's *Grutter*-like admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny with its requirement of narrow tailoring.<sup>95</sup> At the same time, the Supreme Court has held that "[c]ontext matters" when evaluating race-based governmental action, and a university's educational judgment in developing diversity policies is due deference.<sup>96</sup>

## A

Judicial deference to a university's academic decisions rests on two independent foundations. First, these decisions are a product of "complex educational judgments in an area that lies primarily within the expertise of the university," far outside the experience of the courts.<sup>97</sup> Second, "universities occupy a special niche

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95. *Id.* at 326, 328, 123 S.Ct. 2325 (citing *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097); *see also Parents Involved*, 551 U.S. at 720, 127 S.Ct. 2738.

96. *Grutter*, 539 U.S. at 327, 123 S.Ct. 2325; *see also id.* at 328, 123 S.Ct. 2325 ("The Law School's educational judgment ... is one to which we defer .... Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.").

97. *Id.* at 328, 123 S.Ct. 2325.

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in our constitutional tradition,” with educational autonomy grounded in the First Amendment.<sup>98</sup> As Justice Powell explained in *Bakke*, “[a]cademic freedom ... includes [a university’s] selection of its student body.”<sup>99</sup>

Yet the scrutiny triggered by racial classification “is no less strict for taking into account” the special circumstances of higher education.<sup>100</sup> “[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in [a] particular context.”<sup>101</sup> Narrow tailoring, a component of strict scrutiny, 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. Rather than second-guess the merits of the University’s decision, a task we are ill-equipped to perform, we instead scrutinize the University’s decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the University acted in good faith, a presumption Appellants are free to rebut.<sup>102</sup> Relatedly, while we focus

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98. *Id.* at 329, 123 S.Ct. 2325.

99. *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.).

100. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325.

101. *Id.* at 327, 123 S.Ct. 2325.

102. *Id.* at 329, 123 S.Ct. 2325 (“[G]ood faith on the part of a university is presumed absent a showing to the contrary.” (internal

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on the University's decision to adopt a *Grutter*-like plan, admissions outcomes remain relevant evidence of the plan's necessity—a reality check.

## B

With a nod to *Grutter*'s command that we generally give a degree of deference to a university's educational judgments, Appellants urge that *Grutter* did not extend such deference to a university's decision to implement a race-conscious admissions policy. Instead, they maintain *Grutter* deferred only to the university's judgment that diversity would have educational benefits, not to the assessment of whether the university has attained critical mass of a racial group or whether race-conscious efforts are necessary to achieve that end.

As an initial matter, this argument in its full flower is contradicted by *Grutter*. The majority held that, like the examination into whether the University has a compelling interest, “the narrow-tailoring inquiry ... must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education.”<sup>103</sup> That is, the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment.

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quotation marks omitted) (quoting *Bakke*, 438 U.S. at 318–19, 98 S.Ct. 2733 (opinion of Powell, J.)).

103. *Id.* at 333–34.

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Appellants would have us borrow a more restrictive standard of review from a series of public employment and government contracting cases, in which the Supreme Court “held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary.”<sup>104</sup> The Court most recently applied this strong-basis-in-evidence standard in *Ricci v. DeStefano*.

In *Ricci*, white firefighters from New Haven, Connecticut sued under Title VII, challenging the city’s decision to disregard a promotions test after the results showed that white candidates significantly outperformed minority candidates.<sup>105</sup> New Haven defended this action, arguing that if it had ratified the test results it could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters.<sup>106</sup> The white firefighters, however, argued that ignoring the test results was a violation of Title VII’s separate prohibition against intentional race discrimination, or disparate

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104. *Ricci v. DeStefano*, — U.S. —, 129 S.Ct. 2658, 2675, 174 L.Ed.2d 490 (2009) (some internal quotation marks omitted) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), in turn quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality)).

105. *Id.* at 2664.

106. *Id.*; see 42 U.S.C. § 2000e-2(k)(1)(A)(i) (codifying *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

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treatment.<sup>107</sup> Responding to this tension, the Supreme Court held that such intentional race-based action is not permitted by Title VII unless the employer can demonstrate with a strong basis in evidence that it would have been liable under the disparate impact provision had it not taken the action.<sup>108</sup> The Court suggested that anything less would risk creating a *de facto* quota system, where an employer could disregard test results to achieve a preferred racial balance, impermissibly shifting the focus from individual discrimination to group bias.<sup>109</sup> Applying the strong-basis-in-evidence standard, the Supreme Court held that New Haven’s fear of disparate impact liability was not adequately supported.<sup>110</sup>

The city had argued it only needed to show a fear of liability based on a good-faith belief—a rough analogy to the university admissions standard. Yet the Court found that an intent-based standard could not be squared with the statutory text. The *Ricci* Court turned to the strong-basis-in-evidence standard “as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII.”<sup>111</sup>

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107. *See* 42 U.S.C. § 2000e-2(a)(1).

108. *Ricci*, 129 S.Ct. at 2664.

109. *Id.* at 2676.

110. *Id.*

111. *Id.* at 2676. We note that these statutory constraints are not present in the context of university admissions programs.

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Although *Ricci* did not address the firefighters' equal protection claim, the Court derived its standard from *Richmond v. J.A. Croson Co.*,<sup>112</sup> a government contracting case, which in turn adopted from a plurality opinion in *Wygant v. Jackson Board of Education*, a public employment case.<sup>113</sup> In *Wygant*, the plurality concluded that defending race-based public employment decisions as responsive to present effects of past discrimination required a strong basis in evidence of the past discrimination.<sup>114</sup> Similarly, *Croson* adopted this standard after observing that “an amorphous claim [of] past discrimination in a particular industry cannot justify the use of an unyielding racial quota.”<sup>115</sup>

This recitation of history, quick as it is, makes plain that the cases Appellants cite have little purchase in this challenge to university admissions. The high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration. In doing so, it touches the third rail of racial quotas. *Wygant* and *Croson* both involved explicit quotas; in *Ricci*, the Court was concerned that the city's use of race threatened to devolve into a *de facto* quota.

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112. 488 U.S. at 500, 109 S.Ct. 706.

113. 476 U.S. at 277, 106 S.Ct. 1842.

114. *Id.* at 277–78, 106 S.Ct. 1842.

115. *Croson*, 488 U.S. at 499, 109 S.Ct. 706.

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By contrast, *Grutter* recognized that universities are engaged in a different enterprise. Their holistic approach is part of a forward-looking effort to obtain the educational benefits of diversity. The look to race as but one element of this further goal, coupled with individualized consideration, steers university admissions away from a quota system. *Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.

*Parents Involved in Community Schools v. Seattle School District No. 1* further supports this understanding.<sup>116</sup> When scrutinizing two school districts' race-conscious busing plans, the Court invoked *Grutter*'s "serious, good faith consideration" standard, rather than the strong-basis-in-evidence standard that Appellants would have us apply.<sup>117</sup> The *Parents Involved* Court never suggested that the school districts would be required to prove their plans were meticulously supported by some particular quantum of specific evidence. Rather, the Court struck down the school districts' programs because they pursued racial balancing and defined students based on racial group classifications, not on individual circumstances.

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116. 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

117. *See id.* at 735, 127 S.Ct. 2738 (quoting *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325).

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In short, the Court has not retreated from *Grutter*'s mode of analysis, one tailored to holistic university admissions programs. Thus, we apply strict scrutiny to race-conscious admissions policies in higher education, mindful of a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body.

## C

Appellants do not allege that UT's race-conscious admissions policy is functionally different from, or gives greater consideration to race than, the policy upheld in *Grutter*. Rather, Appellants question whether UT *needs* a *Grutter*-like policy. As their argument goes, the University's race-conscious admissions program is unwarranted because (1) UT has gone beyond a mere interest in diversity for education's sake and instead pursues a racial composition that mirrors that of the state of Texas as a whole, amounting to an unconstitutional attempt to achieve "racial balancing"; (2) the University has not given adequate consideration to available "race-neutral" alternatives, particularly percentage plans like the Top Ten Percent Law; and (3) UT's minority enrollment under the Top Ten Percent Law already surpassed critical mass, such that the additional (and allegedly "minimal") increase in diversity achieved through UT's *Grutter*-like policy does not justify its use of race-conscious measures. We will consider each of these arguments in turn.

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## V. RACIAL BALANCING

Again, diversity is a permissible goal for educational institutions, but “outright racial balancing” is not. Attempting to ensure that the student body contains some specified percentage of a particular racial group is “patently unconstitutional.”<sup>118</sup> This concept follows from the Supreme Court’s repeated emphasis that, by itself, increasing racial representation is not a sufficiently compelling interest to justify the use of racial preferences. *Grutter* described many important educational interests that may be sought through diversity, but steadfastly maintained that “[r]acial balance is not to be achieved for its own sake.”<sup>119</sup> Moreover, “[t]he point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance” by creating an unconstitutional quota.<sup>120</sup>

## A

Looking to the details of UT’s race-conscious admissions policy, it is clear that administrators knew a quota system would not survive judicial review, and they took care to avoid this fatal mistake. UT’s system was

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118. *Grutter*, 539 U.S. at 329–30, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J)).

119. *Id.* at 330, 123 S.Ct. 2325 (quoting *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992)).

120. *Parents Involved*, 551 U.S. at 723, 127 S.Ct. 2738.

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modeled after the *Grutter* program, which the Supreme Court held was not a quota. UT has never established a specific number, percentage, or range of minority enrollment that would constitute “critical mass,” nor does it award any fixed number of points to minority students in a way that impermissibly values race for its own sake.<sup>121</sup>

Further, there is no indication that UT’s *Grutter*-like plan is a quota by another name. It is true that UT looks in part to the number of minority students when evaluating whether it has yet achieved a critical mass, but “[s]ome attention to numbers, without more, does not transform

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121. Appellants argue that UT’s “head-in-the-sand approach”—refusing to identify any specific number, percentage, or range of minority students that would constitute critical mass—is an improper attempt “to short circuit any inquiry into whether it can justify its policy with evidence by arguing that critical mass is a purely subjective concept that cannot be evaluated in numerical terms.” Appellants claim that until UT identifies some “finishing line,” the use of race has “no logical stopping point” and is therefore “too amorphous a basis for imposing a racially classified remedy.” But in both *Bakke* and *Grutter*, the controlling opinions expressly approved of policies seeking only some undefined “meaningful number” of minorities, *see Grutter*, 539 U.S. at 335, 123 S.Ct. 2325; *Bakke*, 438 U.S. at 323, 98 S.Ct. 2733 (opinion of Powell, J.), and the Court has firmly “rejected” the argument “that diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite” a ground for race-conscious university admissions policies, *Gratz*, 539 U.S. at 268, 123 S.Ct. 2411 (internal quotation marks omitted). On the contrary, if UT were to identify some numerical target for minority enrollment, that would likely render the policy unconstitutional under *Grutter*.

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a flexible admissions system into a rigid quota.”<sup>122</sup> Whereas a quota imposes a fixed percentage standard that cannot be deviated from, a permissible diversity goal “ ‘require[s] only a good-faith effort ... to come within a range demarcated by the goal itself.’ ”<sup>123</sup> Indeed, UT’s policy improves upon the program approved in *Grutter* because the University does not keep an ongoing tally of the racial composition of the entering class during its admissions process.<sup>124</sup>

UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas. Its methods and efforts belie the charge. The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas’s African-American population, while Asian-American enrollment is more than five times the percentage of Texan Asian-Americans.<sup>125</sup>

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122. *Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 (citation, internal quotation marks, and brackets omitted).

123. *Id.* at 335, 123 S.Ct. 2325 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986)).

124. *Cf. Grutter*, 539 U.S. at 391–92, 123 S.Ct. 2325 (Kennedy, J., dissenting).

125. *Fisher*, 645 F.Supp.2d at 607 n. 11.

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## B

Appellants nevertheless argue that UT’s program amounts to racial balancing because it supposedly evinces a special concern for demographically underrepresented groups, while neglecting the diverse contributions of others. These arguments do not account for the operation of UT’s admissions system or the scope of the diversity interest approved by the Court in *Grutter*.

## 1

The district court expressly found that race can enhance the personal achievement score of a student from any racial background, including whites and Asian–Americans.<sup>126</sup> For example, a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same school. This possibility is the point of *Grutter*’s holistic and individualized assessments, which must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.”<sup>127</sup> Indeed, just as in *Grutter*, UT applicants of every race may submit supplemental information to highlight their potential diversity contributions, which

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126. *Id.* at 606.

127. *Grutter*, 539 U.S. at 337, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733 (opinion of Powell, J.)).

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allows students who are diverse in unconventional ways to describe their unique attributes.<sup>128</sup>

The summary judgment record shows that demographics are not consulted as part of any individual admissions decision, and UT's admissions procedures do not treat certain racial groups or minorities differently than others when reviewing individual applications. Rather, the act of considering minority group demographics (to which Appellants object) took place only when the University first studied whether a race-conscious admissions program was needed to attain critical mass. Appellants' objection therefore must be directed not to the design of the program, but rather to whether UT's decision to reintroduce race as a factor in admissions was made in good faith.

## 2

Appellants contend that UT revealed its true motive to be outright racial balancing when it referenced state population data to justify the adoption of race-conscious admissions measures. They insist that if UT were truly focused on educational benefits and critical mass, then there should be no reason to consult demographic data when determining whether UT had sufficient minority representation.

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128. *Id.* at 338, 123 S.Ct. 2325; see *Fisher*, 645 F.Supp.2d at 597.

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We disagree. The University's policies and measured attention to the community it serves are consonant with the educational goals outlined in *Grutter* and do not support a finding that the University was engaged in improper racial balancing during our time frame of review. Both *Grutter* and *Bakke* recognized that "there is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body.'"<sup>129</sup> In its policymaking process, UT gave appropriate attention to those educational benefits identified in *Grutter* without overstepping any constitutional bounds.

*Grutter* recognized that racial and ethnic backgrounds play an influential role in producing the diversity of views and perspectives which are paramount to a university's educational mission. As Justice O'Connor explained, the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters" can have a significant impact on a student's views.<sup>130</sup> The Court acknowledged that "[b]y virtue of our Nation's struggle with racial inequality, [underrepresented minority students] are both likely to have experiences with particular importance to the [University's] mission, and less likely to be admitted in meaningful numbers on criteria that ignore these experiences."<sup>131</sup> UT properly

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129. *Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 323, 98 S.Ct. 2733 (opinion of Powell, J.)).

130. *Id.* at 333, 123 S.Ct. 2325.

131. *Id.* at 338, 123 S.Ct. 2325.

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concluded that these individuals from the state's underrepresented minorities would be most likely to add unique perspectives that are otherwise absent from its classrooms. Identifying *which* backgrounds are underrepresented, in turn, presupposes some reference to demographics, and it was therefore appropriate for UT to give limited attention to this data when considering whether its current student body included a critical mass of underrepresented groups.

Preparing students to function as professionals in an increasingly diverse workforce likewise calls for some consideration of a university's particular educational mission and the community it serves. For instance, a nationally renowned law school draws upon a nationwide applicant pool and sends its graduates into careers in all states; therefore it is appropriate for such a school to consider national diversity levels when setting goals for its admissions program. In contrast, UT's stated goal is to "produce graduates who are capable of fulfilling the future leadership needs of Texas."<sup>132</sup> This objective calls for a more tailored diversity emphasis. In a state as racially diverse as Texas, ensuring that graduates learn to collaborate with members of racial groups they will encounter in the workforce is especially important. The *2004 Proposal* concluded that a race-conscious admissions program was necessary at UT specifically because "from a racial, ethnic, and cultural standpoint, students at the

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132. *2004 Proposal* at 23 (quoted in *Fisher*, 645 F.Supp.2d at 602).

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University [were] being educated in a less-than-realistic environment that [was] not conducive to training the leaders of tomorrow.”<sup>133</sup>

The need for a state’s leading educational institution to foster civic engagement and maintain visibly open paths to leadership also requires a degree of attention to the surrounding community. A university presenting itself as open to all may be challenged when the state’s minority population grows steadily but minority enrollment does not. Indeed, the *2004 Proposal* expressed concern that UT appeared “largely closed to nonwhite applicants” and did not “provide a welcoming supportive environment” for minority students.<sup>134</sup> UT was keenly aware that by sending a message that people of all stripes can succeed at UT, the University would attract promising applicants from once-insulated communities, over time narrowing the credentials gap between minority and non-minority applicants.<sup>135</sup> After *Hopwood*, such applicants were dissuaded from applying to UT. But through the Top Ten Percent Law and *Grutter*-like plan, UT has increased its minority applicant pool in its effort to ensure that it serves as a flagship university for the entire state, not just Texans

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133. *Id.* at 24–25 (quoted in *Fisher*, 645 F.Supp.2d at 602).

134. *Id.* at 14.

135. See, e.g., Mark C. Long et al., *Policy Transparency and College Enrollment: Did the Texas Top Ten Percent Law Broaden Access to the Public Flagships?*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 82 (2010); Kim M. Lloyd et al., *Minority College Aspirations, Expectations and Applications Under the Texas Top 10% Law*, 86 SOC. FORCES 1105 (2008).

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of certain backgrounds. Cultivating paths to leadership for underrepresented groups serves both the individual and the public, sustaining an infrastructure of leaders in an increasingly pluralistic society. Although a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account.

Finally, *Grutter*'s structure accepts that a university's twin objectives of rewarding academic merit and fostering diversity can be complementary rather than competing goals; that students rising to the top of underrepresented groups demonstrate promise as future leaders. These students' relative success in the face of harmful and widespread stereotypes evidences a degree of drive, determination, and merit not captured by test scores alone. Insofar as Appellants complain that the University's limited attention to demographics was inconsistent with the legitimate educational concerns recognized in *Bakke* and *Grutter*, we conclude that their contention cannot be sustained.

Appellants argue that a broad approach to educational diversity is improper because "critical mass" must be an "inward-facing concept ... that focuses on the functioning of the student body," encompassing only that level of minority enrollment necessary to ensure that minority students participate in the classroom and do not feel isolated. While Appellants' view may comport with one

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literal interpretation of the “critical mass” label, it is not the view that prevailed in *Grutter*. The *Grutter* majority defined critical mass “by reference to the educational benefits that diversity is designed to produce,”<sup>136</sup> and the educational benefits recognized in *Grutter* go beyond the narrow “pedagogical concept” urged by Appellants. On this understanding, there is no reason to assume that critical mass will or should be the same for every racial group or every university. We are persuaded, as was the district court, that the University adhered to *Grutter* when it reintroduced race into its admissions process based in part on an analysis that devoted special attention to those minorities which were most significantly underrepresented on its campus.

## VI. THE TOP TEN PERCENT LAW

*Grutter* is best read as a path toward the moment when all race-conscious measures become unnecessary. To that end, *Grutter* requires universities that employ race-conscious admissions to seriously consider race-neutral alternatives. But “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” especially if the proffered alternatives would require the University to sacrifice other important interests, like its academic selectivity and reputation for excellence.<sup>137</sup>

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136. *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325.

137. *See id.* at 339–40, 123 S.Ct. 2325.

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The parties devote significant attention to the Top Ten Percent Law.<sup>138</sup> Since the Law was first enacted in 1997, UT has seen increases in both African–American and Hispanic enrollment, but again, changing demographics and other minority outreach programs render it difficult to quantify the increases attributable to the Top Ten Percent Law.<sup>139</sup>

Appellants put forward the Top Ten Percent Law as a facially race-neutral alternative that would allow UT to obtain a critical mass of minority enrollment without resorting to race-conscious admissions. As the argument goes, if the Top Ten Percent Law were able to serve the University’s interests “about as well” as race-conscious admissions, without differentiating between students on the basis of race, then it would render UT’s current admissions program unconstitutional.<sup>140</sup> UT responds that the Top Ten Percent Law does not constitute a workable

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138. TEX. EDUC.CODE § 51.803 (1997). The precise impact UT’s other race-neutral alternatives (such as scholarship and outreach programs) have had on minority enrollment is not clear, but their effect would not appear to be great enough to bear on the constitutionality of the University’s race-conscious admissions policy.

139. *Fisher*, 645 F.Supp.2d at 594; *see also* Marta Tienda & Teresa A. Sullivan, *The Promise and Peril of the Texas Uniform Admissions Law* 164–65 & tbl.1, in *THE NEXT TWENTY-FIVE YEARS? AFFIRMATIVE ACTION AND HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA* A 155 (David L. Featherman et al. eds., 2010).

140. *See Grutter*, 539 U.S. at 339, 123 S.Ct. 2325 (quoting *Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct. 1842 (1986)).

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alternative to a flexible admissions system, and so it is “entirely irrelevant” as a matter of law in determining whether or not a university may adopt the holistic consideration of race to achieve critical mass.

UT is correct that so-called “percentage plans” are not a constitutionally mandated replacement for race-conscious admissions programs under *Grutter*, although—as will become apparent—this realization alone does not end our constitutional inquiry. The idea of percentage plans as a viable alternative to race-conscious admissions policies was directly advocated to the *Grutter* Court by the United States, arguing as *amicus curiae*.<sup>141</sup> In response, the Court held that although percentage plans may be a race-neutral means of increasing minority enrollment, they are not a workable alternative—at least in a constitutionally significant sense—because “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.”<sup>142</sup> In addition, the Court emphasized existing percentage plans—including UT’s—are simply not “capable of producing a critical mass without forcing [universities] to abandon the academic selectivity that is the cornerstone of [their] educational mission.”<sup>143</sup>

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141. The United States has since filed an amicus brief in the present case, urging us to uphold UT’s current admissions program.

142. *Grutter*, 539 U.S. at 340, 123 S.Ct. 2325 (internal citation omitted).

143. *Id.*

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That the Top Ten Percent Law is not a constitutionally-mandated alternative does not make it irrelevant. By now it is clear that the Law is inescapably tied to UT's *Grutter* plan, as *Grutter* does its work with the applicants who remain after the cut of the Top Ten Percent Law. In 2008, top ten percent applicants accounted for 8,984 of the 10,200 Texas admittees.<sup>144</sup> Thus, with the Top Ten Percent Law in effect, UT's *Grutter* plan can only possibly influence the review of approximately 1,200 admitted students' applications.<sup>145</sup> In evaluating the constitutionality of an admissions program, we cannot ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texan freshmen.<sup>146</sup>

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144. *2008 Top Ten Report* at 8 tbl.2; *Ishop Aff.* (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

145. In reality, the *Grutter* plan operates on even fewer applications, as many non-top ten percent students are admitted based purely on their class rank and standardized test scores, without any reference to their PAI, leaving only 841 seats in 2008 that were evaluated under the *Grutter* plan. *See Ishop Aff.* (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

146. *2008 Top Ten Report* at 7 tbl.1a; *see supra* note 74 and accompanying text. We also note that since it began, the Top Ten Percent Law has had an increasing impact on admissions decisions. In 1998, top ten percent candidates comprised just 41% of Texans in the freshman class. In 2004, 66% of Texan freshmen were top ten percent students, and in 2008, top ten percent students made up 81% of the Texas freshmen seats. While the legislative 75% cap on top ten percent enrollment may help alleviate some of the concerns with this plan, the fact remains that the Top Ten Percent Law operates today very differently than it did when first implemented.

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The reality is that the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it. While the Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity.<sup>147</sup> For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African-American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African-American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African-American.<sup>148</sup> It is evident that if UT is to have diverse interactions, it needs more minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs. The holistic review endorsed by *Grutter* gives UT that discretion, but the Top Ten Percent Law, which accounts for nearly 90% of all Texas

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147. See Univ. of Tex. at Austin Office of Info. Mgmt., *Statistical Handbook 2009–2010*, at 32 tbl.S27 (2010) (reporting UT enrollment by college, grade level, ethnicity, and gender); Lisa Dickson, *Major Choices: Race and Gender Differences in College Major Choice*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 108 (2010) (analyzing UT data and finding that “significant differences by gender, race, and ethnicity persist in initial college major choice even after controlling for the [SAT] score of the student and the high school class rank of the student”).

148. *Statistical Handbook 2009–2010*, at 31–32 tbl.S27.

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resident admissions, does not.<sup>149</sup>

Focusing narrowly on geographic diversity, in part as a proxy for race, the Top Ten Percent Law crowds out other types of diversity that would be considered under a *Grutter*-like plan. By ignoring these other diversity contributions, the Top Ten Percent Law restricts the University's ability to achieve the maximum educational benefits of a truly diverse student body.<sup>150</sup> As UT's 2003 classroom study shows, percentage plans bear little

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149. For example, instead of admitting a minority top ten percent student from a low-performing school, UT might admit a minority student with an interest in business who is just as academically qualified (and perhaps more so), but falls outside the top ten percent of his high school class because he attends a more competitive high school. This example also demonstrates how the Top Ten Percent Law hurts academic selectivity: UT must admit a top ten percent student from a low-performing high school before admitting a more qualified minority student who ranks just below the top ten percent at a highly competitive high school. This effect, in turn, further widens the "credentials gap" between minority and non-minority students at the University, which risks driving away matriculating minority students from difficult majors like business or the sciences.

150. The Top Ten Percent Law may produce diversity beyond varying hometowns, including differences in socioeconomic status and rural/urban/suburban upbringing. However, under the Top Ten Percent Law, the University does not have the opportunity to select for a wide range of diverse experiences (such as travel abroad, extra-curricular involvement, or work experience), so the Top Ten Percent Law bluntly operates as an attempt to create diversity through reliance on perceived group characteristics and segregated communities.

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promise of producing the meaningful diverse interactions envisioned by *Grutter*, at least not in the classroom. For instance, the study reported that although overall enrollment of minority students at UT rose significantly between 1996 and 2002, the Fall 2002 schedule contained more classes with zero or one African American or Hispanic students than had the Fall 1996 schedule.<sup>151</sup>

Justice Ginsburg pointed out in *Grutter*'s companion case that percentage plans create damaging incentives to the education system. She observed that “[p]ercentage plans depend for their effectiveness on continued racial segregation at the secondary school level.” These measures “encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages.”<sup>152</sup> Similarly, these plans create a strong incentive to avoid competitive educational institutions like magnet schools.<sup>153</sup>

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151. *2004 Proposal* at 25 & tbl. 8.

152. *Gratz*, 539 U.S. at 304 n. 10, 123 S.Ct. 2411 (Ginsburg, J., dissenting).

153. In an effort to ameliorate this effect, a special provision of the Top Ten Percent Law provides that “a high school magnet program, academy, or other special program” may be considered “an independent high school with its own graduating class separate from the graduating class of other students attending the high school,” effectively allowing the school to certify two separate groups of Top Ten Percent Law students. *See* TEX. EDUC.CODE § 51.8045.

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Texas applicants falling outside the top ten percent group face extreme competition to gain admittance to the University. There are approximately 16,000 students competing for only 1,216 fall admissions slots. The competition is so great that, on average, students admitted from outside the top ten percent of their high school class, regardless of race, have even higher SAT scores than those granted automatic admission under the Top Ten Percent Law.<sup>154</sup> Perversely, this system negatively impacts minority students (who nationally have lower standardized test scores) in the second decile of their classes at competitive high schools. *Grutter's* holistic look at race may soften this unreasonable exclusion of those second-decile minorities better qualified than many of the non-minorities bluntly swept in under the Top Ten Percent Law. But not much. It requires no empirical study to observe that those excluded under this Law have been a rich source of Texas leaders over its history and that for some applicants, admission to the flagship school of Texas is little more possible than admission to Harvard.<sup>155</sup>

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154. See *2008 Top Ten Percent Report* at 12 tbl.6 (showing the average SAT range for top ten percent and non-top ten percent students); *id.* at 13–15 tbls.6a–6d (displaying SAT ranges based on race and top ten percent status).

155. To reach its target class size, UT offers fall admission to 10,200 Texas applicants. *Ishop Aff.* (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12. For the class entering Fall 2008, after UT offered admission to top ten percent students, there were 1,216 admissions spots remaining. (The district court noted there were 841 places, but that number included the admission of so-called “Group A” applicants who have extremely high AI scores but are not in the top ten percent of their class. See *id.*) There were a total of

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That all of these weaknesses are apparent in the Top Ten Percent Law only make its focus upon race the plainer.<sup>156</sup>

The Top Ten Percent Law was adopted to increase minority enrollment. That it has done, but its sweep of admissions is a polar opposite of the holistic focus upon individuals. Its internal proxies for race end-run

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27,712 applicants for the fall class of 2008. *Statistical Handbook 2009–2010*, at 25 tbl.S21. Neither the record nor any public information released by the University disclose what portion of that total applicant pool were Texas residents, but if we assume that proportion of applicants from Texas matches the 90% of admissions slots reserved for Texas applicants, one can estimate that there were 24,940 Texas applicants. Subtracting the 8,984 students admitted under the Top Ten Percent Law yields an estimate of 15,956 applicants for 1,216 seats, or an acceptance rate of approximately 7.6%. By comparison, the overall acceptance rate at Ivy League schools for the class entering Fall 2008 ranged from 8% (Harvard) to 21% (Cornell). *See The Rankings: Best National Universities*, U.S. NEWS & WORLD REP., Sept. 2009, at 84–85.

156. Appellants here do not challenge the constitutionality of the Top Ten Percent Law. In fact, they endorse it as a race-neutral alternative to the *Grutter* plan. A court considering the constitutionality of the Law would examine whether Texas enacted the Law (and corresponding admissions policies) because of its effects on identifiable racial groups or in spite of those effects. *See Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *cf.* Brief of Social Scientists Glenn C. Loury et al. as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), available at 2003 WL 402129, at \*2, \*9–\*10 (noting that “it is not clear that [percentage] plans are actually race-neutral” and that some *amici* counsel in *Grutter* “have signaled interest in moving on after this case to challenge these aspects of the Texas program”).

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the Supreme Court's studied structure for the use of race in university admissions decisions. It casts aside testing historically relied upon, admitting many top ten percent minorities with significantly lower scores than rejected minorities and non-minorities alike. That these admitted minorities are academically able to remain in the University does not respond to the reality that the Top Ten Percent Law eliminated the consideration of test scores, and correspondingly reduced academic selectivity, to produce increased enrollment of minorities. Such costs may be intrinsic to affirmative action plans. If so, *Grutter* at least sought to minimize those costs through narrow tailoring. The Top Ten Percent Law is anything but narrow.

In short, while the Top Ten Percent Law appears to succeed in its central purpose of increasing minority enrollment, it comes at a high cost and is at best a blunt tool for securing the educational benefits that diversity is intended to achieve. We cannot fault UT's contention that the Top Ten Percent Law is plainly not the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies. We are keenly aware that the University turned to the Top Ten Percent Law in response to a judicial ruling. Yet we cannot agree that it is irrelevant. To the contrary, that the Top Ten Percent Law, accounting for the vast majority of in-state admissions, threatens to erode the foundations UT relies on to justify implementing *Grutter* policies is a contention not lacking in force. "Facially neutral" has a talismanic ring in the law, but it can be misleading. It is here.

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## VII. CRITICAL MASS

Appellants contend that UT's decision to reintroduce race-conscious admissions was unconstitutional because minority enrollment already met or exceeded "critical mass" when this decision was made, and thus any further facial consideration of race was neither warranted nor constitutional. Appellants claim the best measure of whether UT had attained the benefits of diversity is the raw percentage of minorities enrolled. As a result of the combined effects of changing demographics, targeted high school programs, and the Top Ten Percent Law, total minority enrollment had increased over the years. When the decision was made to reintroduce race-conscious admissions in 2004, underrepresented minorities made up 21.4% of the incoming class (4.5% African-American and 16.9% Hispanic).<sup>157</sup>

Although Texas was not constitutionally required to enact the Top Ten Percent Law, Appellants are correct that the decision to do so—and the substantial effect on aggregate minority enrollment at the University—places at risk UT's race-conscious admissions policies. We are confident, and hold, that a *Grutter*-style admissions system standing alone is constitutional. That said, whether to overlay such a plan with the Top Ten Percent Law and how to calibrate its flow presents a Hobson's choice between the minority students it contributes and the test of constitutional bounds it courts. True enough, the Top Ten Percent Law is in a sense, perhaps a controlling sense,

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157. *Fisher*, 645 F.Supp.2d at 593.

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a “facially” race-neutral plan. But it was animated by efforts to increase minority enrollment, and to the extent it succeeds it is because at key points it proxies for race.

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Appellants propose various baseline levels of diversity which, they suggest, would fully satisfy the University’s interest in attaining critical mass. They first argue that if “from 13.5 to 20.1 percent” minority enrollment was adjudged to be great enough diversity each year by Michigan’s Law School in *Grutter*, then the 21.4% minority enrollment that UT had achieved prior to reintroducing race-conscious admissions must already have achieved critical mass. We find this comparison inapt for numerous reasons.

Appellants’ comparison presumes that critical mass must have some fixed upper bound that applies across different schools, different degrees, different states, different years, different class sizes, and different racial and ethnic subcomposition. It is based on Appellants’ continued insistence that the concept of critical mass is defined by the minimum threshold for minority students to have their ideas represented in class discussions and not to feel isolated or like spokespersons for their race. As we have discussed, *Grutter* firmly rejects that premise and defines critical mass by reference to a broader view of diversity.

At oral argument, Appellants qualified this insistence and wisely conceded that what constitutes critical mass

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in the eyes of one school might not suffice at another. *Grutter* concerned a law school, whereas Appellants challenge UT's undergraduate program. Michigan's Law School operates on a national level, while UT focuses on recruiting and producing future leaders for Texas. The law school enrolled approximately 350 students in its first-year class, few enough students that diversity in the student body readily approximates diversity in the classroom. In contrast, UT enrolls approximately 7,000 undergraduates in its first-year class and has data showing diversity rates vary widely across individual classrooms. African-Americans and Hispanics never represented more than a combined 14.8% of the Michigan Law School's applicant pool during the examined time period,<sup>158</sup> while those same underrepresented minorities were 28% of UT's freshman applicant pool for Fall 2008.<sup>159</sup>

Appellants point to the Supreme Court's observation in *United States v. Virginia* that the Virginia Military Institute "could achieve at least 10% female enrollment—a sufficient critical mass to provide the female cadets with a positive educational experience."<sup>160</sup> But this figure, even if accurate, covers only one component of the multi-faceted concept of diversity elaborated in *Grutter*. In any event, the claim that 10% minority enrollment is a ceiling to critical mass is confounded by *Grutter*.

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158. *Grutter*, 539 U.S. at 384, 123 S.Ct. 2325 tbls.1–2 (Rehnquist, C.J., dissenting).

159. *2008 Top Ten Percent Report* at 6 tbl.1.

160. 518 U.S. 515, 523, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (internal quotation marks omitted).

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Appellants lastly note that minority enrollment at UT now exceeds the level it had reached in the mid-1990s, pre- *Hopwood*, when the University was free to obtain any critical mass it wanted through overtly race-based decisions. UT responds that it has consistently maintained, both in the *2004 Proposal* and before this Court, that even before *Hopwood* it had never reached critical mass.<sup>161</sup> While UT was making a greater use of race in that era, its pursuit of diversity was constrained by other interests, such as admitting only well-qualified students. We cannot assume that diversity levels immediately before *Hopwood* were indicative of critical mass. Moreover, minority enrollment in 1996 is not indicative of UT's true pre- *Hopwood* diversity. While admissions decisions in 1996 were not controlled by *Hopwood*, the case impacted enrollment, resulting in fewer minority students. If one instead compares minority enrollment from 1989 to 2004, a different picture emerges. In 2004, UT enrolled significantly fewer African-Americans than it had in 1989 (309 compared to 380). In addition, the 2004 entering class consisted of only 100 more Hispanics than the 1989 class, a low number considering the vast increases in the Hispanic population of Texas. Further, the *2004 Proposal* demonstrated that the percentage of diverse classrooms had declined since 1996.<sup>162</sup> The decrease in classroom diversity will only continue if additional minority representation is not achieved, as the University plans to increase its number of course offerings in future

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161. See, e.g., *2004 Proposal* at 24 (“[R]estoration to pre-*Hopwood* levels is not sufficient.”).

162. *Id.* at 25 & tbl.8.

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years. Finally, whatever levels of minority enrollment sufficed more than a decade ago may no longer constitute critical mass today, given the social changes Texas has undergone during the intervening years. Appellants' proposed baselines are insufficient reason to doubt UT's considered, good faith conclusion that "the University still has not reached a critical mass at the classroom level."<sup>163</sup>

*Grutter* pointedly refused to tie the concept of "critical mass" to any fixed number. The *Grutter* Court approved of the University of Michigan Law School's goal of attaining critical mass even though the school had specifically abjured any numerical target.<sup>164</sup> The Court recounted how school officials had described "critical mass" only through abstract concepts such as "meaningful numbers," "meaningful representation," and "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."<sup>165</sup> The type of broad diversity *Grutter* approved does not lend itself to any fixed numerical guideposts.

None of this is to say that *Grutter* left "critical mass" without objective meaning. Rather, the legally cognizable interest—attaining a critical mass of underrepresented minority students—"is defined by reference to the educational benefits that diversity is designed to

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163. *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602).

164. *Grutter*, 539 U.S. at 318, 123 S.Ct. 2325.

165. *Id.*

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produce.”<sup>166</sup> If a plaintiff produces evidence that calls into question a university’s good faith pursuit of those educational benefits, its race-conscious admissions policies may be found unconstitutional. We are not persuaded, however, that any of the benchmarks suggested by Appellants succeed at calling that judgment into question.

## B

As we have observed, benchmarks aside, UT’s claim that it has not yet achieved critical mass is less convincing when viewed against the backdrop of the Top Ten Percent Law, which had already driven aggregate minority enrollment up to more than one-fifth of the University’s incoming freshman class before less subtle race-conscious admissions were reintroduced.

The chief difficulty with looking to aggregate minority enrollment is that it lumps together distinct minority groups from different backgrounds who may bring various unique contributions to the University environment. African–American and Hispanic students, for example, are not properly interchangeable for purposes of determining critical mass, and a university must be sensitive to important distinctions within these broad groups. In *Parents Involved*, the Supreme Court specifically faulted two school districts for employing “only a limited notion of diversity” that lumped together very different racial groups.<sup>167</sup> One school district classified

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166. *Id.* at 330, 123 S.Ct. 2325.

167. *Parents Involved*, 551 U.S. at 723, 127 S.Ct. 2738.

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students exclusively as “white” or “nonwhite”; another labeled them as “black” or “other.”<sup>168</sup> This “binary conception of race” runs headlong into the central teaching of *Grutter* and other precedents which instruct that a university must give serious and flexible consideration to all aspects of diversity.<sup>169</sup>

On this record, we must conclude that the University has acted with appropriate sensitivity to these distinctions. Although the aggregate number of underrepresented minorities may be large, the enrollment statistics for individual groups when UT decided to reintroduce race as a factor in admissions decisions does not indicate critical mass was achieved. Further, we recognize that some year-to-year fluctuation in enrollment numbers is inevitable, so statistics from any single year lack probative force; the University needs to maintain critical mass in years when yield is low just as it does when yield is high.

It is also apparent that UT has given appropriate consideration to whether aggregate minority enrollment is translating into adequate diversity in the classroom. Through two separate studies, the *2004 Proposal* reached a serious and good faith determination that the aggregate number overstates the University’s true level of diverse interaction. UT sought to obtain the full educational benefits of diversity as approved in *Grutter* and properly concluded that race-conscious admissions measures would help accomplish its goals.

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168. *Id.* at 712, 716, 127 S.Ct. 2738.

169. *Id.* at 735, 127 S.Ct. 2738. Even current labels of “Hispanic,” “African–American,” or “Asian” may lump very different ethnic groups into a single category.

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## C

Appellants argue that even if UT had not yet achieved critical mass under race-neutral policies, it had come close enough that the reintroduction of race-conscious measures was unwarranted. Pointing to the Supreme Court’s recent decision in *Parents Involved*, they argue that the University’s use of race is unnecessary, and therefore not narrowly tailored, because it has only a “minimal effect.” The district court thought this was an attempt “to force UT into an impossible catch–22: on the one hand, it is well-established that to be narrowly tailored the means ‘must be specifically and narrowly framed to accomplish’ the compelling interest, but on the other hand, according to [Appellants], the ‘narrowly tailored’ plan must have more than a minimal effect.”<sup>170</sup>

*Parents Involved* does not support the cost-benefit analysis that Appellants seek to invoke. Rather, *Parents Involved* was primarily a critique of the school districts’ “extreme approach” that used binary racial categories to classify schoolchildren.<sup>171</sup> The Court referred to the “minimal effect” sought by this policy as evidence that other, more narrowly tailored means would be effective to serve the school districts’ interests.<sup>172</sup> The Court did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small. To the contrary, Justice Kennedy—who provided the fifth vote in *Parents*

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170. *Fisher*, 645 F.Supp.2d at 609.

171. *Parents Involved*, 551 U.S. at 735, 127 S.Ct. 2738.

172. *Id.* at 733, 127 S.Ct. 2738.

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*Involved*—wrote separately to clarify that “a more nuanced, individual evaluation .... informed by *Grutter*” would be permissible, even for the small gains sought by the school districts.<sup>173</sup>

## VIII. CONCLUSION

Mindful of the time frame of this case, we cannot say that under the circumstances before us UT breached its obligation to undertake a “serious, good faith consideration” before resorting to race-conscious measures; yet we speak with caution. In this dynamic environment, our conclusions should not be taken to mean that UT is immune from its obligation to recalibrate its dual systems of admissions as needed, and we cannot bless the university’s race-conscious admissions program in perpetuity. Rather, much like judicial approval of a state’s redistricting of voter districts, it is good only until the next census count—it is more a process than a fixed structure that we review. The University’s formal and informal review processes will confront the stark fact that the Top Ten Percent Law, although soon to be restricted to 75% of the incoming class, increasingly places at risk the use of race in admissions. In 1998, those admitted under the Top Ten Percent Law accounted for 41% of the Texas residents in the freshman class, while in 2008, top ten percent students comprised 81% of enrolled Texan freshmen.<sup>174</sup> This trajectory evidences a risk of eroding the necessity of using race to achieve critical mass with accents that may, if persisted in, increasingly present

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173. *Id.* at 790, 127 S.Ct. 2738 (opinion of Kennedy, J.).

174. *2008 Top Ten Percent Report* at 7 tbl.1a.

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as an effort to meet quantitative goals drawn from the demographics of race and a defiance of the now-demanded focus upon individuals when considering race.

A university may decide to pursue the goal of a diverse student body, and it may do so to the extent it ties that goal to the educational benefits that flow from diversity. The admissions procedures that UT adopted, modeled after the plan approved by the Supreme Court in *Grutter*, are narrowly tailored—procedures in some respects superior to the *Grutter* plan because the University does not keep a running tally of underrepresented minority representation during the admissions process. We are satisfied that the University’s decision to reintroduce race-conscious admissions was adequately supported by the “serious, good faith consideration” required by *Grutter*. Finally, it is neither our role nor purpose to dance from *Grutter*’s firm holding that diversity is an interest supporting compelling necessity. Nor are we inclined to do so. The role of black athletes in the southern universities forty years ago presents diversity’s potential better than can we, although at that early juncture, it was ability overcoming a barrier of race.<sup>175</sup>

The judgment of the district court is AFFIRMED.

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175. See David K. Wiggins & Patrick B. Miller, THE UNLEVEL PLAYING FIELD: A DOCUMENTARY HISTORY OF THE AFRICAN AMERICAN EXPERIENCE IN SPORT 443 (2003) (quoting Roy Wilkins, who wrote in the 1930s that black athletes “carry more interracial education than all the erudite philosophy ever written on race” (internal quotation marks omitted)).

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*KING*, Circuit Judge, specially concurring:

I concur in the judgment and in the analysis and application of *Grutter* in Judge Higginbotham's opinion. No party challenged, in the district court or in this court, the validity or the wisdom of the Top Ten Percent Law. We have no briefing on those subjects, and the district court did not consider them. Accordingly, I decline to join Judge Higginbotham's opinion insofar as it addresses those subjects.

*EMILIO M. GARZA*, Circuit Judge, specially concurring:

Whenever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed. So it goes in *Grutter*, where a majority of the Court acknowledged strict scrutiny as the appropriate level of review for race-based preferences in university admissions, but applied a level of scrutiny markedly less demanding. To be specific, race now matters in university admissions, where, if strict judicial scrutiny were properly applied, it should not.

Today, we follow *Grutter's* lead in finding that the University of Texas's race-conscious admissions program satisfies the Court's unique application of strict scrutiny in the university admissions context. I concur in the majority opinion, because, despite my belief that *Grutter* represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. The Supreme Court has chosen this

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erroneous path and only the Court can rectify the error. In the meantime, I write separately to underscore this detour from constitutional first principles.

## I

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. One of the Amendment’s “core principles” is to “do away with all governmentally imposed discriminations based on race,” *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), and to create “a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement.” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–06, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). This is why “[r]acial and ethnic distinctions of any sort are inherently suspect and ... call for the most exacting judicial examination.” *Miller v. Johnson*, 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.)). It matters not whether the racial preference is characterized as invidious or benign: strict scrutiny applies regardless of “the race of those burdened or benefitted by a particular classification.” *Shaw v. Reno*, 509 U.S. 630, 650–51, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (quoting *Croson*, 488 U.S. at 494, 109 S.Ct. 706). To survive such exacting scrutiny, laws classifying citizens on the basis of race must be “narrowly tailored to achieving a compelling state interest.” *Miller*, 515 U.S. at 904, 115 S.Ct. 2475.

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In *Grutter*, the majority acknowledged these fundamental principles, see *Grutter v. Bollinger*, 539 U.S. 306, 326–27, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), but then departed and held, for the first time, that racial preferences in university admissions could be used to serve a compelling state interest. *Id.* at 328, 123 S.Ct. 2325. Though the Court recognized that strict scrutiny should govern the inquiry into the use of race in university admissions, *id.* at 326, 123 S.Ct. 2325, what the Court applied in practice was something else entirely.

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The *Grutter* majority asserts that “[s]trict scrutiny is not ‘strict in theory, but fatal in fact.’ ” 539 U.S. at 326, 123 S.Ct. 2325 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). But since the Court began applying strict scrutiny to review governmental uses of race in discriminating between citizens, the number of cases in which the Court has permitted such uses can be counted on one hand.<sup>1</sup>

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1. See *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325 (recognizing racial diversity “in the context of higher education” as compelling); *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992) (remedying the effects of past intentional discrimination a compelling governmental interest); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (“[P]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can.”). In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld a federal law that set aside public works monies for minority-owned businesses. Although *Fullilove* has not been expressly overruled, it is unlikely that its holding

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The Court has rejected numerous intuitively appealing justifications offered for racial discrimination, such as remedying general societal discrimination, *see Croson*, 488 U.S. at 496–98, 109 S.Ct. 706 (plurality opinion); enhancing the number of minority professionals available to work in underserved minority communities, *see Bakke*, 438 U.S. at 310–11, 98 S.Ct. 2733 (opinion of Powell, J.); and providing role models for minority students, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). In all of these cases, the Court found that the policy goals offered were insufficiently compelling to justify discrimination based on race.

In those rare cases where the use of race properly furthered a compelling state interest, the Court has emphasized that the means chosen must “work the least harm possible,” *Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.), and be narrowly tailored to fit the interest “with greater precision than any alternative means.” *Grutter*, 539 U.S. at 379, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting) (quotation omitted). Moreover, the failure to consider available race-neutral alternatives and employ them if efficacious would cause a program to fail strict scrutiny. *See Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct. 1842 (plurality opinion) (the “term ‘narrowly tailored’ ... requires consideration of whether lawful alternative and less restrictive means could have

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survives the Court’s later Equal Protection decisions. *See* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 9.3.5, at 738, 742–43 (3d ed.2006). *Korematsu*’s authority is likewise suspect.

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been used.”); *see also Adarand*, 515 U.S. at 237–38, 115 S.Ct. 2097; *Croson*, 488 U.S. at 507, 109 S.Ct. 706; *Fullilove v. Klutznick*, 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Stevens, J., dissenting) (“Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”).

Beyond the use of race-neutral alternatives, the Court, pre-*Grutter*, had considered several other factors in determining whether race-conscious programs were narrowly tailored. Programs employing a quota system would fail this inquiry, as would programs of unlimited duration. *See Bakke*, 438 U.S. at 315–18, 98 S.Ct. 2733; *Croson*, 488 U.S. at 498, 109 S.Ct. 706. The Court looked to a program’s flexibility and its capacity for individualized consideration. *See United States v. Paradise*, 480 U.S. 149, 177, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality opinion); *Croson*, 488 U.S. at 508, 109 S.Ct. 706. The Court also considered the relationship between the numerical goal and the percentage of minority group members in the relevant population, and whether the means chosen were likely to be overinclusive. *See Croson*, 488 U.S. at 506–10, 109 S.Ct. 706. Finally, the Court considered the program’s burden on innocent third parties. *See, e.g., Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O’Connor, J., dissenting) (programs should not “unduly burden individuals who are not members of the favored racial and ethnic groups”); *Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.).

*Grutter* changed this. After finding that racial diversity at the University of Michigan Law School (“Law

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School”) was a compelling governmental interest, the Court redefined the meaning of narrow tailoring. *See Grutter*, 539 U.S. at 387, 123 S.Ct. 2325 (Kennedy, J., dissenting) (“The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.”); *see generally* Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517 (2007). The Court replaced narrow tailoring’s conventional “least restrictive means” requirement with a regime that encourages opacity and is incapable of meaningful judicial review under any level of scrutiny. Courts now simply assume, in the absence of evidence to the contrary, that university administrators have acted in good faith in pursuing racial diversity, and courts are required to defer to their educational judgments on how best to achieve it. *Grutter*, 539 U.S. at 328–29, 123 S.Ct. 2325. What is more, the deference called for in *Grutter* seems to allow universities, rather than the courts, to determine when the use of racial preferences is no longer compelling. *See id.* at 343, 123 S.Ct. 2325 (“We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”). This new species of strict scrutiny ensures that only those admissions programs employing the most heavy-handed racial preferences, and those programs foolish enough to maintain and provide conclusive data, will be subject to “exacting judicial examination.” *Miller*, 515 U.S. at 904, 115 S.Ct. 2475. Others, like the University of Michigan in *Grutter*, and the University of Texas here, can get away with something less.

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## B

Setting aside for a moment *Grutter*'s finding that racial diversity within the Law School was a compelling state interest, *see infra* Sections I.D and III, I find troubling the Court's treatment of whether the Law School's chosen means—using race as a “plus” factor—was narrowly tailored to achieving that end. The Court discussed five hallmarks of a narrowly tailored race-conscious admissions program in answering this question: (1) the absence of quotas; (2) a program that does not unduly harm any racial group; (3) serious, good-faith consideration of race-neutral alternatives; (4) a program that contains a sunset provision or some logical end point; and (5) individualized consideration of all applicants. *See* 539 U.S. at 335–43, 123 S.Ct. 2325. The Court's opinion effectively emptied at least three of these criteria of their probative content, leaving the first and fifth as determinative in any narrow tailoring inquiry. *See* Ayres & Foster, 85 TEX. L. REV. at 543.

First, *Grutter* defined a quota as reserving a fixed number or percentage of opportunities for certain minority groups, and insulating individuals from those groups from competition with all other candidates for available seats. *Id.* at 333–36, 123 S.Ct. 2325. These prohibitions were clear well before *Grutter*. *See Bakke*, 438 U.S. at 317, 98 S.Ct. 2733; *Croson*, 488 U.S. at 496, 109 S.Ct. 706. Only those programs with overt numerical set-asides or separate minority admissions tracks would fail this requirement.

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Next, the Court found that race-conscious admissions programs do not unduly burden innocent third parties so long as they provide individualized consideration. *Grutter*, 539 U.S. at 341, 123 S.Ct. 2325 (“[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.”). Here, the Court collapsed the second narrow tailoring criterion into the fifth.

*Grutter* also held that there were no workable race-neutral alternatives at the Law School, such as “using a lottery system” or “decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores.” *Id.* at 340, 123 S.Ct. 2325. The Court likewise rejected the United States’ argument that the Law School’s plan was not narrowly tailored because race-neutral alternatives that had proven effective elsewhere (i.e., the percentage plans utilized in California, Florida, and Texas) were available and would deliver the educational benefits the Law School was seeking. *Id.* The Court held that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative .... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” *Id.* at 339, 123 S.Ct. 2325. After *Grutter*, universities are no longer required to use the *most effective* race-neutral means. So long as admissions officials have given “serious, good faith consideration” to such programs, they are free to pursue less effective alternatives that serve the interest “about as well.” *Id.* (citing *Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct.

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1842 (plurality opinion)). Thus, this third criterion is now essentially without meaning. Given the deference that universities' educational judgments are to be afforded post- *Grutter*, "serious, good faith consideration" is a peculiarly low bar that will be satisfied in most every case. *Compare id.* at 339, 123 S.Ct. 2325 (narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives"), *with id.* at 329, 123 S.Ct. 2325 ("[G]ood faith on the part of a university is 'presumed' absent a showing to the contrary.") (citation and internal quotation marks omitted).

Finally, while the Court acknowledged that race-conscious admissions programs must be limited in time, such as by sunset provisions or periodic reviews to determine whether the preferences remain necessary, the Court suspended application of this criterion for twenty-five years. *Id.* at 343, 123 S.Ct. 2325 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). In doing so, the *Grutter* majority simply accepted the Law School's promise that it would terminate its race-conscious policies as soon as possible. *See id.* at 343, 123 S.Ct. 2325 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."). The Court's approval here is remarkable given the constitutional gravity of this experiment (i.e., the Law School's allocation of preferences along racial lines). This fourth criterion will now be considered satisfied with little or no showing on the part of university administrators, at least until 2028.

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And thus, all that truly remains of strict scrutiny's narrow tailoring inquiry post- *Grutter* is the requirement of "individualized consideration." But what does this term mean specifically? *Grutter* never tells us. Moreover, the weight given to race as part of this individualized consideration is purposefully left undefined, making meaningful judicial review all but impossible.

## C

In *Grutter*, the University of Michigan Law School sought to achieve a student body that was both academically strong and diverse along several dimensions, including race. There, the Court endorsed the Law School's "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337, 123 S.Ct. 2325. The Court noted approvingly that the Law School had "no policy ... of automatic acceptance or rejection based on any single 'soft' variable." *Id.* The *Grutter* majority permitted the use of race and ethnicity as "plus" factors within the Law School's holistic review, but this simply raises the question: how much of a plus?<sup>2</sup> *Grutter* did not say.

Instead, the Court implicitly forbade universities from quantifying racial preferences in their admissions calculus. Contrasting the admissions system found

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2. The Court's discussion of race as a "plus" factor takes place in the context of strict scrutiny's narrow tailoring inquiry. Whether race should be considered at all is a separate, more fundamental, matter. *See infra* Section III.

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unconstitutional in *Gratz*, the *Grutter* majority noted that “the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.” *Id.* (citing *Gratz v. Bollinger*, 539 U.S. 244, 271–72, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003)). On this view, rigid point systems that allocate preference points for racial and ethnic status are unconstitutional because they “preclude[ ] admissions counselors from conducting the type of individualized consideration the Court’s opinion in *Grutter* requires.” *Gratz*, 539 U.S. at 277, 123 S.Ct. 2411 (O’Connor, J., concurring) (citation omitted).

But it is not clear, to me at least, how using race in the holistic scoring system approved in *Grutter* is constitutionally distinct from the point-based system rejected in *Gratz*.<sup>3</sup> If two applicants, one a preferred minority and one nonminority, with application packets *identical* in all respects save race would be assigned the

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3. Although I do not believe the government’s use of race in university admissions can ever serve a compelling interest, assuming that it can, there is no reason why a well-designed point system could not account for an applicant’s race, among other variables, and yet still provide meaningful, individualized consideration. *See* Ayres & Foster, 85 TEX. L. REV. at 566–70; *see also* *Gratz*, 539 U.S. at 295, 123 S.Ct. 2411 (Souter, J., dissenting) (“[I]t is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell’s plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its ‘holistic review’; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration ....” (citation omitted)).

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same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz*? Although one system quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.

*Grutter*'s new terminology like "individualized consideration" and "holistic review" tends to conceal this result. By obscuring the University of Michigan's use of race in these diffuse tests, the Court allowed the Law School to do covertly what the undergraduate program could not do overtly. *See Gratz*, 539 U.S. at 270–76, 123 S.Ct. 2411. This much is clear and has been discussed elsewhere.<sup>4</sup> I write separately to add my view, confirmed while deciding this appeal, that *Grutter*'s narrow tailoring inquiry—now reduced to testing for individualized consideration—is incapable of meaningful judicial review.

Traditionally, strict scrutiny required that the overall benefits of programs employing racial classifications justified the overall costs.<sup>5</sup> *See Ayres & Foster*, 85 TEX. L. REV. at 526 & n. 38. In *Grutter*, not only did the Court fail

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4. *See, e.g.*, Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3 (2004); CHEMERINSKY, CONSTITUTIONAL LAW 744.

5. For example, a race-conscious admissions policy that added just one, three, or five members of a preferred minority group to an enrolling class of 6,700 would fail to be narrowly tailored. Such a program would have an intolerably high cost for little return. *See infra* Section II.

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to conduct such an analysis, it rejected the only means for measuring the constitutionally relevant costs and benefits. *Id.* Although I disagree with the Court that race-conscious policies can ever serve a compelling interest in university admissions, by prohibiting race and ethnicity from being quantified at all, *Grutter* eliminated any chance for courts to critically evaluate whether race is, in fact, the defining feature of an admissions packet. Post- *Grutter*, there is no way to assess how much of a “plus” race gets as a plus-factor in any admissions system. And without the ability to measure the number of “but-for” admits (i.e., admitted minority students for whom race was the decisive factor), courts cannot meaningfully evaluate whether a university’s use of race fits its asserted interest narrowly. *See id.* at 527–41, 575–82.<sup>6</sup> In short, it is impossible to subject such uses of race to strict scrutiny. *Grutter* rewards admissions programs that remain opaque.

Even assuming the Court’s “educational benefits of diversity” justification holds true, *see infra* Section I.D, there are far more effective *race-neutral* means of screening for the educational benefits that states like Michigan and Texas ostensibly seek. To the degree that state universities genuinely desire students with diverse

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6. *See also id.* at 528 n. 42 (citing, *inter alia*, WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 31–39 (1998)) (observing that the degree of racial preferences can be measured by examining the number of but-for admits and the qualification differentials between but-for admits and nonpreferred applicants who would have been admitted in the absence of affirmative action).

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backgrounds and experiences, race-neutral factors like specific hardships overcome, extensive travel, leadership positions held, volunteer and work experience, dedication to particular causes, and extracurricular activities, among many other variables, can be articulated with specificity in the admissions essays.<sup>7</sup> These markers for viewpoint diversity are far more likely to translate into enhanced classroom dialogue than a blanket presumption that race will do the same. Moreover, these markers represent the kind of life experiences that reflect industry. Race cannot. While race inevitably colors an individual's life and views, that facet of race and its impact on the individual can be described with some precision through an admissions essay. We should not presume that race shapes everyone's experiences in the same ways and award preference (or a bonus, or a "plus") accordingly. Such a policy, however labeled, is not narrowly tailored.

Finally, the Court's unusual deference to educators' academic judgments that racial diversity is a compelling interest, coupled with the deference allegedly owed to

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7. In addition to the two essays that UT requires as part of each application packet, the University considers several of the factors described above in determining an applicant's personal achievement score. See *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587, 597 (W.D.Tex.2009) ("The third [Personal Achievement Index] element is the personal achievement score, which is based on an evaluation of the file in its entirety by senior members of the admissions staff. The evaluators conduct a holistic review considering the applicant's demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances.").

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their determination of when the use of race is no longer necessary, *see id.* at 343, 123 S.Ct. 2325, would appear to permit race-based policies indefinitely. For example, notwithstanding that a university's race-conscious policies had achieved 25% African-American and 25% Hispanic enrollment in the student body generally, that university could still justify the use of race in admissions if these minority students were disproportionately bunched in a small number of classes or majors. In fact, the majority's application of *Grutter* today reaches just such a result.

Despite Top Ten Percent's demonstrable impact on minority enrollment at the University of Texas, the majority opinion holds that the University's use of race in admissions can be justified by reference to the paucity of minority students in certain majors:

While the [Top Ten Percent] Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, severely limiting the beneficial effects of educational diversity. For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African-American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African-American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African-American. It is evident that if UT is to have diverse interactions, it needs more

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minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs.

*Ante* at 240. If this is so, a university's asserted interest in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom.

Given the "large-scale absence of African-American and Hispanic students from thousands of classes" at the University of Texas, *Fisher*, 645 F.Supp.2d at 607, today's decision ratifies the University's reliance on race at the departmental and classroom levels, and will, in practice, allow for race-based preferences in seeming perpetuity. Such a use of race "has no logical stopping point" and is not narrowly tailored. *See Croson*, 488 U.S. at 498, 109 S.Ct. 706 (citing *Wygant*, 476 U.S. at 275, 106 S.Ct. 1842). Allowing race-based social engineering at the university level is one thing, but not nearly as invasive as condoning it at the classroom level. I cannot accept that the Fourteenth Amendment permits this level of granularity to justify dividing students along racial lines.

## D

The same imprecision that characterizes *Grutter's* narrow tailoring analysis casts doubt on its discussion of racial diversity as a compelling state interest. *Grutter*

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found that the Law School had a compelling interest in “securing the educational benefits of a diverse student body,” and that achieving a “critical mass” of racially diverse students was necessary to accomplish that goal. *Id.* at 333, 123 S.Ct. 2325. The Law School defined “critical mass” as “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated ... or like spokespersons for their race.” *Id.* at 318–19, 123 S.Ct. 2325. The Court clarified: “critical mass is defined by reference to the educational benefits that diversity is designed to produce.” *Id.* at 330, 123 S.Ct. 2325. Justice O’Connor’s majority opinion identified three such constitutionally relevant benefits: (i) increased perspective in the classroom; (ii) improved professional training; and (iii) enhanced civic engagement. *Id.* at 330–33, 123 S.Ct. 2325. The first element is based on Justice Powell’s focus in *Bakke* on the campus-level benefits of diversity. The second two are new.<sup>8</sup>

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8. See Robert C. Post, *The Supreme Court, 2002 Term—Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 59–60 (2003) (“Although *Grutter* casts itself as merely endorsing Justice Powell’s opinion in *Bakke*, *Grutter*’s analysis of diversity actually differs quite dramatically from Powell’s. Powell conceptualized diversity as a value intrinsic to the educational process itself. He regarded diversity as essential to ‘the quality of higher education,’ because education was a practice of enlightenment, ‘of speculation, experiment, and creation,’ that thrived on the ‘robust exchange of ideas; characteristically provoked by confrontation between persons of distinct life experiences .... [ *Grutter*] instead conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership .... *Grutter*’s justifications for diversity thus potentially reach far more widely than do Powell’s.”); see also Ayres & Foster, 85 TEX. L. REV. at 578 n.215 (citing commentary).

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My difficulty with *Grutter*'s "educational benefits of diversity" discussion is that it remains suspended at the highest levels of hypothesis and speculation. And unlike ordinary hypotheses, which must be testable to be valid, *Grutter*'s thesis is incapable of testing. Justice O'Connor's majority opinion rests almost entirely on intuitive appeal rather than concrete evidence.

## 1

The first constitutionally relevant benefit that makes up *Grutter*'s compelling interest is racial diversity's direct impact in the classroom. Here, the Court concluded that diverse perspectives improve the overall quality of education because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when students have the greatest possible variety of backgrounds." *Id.* at 330, 123 S.Ct. 2325 (internal quotation marks omitted). This rationale conforms to Justice Powell's opinion in *Bakke* that universities should pursue "[t]he atmosphere of speculation, excitement and creation" that is "promoted by a diverse student body." 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.).<sup>9</sup> I question the validity of this surmise.

Nonetheless, assuming a critical mass of minority students could perceptibly improve the quality of classroom learning, how would we measure success? By polling students and professors, as the University of Texas

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9. Justice Powell's opinion in *Bakke* conspicuously avoided claiming a categorical educational benefit of diversity, asserting only the potential for such benefits. *See* 438 U.S. at 314, 98 S.Ct. 2733 (opinion of Powell, J.).

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has done?<sup>10</sup> How would we know whether the substantial social harm we are tolerating by dividing students based on race is worth the cost? That classroom discussion is, in fact, being enhanced? How can a party prove that it is? How can an opposing party prove that it is not?

My concern with allowing viewpoint diversity's alleged benefits to justify racial preference is that viewpoint diversity is too theoretical and abstract. It cannot be proved or disproved. Sure, the *Grutter* majority cited to expert reports and amicus briefs from corporate employers as evidence that student body diversity improves educational outcomes and better prepares students for the workforce. *Id.* at 330, 123 S.Ct. 2325. But this support can be easily manipulated.<sup>11</sup> If all a university "need do is find ... report[s]," studies, or surveys to implement a race-conscious admissions policy, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson*, 488 U.S. at 504, 109 S.Ct. 706; *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n. 11, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) ("[C]lassifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalizations."). *Grutter* permits race-based

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10. Every measure of social benefit or harm would be subjective and, at worst, capable of manipulation through framing biases.

11. *See* Alexander & Schwarzschild, 21 CONST. COMMENT. at 5 n.9 (criticizing the Court's undue reliance on amicus briefs from corporate employers).

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preferences on nothing more than intuition—the type that strict scrutiny is designed to protect against. *See* 539 U.S. at 327, 123 S.Ct. 2325 (“Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”) (citation and internal quotation marks omitted).

*Grutter* and *Bakke* err by simply assuming that racial diversity begets greater viewpoint diversity. This inference is based on the assumption that members of minority groups, *because of* their racial status, are likely to have unique experiences and perspectives incapable of expression by individuals from outside that group. But as the Court has recognized elsewhere, the Constitution prohibits state decisionmakers from presuming that groups of individuals, whether classified by race, ethnicity, or gender, share such a quality collectively. *See Miller*, 515 U.S. at 914, 115 S.Ct. 2475 (the Equal Protection Clause forbids “the demeaning notion that members of the defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens.”) (citation omitted). There is no one African–American or Hispanic viewpoint,<sup>12</sup> and, in fact, *Grutter* approved the Law

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12. For example, life experiences differ significantly if a Hispanic student’s ethnicity originates in Mexico as opposed to Spain, or, for that matter, any of various Central and South American countries. Likewise, an African–American student whose roots come from Nigeria would be distinct in culture and ethnicity from a student whose ancestry originated in Egypt or Haiti. This same principle applies for students from non-preferred

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School's diversity rationale precisely because of the role that racial diversity can play in dispelling such falsehoods. *See id.* at 320, 123 S.Ct. 2325 (citing expert testimony suggesting that “when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”); and *id.* at 333, 123 S.Ct. 2325 (“[D]iminishing the force of such stereotypes is a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.”).

*Grutter* sought to have it both ways. The Court held that racial diversity was necessary to eradicate the notion that minority students think and behave, not as individuals, but as a race. At the same time, the Court approved a policy granting race-based preferences on the assumption that racial status correlates with greater diversity of viewpoints.

## 2

*Grutter*'s second asserted educational benefit of diversity relates to improved professional training. Here, Justice O'Connor writes that diversity “promotes cross-racial understanding, helps to break down racial

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racial classes. For example, second-generation students from English, Irish, Scottish, or Australian ancestry would come with very different cultural experiences, and yet all of these students would be grouped together as “White” in racial classification systems like the one used at the University of Texas.

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stereotypes, and enables students to better understand persons of different races.” *Id.* at 330, 123 S.Ct. 2325 (internal quotation marks and brackets omitted). Such training is essential, the argument goes, for future leaders who will eventually work within and supervise a racially diverse workforce. *Id.* at 330–31, 123 S.Ct. 2325.

State universities are free to define their educational goals as broadly as needed to serve the public interest. We defer to educators’ professional judgments in setting those goals. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325 (“Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally proscribed limits.”). My concern, discussed throughout this opinion, is not that *Grutter* commands such deference, but that it conflated the deference owed to a university’s asserted interest with deference to the means used to attain it. *See id.* at 388, 123 S.Ct. 2325 (Kennedy, J., dissenting) (“The Court confuses deference to a university’s definition of its educational objective with deference to the implementation of this goal.”).

There is, however, one aspect of the Court’s “improved professional training” rationale that I find especially troubling. While *Grutter* made much of the role that educational institutions play in providing professional training, *see id.* at 331, 123 S.Ct. 2325 (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship”), the cases the Court relied on involved primary and secondary schools. *See id.* (citing *Plyler v. Doe*, 457 U.S. 202, 221, 102

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S.Ct. 2382, 72 L.Ed.2d 786 (1982) (describing education as pivotal to “sustaining our political and cultural heritage”) and *ibid.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (“education ... is the very foundation of good citizenship.”)). I question whether these cases apply with equal force in the context of higher education, where academic goals are vastly different from those pursued in elementary and secondary schools. Moreover, a university’s self-styled educational goals, for example, promoting “cross-racial understanding” and enabling students “to better understand persons of different races,” could just as easily be facilitated in many other public settings where diverse people assemble regularly: in the workplace, in primary and secondary schools, and in social and community groups. *See Grutter*, 539 U.S. at 347–48, 123 S.Ct. 2325 (Scalia, J., dissenting). I do not believe that the university has a monopoly on furthering these societal goals, or even that the university is in the best position to further such goals. Notwithstanding an institution’s decision to expand its educational mission more broadly, the university’s core function is to educate students in the physical sciences, engineering, social sciences, business and the humanities, among other academic disciplines.

## 3

Finally, *Grutter* articulated a third benefit of racial diversity in higher education: enhancing civic engagement. Here, the Court wrote that:

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Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

...

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of educational institutions that provide this training .... Access to [higher] education ... must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

*Id.* at 332–33, 123 S.Ct. 2325.

Unlike the first two “educational benefits of diversity,” which focused on improving classroom discussion and professional training, this third claimed benefit plainly has nothing to do with the university’s core education and training functions. Instead, *Grutter* is concerned here with role that higher education plays in a democratic society, and the Court suggests that affirmative action

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at public universities can advance a societal goal of encouraging minority participation in civic life.<sup>13</sup> This proposition lacks foundation.

If a significant portion of a minority community sees our nation's leaders as illegitimate or lacks confidence in the integrity of our educational institutions, as *Grutter* posits in the block quote above, *see id.*, 539 U.S. at 332, 123 S.Ct. 2325, I doubt that suspending the prevalent constitutional rules to allow preferred treatment for as few as 15–40 students, *see infra* Section II, is likely to foster renewed civic participation from among that community as a whole.<sup>14</sup>

*Grutter* replaced *Bakke's* emphasis on diversity in educational *inputs* with a new emphasis on diversity in

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13. *See* Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 174–76 (2003).

14. This is not to criticize universities, like the University of Texas, for implementing policies that seek to increase minority representation, not merely for its educational benefits on campus, but also for the secondary benefits that such increases in minority enrollment can have in the workplace and in society generally. A university degree confers professional and leadership opportunities unavailable otherwise, and ensuring that all segments of society have meaningful access to public institutions of higher education “represents a paramount government objective.” *Grutter*, 539 U.S. at 331–32, 123 S.Ct. 2325 (citing Brief of United States as Amicus Curiae 13). I do not question this goal, but rather the constitutionality of using race to attain it.

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educational *outputs*. By expanding Justice Powell's original viewpoint diversity rationale to include diversity's putative benefits in the workforce and beyond (i.e., inspiring a sense of civic belonging in discouraged minority communities), the Court has endorsed a compelling interest without bounds. Post- *Grutter*, it matters little whether racial preferences in university admissions are justified by reference to their potential for improved discussion in individual classrooms, or even at the university generally. Now such preferences can be justified based on their global impact. By removing the focus of attention from diversity's educational value at the campus level, the Court has ensured that the "educational benefits of diversity" will accommodate all university affirmative action plans as compelling.

## E

Finally, by using metaphors, like "critical mass," and indefinite terms that lack conceptual or analytical precision, but rather sound in abject subjectivity, to dress up constitutional standards, *Grutter* fails to provide any predictive value to courts and university administrators tasked with applying these standards consistently. And notwithstanding the Court's nod to federalism, *Grutter*'s ambiguity discourages States from experimenting or departing from the one accepted norm. *See id.* at 342, 123 S.Ct. 2325 (citing *United States v. Lopez*, 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.")). In the

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absence of clear guidance, public universities nationwide will simply model their programs after the one approved in *Grutter* rather than struggle with the risks and uncertain benefits of experimentation. That is exactly what has occurred here. With one exception—the Top Ten Percent law—the race-conscious admissions policy that we review today is identical to the program used at the Law School.

## II

As mentioned at the outset, I concur in the opinion because I believe today's decision is a faithful application of *Grutter's* teachings, however flawed I may find those teachings to be. I am compelled to follow the Court's unusual deference towards public university administrators in their assessment that racial diversity is a compelling interest, as well as the Court's refashioned narrow-tailoring inquiry. *See* 28 U.S.C. § 453. My difficulty is not necessarily with today's decision, but with the one that drives it. Nonetheless, there is one aspect of Judge Higginbotham's thoughtful opinion that gives me pause about whether *Grutter* compels the result we reach today. Ultimately, and regrettably, I recognize that the deference called for by *Grutter* may make this concern superfluous.

As today's opinion notes, the University of Texas's race-conscious admissions policy is nearly indistinguishable from the program approved by the Supreme Court in *Grutter*.<sup>15</sup> *Ante* at 216–17, 217–18, 230. As such, the

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15. As a result, UT's policy suffers from all the same defects as the Law School policy evaluated in *Grutter* and discussed previously in this opinion. *See supra* Section I.

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majority opinion summarily finds that, like the Law School in *Grutter*, the University of Texas has a compelling interest in obtaining the educational benefits of diversity in its undergraduate program. *Id.* at 230–31. After affording all deference due, today’s decision focuses on the efficacy of the University’s race-conscious admissions policy. *Id.* at 232–33 (“[W]hile we focus on the University’s decision to adopt a *Grutter*-like plan, admissions outcomes remain relevant evidence of the plan’s necessity—a reality check.”). In my view, the efficacy of the University’s race-based admissions policy is more than merely relevant, it is dispositive.

The plaintiffs here argue that the University of Texas’s interest in obtaining a racially diverse student body is not compelling because the University has already achieved critical mass by way of Texas’s Top Ten Percent law. *See* TEX. EDUC. CODE § 51.803 (1997). The University disagrees. This claim is difficult to evaluate. The University refuses to assign a weight to race or to maintain conclusive data on the degree to which race factors into admissions decisions and enrollment yields. *See Fisher*, 645 F.Supp.2d at 608–09 (“At no point in the process is race considered individually or given a numerical value; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context.”). Whether the University of Texas’s use of race is narrowly tailored turns on whether its chosen means—using race as a plus factor in the University’s holistic scoring system—are effective, not just in theory, but also in practice.

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If, apart from the Top Ten Percent law, the University of Texas’s race-conscious admissions program added just three-to-five African–American students, or five-to-ten Hispanic students, to an entering freshman class of 6,700, that policy would completely fail to achieve its aims and would not be narrowly tailored. *See* Ayres & Foster, 85 TEX. L. REV. at 523 n. 27 (“At least as a theoretical matter, narrow tailoring requires not only that the preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest.”). The marginal benefit of adding just five or ten minority students to a class of this size would be negligible and have no perceptible impact on the “educational benefits that diversity is designed to produce.” *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 (“[C]ritical mass is defined by reference to the educational benefits that diversity is designed to produce.”).<sup>16</sup> This is especially so, if, as the district court suggests, “the large-scale absence of African–American and Hispanic students from thousands of classes indicates UT has not

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16. *See Bakke*, 438 U.S. at 316, 98 S.Ct. 2733 (opinion of Powell, J.) (noting the “necessity of including more than a token number of black students”). *See also* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 360–61 (2002) (enrolling “significant numbers of students of various groups” is necessary to enable students to “perceive differences both within groups and between groups”); Kathryn R.L. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale*, 54 J. LEGAL. EDUC. 316, 332–34 (2004) (noting that under a cost-benefit analysis it may be more difficult to justify an affirmative action program when a university is unable to enroll a critical mass of minority applicants).

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reached sufficient critical mass for its students to benefit from diversity and illustrates UT's need to consider race as a factor in admissions in order to achieve those benefits." *Fisher*, 645 F.Supp.2d at 607 (citing statistics showing that in 2002, the University offered over 5,631 classes, 79% of which (4,448) had just one or zero African-American students; 30% of classes (1,689) had zero or one Hispanic students).<sup>17</sup> So, the controlling question is, "Is the University of Texas's race-conscious policy effective?" And by effective, I do not mean that every statistically insignificant gain (i.e., adding one, three, or five students at the margin) qualifies. The constitutional inquiry for me concerns whether the University's program meaningfully furthers its intended goal of increasing racial diversity on the road to critical mass. I find it does not.

In the 2008 admissions cycle, 29,501 students applied to the University of Texas. *See Fisher*, 645 F.Supp.2d at 590. Less than half, 12,843, were admitted and 6,715 ultimately enrolled.<sup>18</sup> *Id.* Of these enrolled students, 6,322

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17. These statistics represent all classes at UT with five or more students, including large lecture courses. For classes with five to 24 students—the most likely to foster the vibrant discussion described in *Grutter* and *Bakke*—the figures are more revealing. In 2002, UT offered 3,616 classes with five to 24 students. Of these, 90% had one or zero African-American students and 43% had one or zero Hispanic students. *See Proposal to Consider Race and Ethnicity in Admissions*, June 25, 2004 at 26, Table 8.

18. Today's decision, like the district court's, alternates between using statistics from admitted and enrolled students. If realizing the educational benefits of diversity is the University's asserted interest, only the data for enrolled students is relevant to our review.

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came from Texas high schools.<sup>19</sup> *See Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin*, October 28, 2008 at 7 (“2008 Top Ten Percent Report”). 5,114 (80.9% of enrolled Texas residents) of these students were a product of Top Ten Percent, meaning that, at most, 1,208 (19.1%) enrolled non-Top Ten Percent Texas residents had been evaluated on the basis of their AI/PAI scores. *Id.*

Of the 363 African–American freshmen from Texas high schools that were admitted and enrolled (6% of the 6,322–member enrolling class from Texas high schools),

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19. In the discussion that follows, I use the number of enrolled Texas residents (6,322) as a baseline rather than the aggregate enrollment for first-time freshman (6,715). There are two reasons for this. First, this case asks us to decide the necessity of UT’s race-conscious admissions policy in light of Texas’s Top Ten Percent law. I find this question is evaluated most effectively by comparing enrollment data for Texas residents, which include precise figures for Top 10% and Non–Top 10% enrollees. Second, as the majority opinion recognizes, *ante* at 241–42 n. 155, the record does not include data showing what portion of the total applicant pool were Texas residents and what portion came from out-of-state. This is problematic. We know, for example, that the 2008 entering freshman class included 375 African–American and 1,338 Hispanic students, and that 363 and 1,322 of these students, respectively, were Texas residents. *See 2008 Top Ten Percent Report* at 6–7. So, although we know that the 2008 enrolling freshman class included 12 African–American and 16 Hispanic students from out-of-state, we cannot intelligently discuss the potential impact of UT’s race-conscious policy on this data set without also having total application and admissions information available for non-Texas residents. This does not affect my conclusions—the number of non-Texas African–American and Hispanic students enrolled in the freshman class is statistically insignificant.

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305 (4.8%) were a product of Top Ten Percent, while 58 (0.92%) African–American enrollees had been evaluated on the basis of their AI/PAI scores.<sup>20</sup> *See 2008 Top Ten Percent Report* at 7. For the 1,322 (21%) total enrolled in-state Hispanic students, 1,164 (18.4% of enrolled in-state students) were a product of Top Ten Percent, while 158 (2.5%) had been evaluated on the basis of their AI/PAI scores. *Id.* We know that in some cases an applicants’ AI score is high enough that the applicant is granted admission based on that score alone. But we do not have data to show how many of these 58 African–American and 158 Hispanic students were admitted automatically based on their AI scores, which are race-neutral, and how many were admitted after factoring in the students’ PAI scores, which use the University’s *Grutter*-like holistic evaluation plan and include consideration of an applicant’s race as one of seven “special circumstances.” Nonetheless, assuming that *all* 58 and 158 African–American and Hispanic students, respectively, were admitted on the basis of their combined AI and PAI scores (i.e., that none of these minority students gained admission on the basis of their race-neutral Academic Index score alone), the question is whether the University’s use of race, which is a “highly suspect tool,” *Crosby*, 488 U.S. at 493, 109 S.Ct. 706, as part of the PAI score contributes a statistically significant enough number of minority students to affect critical mass at the University of Texas.

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20. In this section, I often refer to a raw number followed by a percentage listed in parentheses. *E.g.*, “305 (4.8%).” This percentage figure (\_\_\_%) is calculated by dividing number of students cited by 6,322, the number of enrolled Texas residents in the 2008 freshman class.

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We do not know, because the University does not maintain data, the degree to which race influenced the University's admissions decisions for any of these enrolled students or how many of these students would not have been admitted but-for the use of race as a plus factor. But assuming the University gave race decisive weight in each of these 58 African-American and 158 Hispanic students' admissions decisions, those students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman class. And this is assuming a 100%, unconstitutional use of race, not as a plus factor, but as a categorical condition for guaranteed admission. *See Grutter*, 539 U.S. at 329–30, 123 S.Ct. 2325 (making race an automatic factor in admissions would “amount to outright racial balancing, which is patently unconstitutional.”).

Assume further, that such a prohibited use of race was employed in only half of the University's admissions decisions. This would still only yield 29 (0.46%) African-American and 79 (1.25%) Hispanic students.

Now assume that the University's use of race is truly holistic; that given the multitude of other race-neutral variables the University considers and values sincerely, race's significance is limited in any individual application packet. *See Fisher*, 645 F.Supp.2d at 608 (“UT considers race in its admissions process as a factor of a factor of a factor of a factor. As described in exhaustive detail above, race is one of seven ‘special circumstances,’ which is in turn one of six factors that make up an applicants personal achievement score.”). Lastly, assume that in this system,

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the University's use of race results in a but-for offer of admission in one-quarter of the decisions. A twenty-five percent but-for admissions rate seems highly improbable if race is truly limited in its holistic weighting, but the unlikelihood of the assumption proves my point. Even under such a system, the University's proper use of race holistically would only yield 15 (0.24%) African-American and 40 (0.62%) Hispanic students. African-American students, for example, admitted and enrolled by way of this holistic system would still only constitute *two-tenths of one percent* of the University of Texas's 2008 entering freshman class. Such a use of race could have no discernable impact on the classroom-level "educational benefits diversity is designed to produce" or otherwise influence "critical mass" at the University of Texas generally. Such a plan exacts a cost disproportionate to its benefit and is not narrowly tailored. This is especially so on a university campus with, for example, 4,448 classes (out of 5,631) with zero or one African-American students, and 1,689 classes with zero or one Hispanic students. *Fisher*, 645 F.Supp.2d at 607.

More importantly, if the figures above are reasonably accurate, the University's use of race also fails *Grutter*'s compelling interest test as a factual matter. *See* 539 U.S. at 333, 123 S.Ct. 2325 ("[D]iminishing the force of [racial] stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."). From its inception immediately following *Grutter*, the University's race-conscious admissions policy was described as essential to the University of Texas's educational mission:

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[T]o accomplish [UT's] mission and fulfill its flagship role ... the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds. The proposal to consider race in the admissions process is not an exercise in racial balancing but an acknowledgment that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission.

*Fisher*, 645 F.Supp.2d at 602 (citing Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004 at 24). If the University's use of race is truly necessary to accomplish its educational function, then as a factual matter, the University of Texas's race-conscious measures have been completely ineffectual in accomplishing its claimed compelling interest.

In contrast, Top Ten Percent was responsible for contributing 305 and 1,164 African-American and Hispanic students, respectively, to the entering 2008 freshman class using entirely race-neutral means. These students represent 4.8% and 18.4% of the entering in-state freshman class. In addition, of the 58 African-American and 158 Hispanic enrolled students evaluated on the basis of their AI and PAI scores, if the University's use of race was truly holistic, the percentage of these students for whom race was a decisive factor (i.e., but-for admits) should be minimal. In other words, the vast

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majority of these 58 and 158 students were admitted based on objective factors other than race. That is, the University was able to obtain approximately 96% of the African–American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means. And although the University argues that this number still does not qualify as critical mass, one thing is certain: the University of Texas’s use of race has had an infinitesimal impact on critical mass in the student body as a whole. As such, the University’s use of race can be neither compelling nor narrowly tailored.

I do not envy the admissions officials at the University of Texas. In 1997, in response to our decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.1996), the people of the State of Texas determined, through their elected representatives, that something needed to be done to improve minority enrollment at Texas’s public institutions of higher education. Texas’s Top Ten Percent law was intended to effectuate that desire. We take no position today on the constitutionality of that law.<sup>21</sup> Instead, we

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21. In assessing whether the University’s use of race is narrowly tailored, today’s majority opinion finds that Top Ten Percent is not a race-neutral alternative that serves the University’s asserted interest “about as well” as its *Grutter*-like plan. *See ante* at 238–42. My concurrence should not be read to approve or reject the constitutionality of percentage plans like Top Ten Percent. That issue remains open. I write separately to underscore the minimal effect that the University’s use of race has had on critical mass *in light of Top Ten Percent*, and why the University’s use of race would not, therefore, be narrowly tailored applying traditional strict scrutiny principles before *Grutter*. I recognize that *Grutter* appears to swallow this concern.

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are asked to scrutinize the legality of the University's race-conscious policy designed to complement Top Ten Percent. Even with the limited data available, I cannot find that the University of Texas's use of race is narrowly tailored where the University's highly suspect use of race provides no discernable educational impact. In my view, the University's program fails strict scrutiny before or after *Grutter*. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (Kennedy, J., concurring) (“[I]ndividual racial classifications employed in this manner may be considered legitimate *only if they are a last resort* to achieve a compelling interest.”) (citation omitted) (emphasis added). Before *Grutter*, it is unlikely that the Supreme Court would have found that the University of Texas's means were narrowly tailored to the interest it asserts. Nonetheless, narrow tailoring in the university admissions context is not about balancing constitutional costs and benefits any longer. Post- *Grutter*, universities need not inflict the least harm possible so long as they operate in good faith. And in assessing good faith, institutions like the University of Texas need not even provide the type of metrics that allow courts to review their affirmative action programs. As long as these public institutions remain sufficiently opaque in their use of race, reviewing courts like ours will be hard pressed to find anything short of good faith and narrow tailoring. In the world post- *Grutter*, courts are enjoined to take universities at their word.

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## III

The Supreme Court's narrow tailoring jurisprudence has been reliably tethered, at least before 2003, to the principle that whenever the government divides citizens by race, which is itself an evil that can only be justified in the most compelling circumstances, that the means chosen will inflict the least harm possible, *see Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.), and fit the compelling goal "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493, 109 S.Ct. 706; *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) ("[W]hen a State discriminates on the basis of race ..., we require a tighter fit between the discriminatory means and the legitimate ends they serve."). *Grutter* abandoned this principle and substituted in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades.

My disagreement with *Grutter* is more fundamental, however. *Grutter*'s failing, in my view, is not only that it approved an affirmative action plan incapable of strict scrutiny, but more importantly, that it approved the use of race in university admissions as a compelling state interest at all.

The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible

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biologically into any set number of races.<sup>22</sup> A world war was fought over such principles. Each individual is unique. And yet, in 2010, governmental decisionmakers are still fixated on dividing people into white, black, Hispanic, and other arbitrary subdivisions. The University of Texas, for instance, segregates student admissions data along five racial classes. *See, e.g., 2008 Top Ten Percent Report* at 6 (reporting admissions data for White, Native–American, African–American, Asian–American, and Hispanic students). That is not how society looks any more, if it ever did.

When government divides citizens by race, matters are different.<sup>23</sup> Government-sponsored discrimination is repugnant to the notion of human equality and is more than the Constitution can bear. *See Grutter*, 539 U.S. at 388, 123 S.Ct. 2325 (Kennedy, J., dissenting) (“Preferment

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22. *See* Alexander & Schwarzschild, 21 CONST. COMMENT. at 6 & n.10 (“There is broad scholarly support for this proposition. *See, e.g.,* NAOMI ZACK, PHILOSOPHY OF SCIENCE AND RACE 58–62 (2002); JOSEPH L. GRAVES, JR., THE EMPEROR’S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENNIUM (2001); Joshua M. Glasgow, *On the New Biology of Race*, 100 J. PHIL. 456 (2003).”).

23. *See* Alexander & Schwarzschild, 21 CONST. COMMENT. at 6–7 (“[W]hen the government classifies people racially and ethnically, and then makes valuable entitlements such as admission to a university turn on those classifications, ... that very fact encourages people to think that ‘races’ are real categories, not bogus ones, and that one’s race is an exceedingly important rather than a superficial fact about oneself and others. In other words, it encourages people to pay close attention to race and to think in racial terms.”).

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by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality.”). There are no *de minimis* violations of the Equal Protection Clause, and when government undertakes any level of race-based social engineering, the costs are enormous. Not only are race-based policies inherently divisive, they reinforce stereotypes that groups of people, because of their race, gender, or ethnicity, think alike or have common life experiences. The Court has condemned such class-based presumptions repeatedly. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (“Supposed ‘inherent differences’ are no longer accepted as a ground for race or national origin classifications.”); *Shaw*, 509 U.S. at 647, 113 S.Ct. 2816 (rejecting the notion “that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same ... interests,” or have a common viewpoint about significant issues); *Wygant*, 476 U.S. at 316, 106 S.Ct. 1842 (Stevens, J., dissenting) (the “premise that differences in race, or the color of a person’s skin, reflect real differences ... is utterly irrational and repugnant to the principles of a free and democratic society”). I do not see how racial discrimination in university admissions is any less repugnant to the Constitution. If anything, government-sponsored discrimination in this context presents an even greater threat of long-term harm.<sup>24</sup>

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24. Professor Cohen succinctly describes some of the effects of racial and ethnic preferences in higher education:

1. preference divides the society in which it is awarded;

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For the most part, college admissions is a zero-sum game. Whenever one student wins, another loses. The entire competition, encouraged from age five on, is premised on *individual* achievement and promise.<sup>25</sup> It is no

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2. it establishes a precedent in excusing admitted racial discrimination to achieve political objectives;
  3. it corrupts the universities in which it is practiced, sacrificing intellectual values and creating pressures to discriminate by race in grading and graduation;
  4. ...
  5. it obscures the real social problem of why so many minority students are not competitive academically;
  6. it obliges a choice of some few ethnic groups, which are to be favored above all others;
  7. ...
  8. it removes incentives for academic excellence and encourages separatism among racial and ethnic minorities;
  9. it mismatches students and institutions, increasing the likelihood of failure for many minority students; and
  10. it injures race relations over the long haul.

CARL COHEN & JAMES P. STERBA,  
AFFIRMATIVE ACTION & RACIAL  
PREFERENCE 109 (2003).

25. For example, in the School of Architecture, the School of Fine Arts, and certain honors programs, where aptitude is essential, the University requires special portfolio, audition, and

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exaggeration to say that the college application is 18 years in the making and is an unusually personal experience: the application presents a student's best self in the hopes that her sustained hard work and experience to date will be rewarded with admission. Race-based preferences break faith with this expectation by favoring a handful of students based on a trait beyond the control of all. *See Bakke*, 438 U.S. at 361, 98 S.Ct. 2733 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (“[A]dvancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of the individual ...”). Given the highly personal nature of the college admissions process, this kind of class-based discrimination poses an especially acute threat of resentment and its corollary—entitlement. More fundamentally, it “assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race will never be achieved.” *Croson*, 488 U.S. at 495, 109 S.Ct. 706 (citation and internal quotation marks omitted).

Yesterday’s racial discrimination was based on racial preference; today’s racial preference results in racial discrimination. Changing the color of the group discriminated against simply inverts, but does address, the fundamental problem: the Constitution prohibits all

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other requirements. *See ante* at 229 n. 87. In these and other impacted programs where student demand outstrips available space, the University recognizes and uses merit as the decisive consideration in admission. I do not see why excellence and merit warrant less consideration in the University’s other disciplines.

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forms of government-sponsored racial discrimination. *Grutter* puts the Supreme Court's imprimatur on such ruinous behavior and ensures that race will continue to be a divisive facet of American life for at least the next two generations. Like the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles.

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**APPENDIX B — ORDER OF THE UNITED  
STATES DISTRICT COURT, W.D. TEXAS, AUSTIN  
DIVISION, DATED AUGUST 17, 2009**

United States District Court,  
W.D. Texas,  
Austin Division.

645 F.Supp.2d 587, 250 Ed. Law Rep. 298

No. A-08-CA-263-SS.  
Aug. 17, 2009

Abigail Noel FISHER and  
Rachel Multer Michalewicz,

Plaintiffs,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Defendants.

**ORDER**

*SAM SPARKS*, District Judge.

BE IT REMEMBERED on June 12, 2009 the Court called the above-styled cause for a hearing on all pending matters, the parties appeared through counsel, and the Court addressed Plaintiffs' Motion for Partial Summary Judgment [# 94], Defendants' Cross-Motion for

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Summary Judgment [# 96], Plaintiffs' Combined Reply Memorandum in Support of Motion for Partial Summary Judgment and Memorandum in Opposition to Defendants' Cross-Motion for Partial Summary Judgment ("Plaintiffs' Reply and Resp.") [# 98, 99], Defendants' Reply memorandum in Support of Cross-Motion for Summary Judgment [# 102], *Amicus Curiae* Lawrence Longoria, Jr., Nathan Bunch, and Texas League of United Latin American Citizens' (hereinafter collectively referred to as "LULAC") Motion for Leave to File *Amicus Curiae* Brief In Support of Defendants Out of Time [# 104], and Plaintiffs' Response to LULAC's Motion for Leave [# 107]. Plaintiffs do not object to LULAC's participation as *amici*, thus LULAC's Motion for Leave to File *Amicus Curiae* Brief In Support of Defendants Out of Time [# 104] is GRANTED; however, Plaintiffs' objection to the new evidence submitted in support of LULAC's brief is well taken. The Court will sustain the objection and thus consider only LULAC's legal arguments and arguments based on the properly-submitted evidence in this case, and will not consider the new evidence submitted by LULAC. Also filed in relation to the cross motions for summary judgment and considered by the Court are LULAC's *Amicus Curiae* Brief in Support of Defendants [# 104] and *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc., The Black Student Alliance at the University of Texas at Austin, Chad Stanton, Anthony Williams, Ariel Barrett, C.J. Davis, Devon Robinson, Trenton Stanton, and Eric Stanton's (hereinafter collectively referred to as "NAACP") *Amicus Curiae* Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and In Opposition to Plaintiffs' Motion for Partial Summary

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Judgment [# 103]. After considering the motions, the responses, the replies, the *amicus* briefs, the relevant law, and the case file as a whole, the Court enters the following opinion and orders.

**BACKGROUND****I. Procedural History**

On April 7, 2008, Plaintiff Abigail Fisher filed suit in the Western District of Texas. On April 17, 2008, Ms. Fisher was joined in her suit by Rachel Michalewicz. Plaintiff Fisher is a Caucasian female who attended Stephen F. Austin High School in Sugar Land, Texas. Plaintiff Michalewicz is a Caucasian female who attended Jack C. Hays High School in Buda, Texas. Plaintiffs both applied for admission to the University of Texas at Austin (“UT” or the “University”) in the fall of 2008. Both were rejected.<sup>1</sup> Plaintiffs sued multiple defendants: the State of Texas; UT; Mark G. Yudof, Chancellor of the University of Texas System in his official capacity; David B. Pryor, Executive Vice Chancellor for Academic Affairs in his official capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in his official capacity; William Powers, Jr., President of the University of Texas at Austin in his official capacity; the Board of Regents of the Texas State University System; John W. Barnhill, Jr., H. Scott Caven, Jr., James R. Huffines, Janiece Longoria, Colleen

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1. However, as Texas residents both Plaintiffs were offered the opportunity to participate in UT’s Coordinated Admission Program (“CAP”), described more fully below.

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McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, and Printice L. Gary, as Members of the Board of Regents in their official capacities; and Bruce Walker, Vice Provost and Director of Undergraduate Admissions in his official capacity (collectively “Defendants”).<sup>2</sup> Plaintiffs contend the “admissions policies and procedures currently applied by Defendants discriminate against Plaintiffs on the basis of their race in violation of their right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*” Pls.’ Am. Compl. [# 30] ¶ 2. Plaintiffs seek declaratory and injunctive relief, including evaluation of Plaintiffs’ applications for admission under race-neutral criteria, and attorneys’ fees and costs.

Following the Court’s denial of Plaintiffs’ motion for preliminary injunction, the parties agreed to a scheduling order bifurcating the trial into two phases: liability and remedy. The Court permitted two groups, LULAC and NAACP, to submit *amici* briefs in lieu of intervention. On June 12, 2009, the Court held a hearing on the parties’ motions for summary judgment regarding liability, specifically on the issue of whether UT’s admissions policies and practices violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

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2. Plaintiffs subsequently voluntarily dismissed Defendants the State of Texas and Burgdorf, and substituted Kenneth Shine for Mark Yudof.

*Appendix B***II. History of Undergraduate Admissions at the University of Texas at Austin**

The University of Texas at Austin (“UT”) is a public education institution authorized by Article VII § 10 of the Texas Constitution and funded by the governments of Texas and the United States. Pls.’ Second Am. Compl. [# 85] ¶ 18. It is a highly selective university, receiving applications from approximately four times more students each year than it can enroll in its freshman class. Defs.’ Cross-Mot. for Summ. J. Statement of Facts ¶ 2. For the entering class of 2008, to which Plaintiffs sought admission, 29,501 students applied to UT. Less than half, 12,843, were admitted and 6,715 ultimately enrolled. Defs.’ Cross-Mot. for Summ. J. Tab 8, Aff. of Gary M. Lavergne (“Lavergne Aff.”) Ex. C, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin*, October 28, 2008 at 6 (Table 1) (“2008 Top Ten Report”). As the flagship university of Texas, UT describes its admissions goal as enrolling a meritorious and diverse student body with the expectation that many of its graduates will become state and national leaders. Defs.’ Cross-Mot. for Summ. J. Tab 11, Affidavit of N. Bruce Walker (“Walker Aff.”) Ex. A, *Proposal to Consider Race and Ethnicity in Admissions*, June 25, 2004 at 24-25 (“2004 Proposal”); Defs.’ Cross-Mot. for Summ. J. Tab 5, Dep. of N. Bruce Walker (“Walker Dep.”) at 9:10-12. To accomplish this, the University continuously develops internal procedures to supplement the judicial and legislative mandates governing its admissions process. Defs.’ Cross-Mot. for Summ. J. Tab 2, Dep. of Kendra Ishop (“Ishop Dep.”) at 9:13-18. The complex

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system currently in use at UT and challenged by the Plaintiffs is the product of these shifting internal and external policies. *Id.* In order to provide context to the current system, the Court will briefly review the changes in UT's admissions process from 1995 to today.

**a. UT Admissions Pre- and Post-*Hopwood v. Texas***

Until 1996, UT admitted students based on a two-tiered affirmative action system. Pls.' Mot. for Part. Summ. J. Mem. at 3. The first element, still in use today, is known as the Academic Index ("AI"), and is a computation of each applicant's predicted freshman grade point average ("PGPA") based on the student's high school class rank and standardized test scores (SAT or ACT). *Id.* The second element considered prior to the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.1996), was the applicant's race, as UT believed exclusive reliance on PGPA would yield a class with "unacceptably low diversity levels." Lavergne Aff. Ex. A, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin*, December 2006 (revised December 2007) at 2 ("*2006 Top Ten Report*"). As a result of this system, UT's 1996 enrolled freshman class, the last class admitted using this process, included 4.1 percent African-American student enrollment and 14.7 percent Hispanic student enrollment. Pls.' Mot. for Part. Summ. J. Statement of Facts ¶ 13 (citing *2006 Top Ten Report* at 4-5 (Tables 1, 1a)).

The Fifth Circuit terminated this system with its decision in *Hopwood v. Texas*, holding unconstitutional

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the use of race-based criteria in admissions decisions at The University of Texas School of Law. 78 F.3d at 957. The Court concluded diversity in education does not constitute a compelling governmental interest, a conclusion the Texas Attorney General interpreted as prohibiting the use of race as a factor in admissions by any undergraduate or graduate program at Texas state universities, including UT. *Hopwood* at 944; Tex. Att’y Gen. Ltr. Op. No. 97-001 at 18. Consequently, beginning with the 1997 admissions cycle UT eliminated its affirmative action program. *2008 Top Ten Report* at 4. Although the University retained its use of the AI, it replaced consideration of race with a Personal Achievement Index (“PAI”). Defs.’ Cross-Mot. for Summ. J. Statement of Facts ¶¶ 86-87. The PAI was determined by a holistic review of applications intended to identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores. *Id.* at ¶ 86; Walker Dep. at 31:7-9.

Although this AI/PAI system was facially race-neutral in accordance with *Hopwood*, it was also partially designed to increase minority enrollment. Walker Dep. at 31:10-12. Many of the special circumstances considered in computing applicants’ PAIs disproportionately affect minority candidates, including the socio-economic status of the student’s family, languages other than English spoken at home, and whether the student lives in a single-parent household. Pls.’ Mot. for Part. Summ. J. Mem. at 3. Despite these measures, minority enrollment at the University decreased immediately following *Hopwood*. In 1997, the first year during which admissions were conducted under the post-*Hopwood* system, African-

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Americans accounted for 2.7 percent and Hispanics for 12.6 percent of the entering freshman class, compared to 4.1 percent and 14.5 percent respectively the previous year under the pre-*Hopwood* system. Pls.' Mot. for Part. Summ. J. Statement of Facts ¶ 79 (citing *2006 Top 10 Report* at 4-5 (Tables 1, 1a)).

**b. Internal Initiatives and the Top Ten Percent Law**

In order to counter these decreases in minority enrollment, both UT and the Texas State Legislature adopted additional race-neutral<sup>3</sup> initiatives that, along with the AI/PAI system, are still in use by the University. Defs.' Cross-Mot. for Summ. J. Tab 9, Affidavit of Michael K. Orr ("Orr Aff.") ¶ 3. UT instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools. *Id.* ¶ 4. Although the University believes these initiatives had the residual effect of improving diversity, no specific increases can be directly attributed to them and the University does not keep track of their effects on minority representation. Defs.' Cross-Mot. for Summ. J. Tab 4, Dep. of Michael K. Orr ("Orr Dep.") at 20:3-12.

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3. "Race-neutral" may be a misnomer. As the parties appear to agree, many of these initiatives as well as HB 588 are intended to increase minority enrollment and thus, in reality, are "race-conscious." But *facially* these policies are race-neutral, and thus the Court will continue to use that phrase to describe policies which do not explicitly favor one racial group over another.

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The Texas State Legislature responded to *Hopwood* by passing House Bill 588, codified as TEX. EDUC. CODE § 51.803 (1997) and also known as HB 588 or the “Top Ten Percent law,” a year after the Fifth Circuit issued its decision. Pls.’ Mot. For Part. Summ. J. at 3-4. HB 588, which is still in effect, granted automatic admission to any public state university, including UT, for all public high school seniors in the top ten percent of their class at the time of their application, as well as the top ten percent of high school seniors attending private schools that make their student rankings available to university admissions officers.<sup>4</sup> TEX. EDUC. CODE § 51.803(a); Pls.’ Mot. for Part. Summ. J. Statement of Facts ¶¶ 59-60.

The purpose of the Top Ten Percent law was to “ensure a highly qualified pool of students each year in the state’s higher educational system” while promoting diversity among the applicant pool so “that a large well qualified pool of minority students [is] admitted to Texas universities.” HB 588, House Research Organization Digest (1997) at 4-5. Though facially neutral, one of the purposes of HB 588 was to increase minority representation at UT. Defs.’ Opp. to Pls.’ Mot. for Prelim. Inj. at 19-20. Under HB 588, and in conjunction with the AI/PAI system and other facially race neutral initiatives instituted by UT, post-*Hopwood* minority enrollment levels have improved. *2006 Top 10 Report* at 4-5 (Tables

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4. HB 588 has recently been amended, limiting the number of freshmen UT must admit under the Top Ten Percent law to 75 percent of its overall freshman class. But this change was not in effect during the relevant time period in which the Plaintiffs applied to UT.

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1, 1a). The entering freshman class of 2004, the last admitted under this race-neutral system, was 4.5 percent African-American and 16.9 percent Hispanic, compared to 2.7 percent and 12.6 percent respectively seven years earlier when *Hopwood* first went into effect. Pls.’ Mot. for Part. Summ. J. Statement of Facts ¶ 79 (citing *2006 Top Ten Report* at 4-5 (Tables 1, 1a)). Seventy-five percent of all admitted African-American students and seventy-six percent of all admitted Hispanic students in 2004 qualified under the Top Ten Percent law, compared to fifty-six percent of all admitted Caucasian students. *2008 Top Ten Report* at Table 2.

**c. UT Admissions *Post-Grutter v. Bollinger* (the Current Admissions System)**

*Hopwood’s* prohibition on the consideration of race in admissions ended after the 2004 admissions cycle as a result of the United States Supreme Court’s landmark decision in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). The Supreme Court held that universities have a compelling governmental interest “in obtaining the educational benefits that flow from a diverse student body.” *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. In order to improve classroom discussion, develop the next generation of leaders, and break down racial stereotypes, the Supreme Court decided universities may consider race as a “plus” in evaluating an applicant’s file in order to enroll a “critical mass” of minority students, described as “a number that encourages underrepresented minority students to participate in the classroom and not

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feel isolated ... or like spokespersons for their race.” *Id.* at 318-19, 330-34, 123 S.Ct. 2325.

To conform with the *Grutter* decision, UT again modified its admissions policies. On August 6, 2003, the University of Texas Board of Regents passed a resolution authorizing each UT System school to decide “whether to consider an applicant’s race and ethnicity as part of the [institution’s] admission” policies, which must include “individualized and holistic review of applicant files in which race and ethnicity are among a broader array of qualifications and characteristics considered,” as well as periodic reviews to evaluate the efficacy and necessity of considering applicants’ race. Pls.’ Mot. for Part. Summ. J. Ex. 19, Aff. of Francie A. Frederick (“Frederick Aff.”) Ex. A at 4-5.

To determine whether such consideration of race was warranted, UT conducted a study in November 2003 that concluded there was not a critical mass of underrepresented minority students enrolled at the University, though it did not establish what number or percentage of minority students would meet that standard. Walker Dep. at 18:15-24; Walker Aff. ¶ 10. In their survey responses, minority students reported feeling isolated and a majority of students at the University stated there was insufficient diversity in the classroom. *Id.* ¶ 12; Walker Dep. at 21:6-13. The study also found that in 2002, 90 percent of classes with 5 to 24 students had one or zero African-American students and 43 percent had one or zero Hispanic students. Walker Aff. ¶ 11; Lavergne Aff.

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Ex. B, *Diversity Levels of Undergraduate Classes at the University of Texas at Austin, 1996-2002* at 8 (Table 3) (“*Diversity Study*”).<sup>5</sup> Thus, in August 2004, after almost a year of deliberations, the UT System approved a revised admissions policy for UT that included an applicant’s race as a special circumstance reviewers may consider in evaluating an applicant’s PAI. Walker Aff. ¶ 14; Defs.’ Opp. to Pls.’ Mot. for Prelim. Inj. at 5.

UT does not have a projected date by which it intends to cease using race as a factor in undergraduate admission decisions. Pls.’ Mot. for Part. Summ. J. Mem. at 6. However, as an informal practice UT reviews its admissions procedures each year. Walker Aff. ¶ 16. Furthermore, every five years the admissions process is evaluated specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body, or whether race-neutral alternatives exist that would achieve the same results. *Id.*; *2004 Proposal* at 32. The first formal review of UT’s use of race in admissions is scheduled to begin in the fall of 2009. *2004 Proposal* at 32.

As a result of its policies, UT “ranks sixth in the nation in producing undergraduate degrees for minority groups.” Walker Dep. at 10:21-24 (quoting *Diverse Issues in Higher Education*, May 31, 2007). From 1998 to 2008, a period

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5. Forty-six percent of classes with between five and twenty-four students had one or zero Asian-American students in 2002. However, UT does not consider Asian-American students to constitute an underrepresented minority at the University. Walker Aff. ¶ 11; *Diversity Study* at 8 (Table 3).

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during which the Top Ten Percent law, the AI/PAI system, and race-neutral initiatives governed the University's admissions policies and to which consideration of race was added in 2005, the enrollment of African-American students increased from three to six percent of the entering freshman class and the enrollment of Hispanic students increased from 13 to 20 percent. *2008 Top Ten Report* at Table 2. However, the various programs in place make it difficult to attribute increases in minority enrollment to a specific program or programs. Walker Dep. at 13:13-17, 23:20-24. Furthermore, demographics in the state of Texas have changed substantially in recent years, indicating that increases in minority enrollment may be at least partially attributed to population shifts. Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 21-22 n. 8. While African-American students accounted for 12.56 percent of Texas high school graduates in 1997 and Hispanic students accounted for 29.78 percent, their populations had increased to account for 13.33 percent and 35.79 percent, respectively, of Texas high school graduates by 2007. Weirich Aff. ¶ 4. Underrepresented minorities are also somewhat more likely to have been admitted to UT under the Top Ten Percent law than their Caucasian peers; in 2008, 85 percent of all admitted Hispanic students and 80 percent of all admitted African-American students qualified for admission under the Top Ten Percent law, compared to 67 percent of all admitted Caucasian students.<sup>6</sup> *2008 Top Ten Report* at Table 2.

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6. Within ethnic groups, enrolling top ten percent students generally report higher PGPA's than non-top ten percent students, though their SAT score averages vary little. Caucasian students in both the top ten percent and the non-top ten percent categories

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The system under which Plaintiffs were denied admission to UT is a product of all of the developments discussed above, with its most recent changes based on the affirmative action program used by the University of Michigan School of Law and approved by the United States Supreme Court in *Grutter v. Bollinger*. Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 15-16. As did the University of Michigan School of Law, UT uses "a holistic, multi-factor, individualized assessment of each applicant" in which race is but one of many factors. *Id.* at 4. However, the two institutions' admissions policies and procedures differ significantly due to UT's legislatively-mandated admission of Top Ten Percent Texas residents, which largely dominates the admissions process. Pls.' Mot. for Part. Summ. J. Mem. at 12. As a result of HB 588, UT operates a two-tiered system of admissions based on the Top Ten Percent law and the AI/PAI system, under which an applicant's race is taken into consideration. *Id.* at 4.

**i. Admissions Under HB 588**

Before their candidacies are evaluated, all applicants to UT are divided into three pools: Texas residents,

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also report on average higher PGPA's and SAT scores than African-American or Hispanic students. In the entering class of 2007, Caucasian top-ten percent students had an average PGPA of 3.25 and SAT score of 1275, and non-top ten percent students had an average PGPA of 2.95 and SAT score of 1275. African-American top ten percent students had an average PGPA of 2.65 and SAT score of 1078, and non-top ten percent students had an average PGPA of 2.42 and SAT score of 1073. Hispanic top ten percent students had an average PGPA of 2.70 and SAT score of 1115, and non-top ten percent students had an average PGPA of 2.47 and SAT score of 1155.

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domestic non-Texas residents and international students. Defs.' Cross-Mot. for Summ. J. Tab 7, Aff. of Kendra B. Ishop ("Ishop Aff.") ¶ 7. Students compete only against other students in their respective pools for admission. *Id.* Texas residents are allotted 90 percent of all available seats, and their admission is based on the Top Ten Percent law, the AI/PAI system, or a combination of both. Defs.' Cross-Mot. for Summ. J. Tab 2, Dep. of Kendra B. Ishop ("Ishop Dep.") at 14:11-15:5; 39:16-17. The remaining ten percent of seats are awarded to domestic non-Texas residents (approximately seven percent in recent years) and international students (approximately three percent in recent years). *Id.* at 40:22-41:6; Pls.' Mot. for Part. Summ. J. at 4. Admission decisions for non-Texas resident applicants are made solely on the basis of their AI and PAI scores. Ishop Aff. ¶ 12.

Texas residents are divided into Top Ten Percent applicants and non-Top Ten Percent applicants. *2008 Top Ten Report* at 2. A significant majority of admitted students qualify for admission due to HB 588. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 15. In 2008, Top Ten Percent applicants accounted for eighty-one percent of the entering class overall, compared to forty-one percent in 1998, and filled ninety-two percent of the seats allotted to Texas residents, leaving only 841 places university-wide in the Fall 2008 class for non-Top Ten Percent Texas residents. *2008 Top 10 Report* at 9 (Table 2b); Ishop Aff. ¶ 16. However, while Texas residents who graduate in the top ten percent of their high school class are guaranteed admission to the University, they are not guaranteed admission to the program of their choice. Defs.' Cross-Mot. for Summ. J. Tab 3, Dep. of Gary M. Lavergne ("Lavergne Dep.") at 15:20-21.

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Admission to UT is granted by individual schools or majors. *Ishop Aff.* ¶ 7. Each applicant identifies their first and second choice programs at the University and competes for admission against other applicants who have identified the same program. *Id.* ¶¶ 7-10. Many colleges and majors provide automatic admission to Top Ten Percent applicants, but two groups impose additional requirements. First, because of special portfolio, audition and other requirements the Top Ten Percent law does not apply to the School of Architecture, the School of Fine Arts, and certain honors programs. *Ishop Dep.* at 92:6-22. Second, programs known as “impacted majors,” including the School of Business, College of Communication, School of Engineering, Kinesiology, and Nursing, are obligated to accept only a certain number of Top Ten Percent applicants. *Id.* at 32:5-17. These programs are “impacted” because they could fill eighty percent or more of their available spaces each year based solely on the preferences of applicants admitted pursuant to the Top Ten Percent law. *Id.* To prevent over-subscription and allow those colleges to admit non-Top Ten Percent applicants, UT caps the percentage of students automatically admitted to these programs at seventy-five percent of the available spaces. *Id.*; *Ishop Aff.* ¶ 11. Top Ten Percent students who do not receive automatic entry to their first choice program are grouped with other Texas applicants and compete against them for admission to a specific program based on their AI and PAI scores. *Defs.’ Cross-Mot. for Summ. J. Statement of Facts* ¶ 27.

*Appendix B***ii. Admissions Under the Academic Index/  
Personal Achievement Indices**

The AI/PAI system is used to make admission decisions as to all of the Top Ten Percent applicants who are denied automatic admission to the program of their choice, the non-Top Ten Percent Texas resident applicants, the domestic non-Texas resident applicants, and the international applicants. *Ishop Aff.* ¶ 12. Throughout the process, they remain separated in three pools: Texas residents, domestic non-Texas residents, and international applicants. *Ishop Aff.* ¶ 7. The current AI/PAI system has been in continuous use since 1997; its only substantive change was UT's decision after *Grutter* to authorize consideration of race in determining an applicant's PAI. *Walker Dep.* at 30:23-31:1; *2008 Top Ten Report* at 4. AI/PAI contains two elements: the Academic Index and the Personal Achievement Index.

First, the Academic Index predicts an applicant's freshman GPA in the program to which she has applied. *Defs.' Cross-Mot. for Summ. J. Statement of Facts* ¶ 25. The AI is computed using a multiple regression equation that contains four elements: (1) an applicant's high school class rank; (2) completion of UT's required high school curriculum; (3) the extent to which the applicant exceeded the required curriculum; and, (4) SAT (verbal and math) or ACT scores. *2008 Top Ten Report* at 2. The equation varies by school, as different programs accord different relative weight to each variable, such as the applicant's math versus her critical reading standardized test scores. *Lavergne Dep.* at 18:5-18. The equation generates a

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number ranging from 0.0 to 4.1, with the additional 0.1 points awarded if the applicant has exceeded the required high school curriculum. *Id.* at 17:13-25. Students who take the SAT or ACT more than once receive the benefit of the higher score. *2008 Top 10 Report* at 5 n. 5. Some applicants' AI scores are high enough that the applicant is granted admission based on that score alone. *Ishop Aff.* ¶ 12. Others are low enough that their applications are considered presumptively denied. *Id.* Known as group "C", applicants whose applications are presumptively denied based on their AI score have their file reviewed by senior admission staff readers who either award a default PAI score of 3-3-3 to the application or determine the file warrants a full review before any PAI scores are assigned. *Id.*

Second, the Personal Achievement Index accounts for all remaining parts of the applicant's file. *Ishop Aff.* ¶ 4. The index is based on an equation containing three scores: one score for each of the two required essays and a third score, called the personal achievement score, representing a holistic evaluation of the applicant's entire file. *Defs.' Cross-Mot. for Summ. J. Statement of Facts* ¶¶ 29, 49. Each element receives a score from 1 to 6 and is inserted into the PAI equation, which gives slightly greater weight to the personal achievement score than to the mean of the two essays.<sup>7</sup> *Lavergne Dep.* at 57:14-17, 21:23.

Each of the two essay scores is the result of a holistic evaluation of the essay as a piece of writing based on its

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7.  $PAI = [(personal\ achievement\ score * 4) + (average\ essay\ score * 3)] / 7$ . *Lavergne Dep.* 57:41-17.

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complexity of thought, substantiality of development, and facility with language. Defs.' Cross-Mot. for Summ. J. Tab 1, Dep. of Brian Bremen ("Bremen Dep.") at 10:19-21. The majority of essays are written on the two basic topics provided by the University, though some programs require applicants to base their essays on different, program-specific topics. Ishop Dep. at 12:17-19. The scores are awarded by a member of the UT admissions office staff who relies on annual training, a scoring guide, and a set of samples, all of which are provided each year by a UT faculty member who is a nationally recognized expert in holistic scoring. Bremen Dep. at 10:1-12, 18-21, 31:9; Ishop Aff. ¶ 13. Additionally, senior staff members perform quality control, verifying that awarded scores are in line with those they would give. Bremen Dep. at 13:14-20. The most recent study, conducted in 2005, found that essay readers scored within one point of one another 91 percent of the time and holistic file readers scored within one point of one another 88 percent of the time, reflecting significant consistency. Lavergne Aff. ¶ 8.

The third PAI element is the personal achievement score, which is based on an evaluation of the file in its entirety by senior members of the admissions staff. Bremen Dep. at 14:10-15:6. The evaluators conduct a holistic review considering the applicant's demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances. *2008 Top Ten Report* at 2. The relevant special circumstances include the applicant's family's socio-economic status, her school's socio-economic status, her family responsibilities, whether she lives in a single-parent home, whether languages

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other than English are spoken at home, her SAT/ACT score compared to her school's average score and, as of 2005, her race. *Id.* The essays are re-read during this process, but only for consideration of the information they convey, rather than to assess the quality of the student's writing. Bremen Dep. at 17:5-13. Students may also choose to submit a resume, supplemental essays, or any additional information such as artwork and portfolios for consideration during this process. Ishop Dep. at 12:19-13:5. None of the elements are considered individually, or given a numerical value and then added together; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context. Bremen Dep. at 22:8-13; Ishop Dep. at 13:9-14:19.

Because an applicant's race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation. Ishop Dep. at 19:20-24. Race in and of itself does not affect the score but is instead used to place the student's achievements into context and reveal whether she possesses a valuable "sense of cultural awareness." Bremen Dep. at 30:25, 41:5-7. Used in this manner, it can positively impact applicants of all races, including Caucasian, or may have no impact whatsoever. Ishop Dep. at 57:2-58:12. Given these guidelines and the fact race, like all the other elements, is never awarded a numerical value or considered alone, it is difficult to evaluate which applicants have been positively or negatively affected by its consideration or which applicants were ultimately offered admission due to their race who would not have otherwise been offered admission. Ishop Dep. at 19:20-

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20:3, 23:10-14. Yet, even though race is not determinative, it is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application. Pls.' Mot. for Part. Summ. J. Mem. at 5; Pls.' Mot. for Part. Summ. J. Ex. 8, Dep. of Bruce Walker ("Walker Dep.") at 45:5-12. Although a candidate's race is known throughout the application process, no admissions office employee or anyone else at UT monitors the racial or ethnic composition of the entire group of admitted students in order to decide whether a particular applicant will be admitted. Ishop Aff. ¶ 17.

Once AI and PAI scores have been awarded, the data is entered in matrices created for each major or school, depending on whether the program to which the student applied admits students to the college or into a specific major. Ishop Aff. ¶ 14. The matrix is set up as a graph, with the vertical left axis representing an applicant's PAI score and the horizontal bottom axis representing an applicant's AI score. *Id.* Applicants are identified only by their AI/PAI numbers, with the upper left corner containing the highest combined scores and the lower right corner containing the lowest combined scores. *2008 Top 10 Report* at 3 (Figure 1). Each cell on the matrix contains a number representing the total number of applicants who share that particular combination of AI and PAI scores. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 66.

Once all applicants have been placed within the appropriate matrix cell, a liaison for the school or major establishes a cut-off line. Ishop Dep. at 38:6-8. The line is drawn in a "stair step" manner and UT offers admission

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to applicants whose AI and PAI scores place them in cells located to the left of the line. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 70. Placement of the cutoff line depends on the combination of AI/PAI scores desired by the school and the number of available slots. Ishop Dep. at 47:10-24.

Applicants denied admission to their first choice program under this process are then “cascaded” down to the matrix of their second choice. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶¶ 69-70. The influx of new applicants changes the matrices' composition, and the cut-off lines are accordingly re-adjusted to accommodate this shift. Ishop Aff. ¶ 14. After all applicants have been considered for their second choice program, Top Ten Percent applicants who have not been admitted to either their first or second choice programs are automatically admitted as Liberal Arts Undeclared majors. *Id.* All remaining applicants are cascaded into the Liberal Arts Undeclared matrix, where they compete for the remaining seats using the same procedure discussed above. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 75. Any non-Texas residents and international applicants who fail to gain admission into Liberal Arts Undeclared are denied admission to UT. Ishop Dep. at 47:2-5.

**iii. The Summer and Coordinated Admission Programs**

Texas residents, however, are never denied admission to UT if they submit a complete entering freshman application by the published deadlines. *2008 Top Ten*

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*Report* at 3. If not admitted to the entering fall class, a Texas resident is offered admission to either the summer program or the Coordinated Admission Program (“CAP”). *Id.* The summer program allows students to begin their studies at UT during the summer, joining the regularly admitted students in the fall. *Ishop Aff.* ¶ 15. Approximately eight hundred students are enrolled in that program each year. *Ishop Dep.* at 47:10-24. CAP entitles its participants to automatically transfer to UT if they meet certain conditions, including the completion of thirty credit hours with a cumulative GPA of 3.2 or higher at a participating UT System campus during their freshman year. *Ishop Aff.* ¶ 15.

Applicants located in AI/PAI cells on the Liberal Arts Undeclared matrix near those selected for admission to the fall class are considered for admission to the summer class, while all other applicants are automatically admitted into CAP. *Ishop Aff.* ¶ 15. The potential summer students’ files are re-read in their entirety. *Id.* Although senior staff members conducting the review are aware of the scores originally awarded to each applicant’s file, they are not bound by them and do not recalculate a new score, but rather make the summer admissions decision based on the file as a whole. *Ishop Dep.* at 27:10-22. Admission to the summer program is offered solely based on this individualized, holistic review. *Id.* at 29:10-14. Although it is relatively rare, reviewers may still at this late stage admit an applicant to the entering fall class. *Id.* at 49:5-50:12. Furthermore, although the readers conducting this review, like all admission office staffers, have access to a head count of admitted students by race, they do not

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take such information into account as part of the review process. *Ishop Aff.* ¶ 15. All Texas residents not offered admission to the summer class through this process are then accepted to CAP, ending the admissions process at UT for that cycle. *Id.* ¶ 14.

**ANALYSIS****I. Standard**

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In deciding summary judgment, the Court construes all facts and inferences in the light most favorable to the nonmoving party. *Richter v. Merchs. Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir.1996). The standard for determining whether to grant summary judgment “is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court.” *James v. Sadler*, 909 F.2d 834, 837 (5th Cir.1990).

Both parties bear burdens of production in the summary judgment process. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). First, the moving party has the initial burden of showing there is no genuine issue of any material fact and judgment should be entered as a matter of law. FED.R.CIV.P. 56(c); *Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The nonmoving party must

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then come forward with competent evidentiary materials establishing a genuine fact issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson*, 477 U.S. at 256-257, 106 S.Ct. 2505. However, “[n]either ‘conclusory allegations’ nor ‘unsubstantiated assertions’ will satisfy the non-movant’s burden.” *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir.1996).

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 2. Consequently, the “government may treat people differently because of their race only for the most compelling reasons.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Thus, as the Supreme Court has held, “all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’” *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097). To survive strict scrutiny, the racial classification must be “narrowly tailored to further compelling governmental interests.” *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325.

**II. *Grutter v. Bollinger***

In 2003, the Supreme Court squarely addressed and decided the question of “[w]hether diversity is a compelling interest that can justify the narrowly tailored

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use of race in selecting applicants for admission to public universities.” *Id.* at 322, 123 S.Ct. 2325. The Supreme Court answered the question in the affirmative, finding that the University of Michigan Law School (the “Law School”) had “a compelling interest in attaining a diverse student body.” *Id.* at 328, 123 S.Ct. 2325. The Supreme Court also found the Law School’s admissions program to be narrowly tailored despite the existence of race-neutral alternatives, including “percentage plans” similar to Texas’ Top Ten Percent law. *Id.* at 339-40, 123 S.Ct. 2325. As the landmark case regarding the consideration of race as part of college admissions, the facts of *Grutter* deserve particular attention.

Michigan’s Law School is one of the top, and most selective, law schools in the nation, routinely admitting 10% or less of applicants. *Id.* at 312-13, 123 S.Ct. 2325. In addition to selecting a highly qualified and promising group of students, the Law School sought, through its admissions process, to admit “a mix of students with varying backgrounds and experiences who will respect and learn from each other.” *Id.* at 314, 123 S.Ct. 2325 (citation omitted). The “hallmark” of the admissions policy was “its focus on academic ability coupled with a flexible assessment of applicants’ talents, experiences, and potential ‘to contribute to the learning of those around them.’” *Id.* at 315, 123 S.Ct. 2325 (citation omitted). Importantly, admissions officials evaluated each applicant individually based on all of the information available, which included a personal statement, letters of recommendation, an essay on how the applicant would contribute to the life and diversity of the school, undergraduate grades,

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and the applicant's score on the Law School Admission Test ("LSAT"). *Id.* The admissions policy specifically reaffirmed the school's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.* at 316, 123 S.Ct. 2325 (citation omitted). Specifically, the Law School sought to enroll a "'critical mass' of [underrepresented] minority students" in order to "ensure[e] their ability to make unique contributions to the character of the Law School." *Id.* (citations omitted).

This policy was challenged by Barbara Grutter, a white Michigan resident who was denied admission to the Law School in 1996, as a violation of the Fourteenth Amendment and federal civil rights laws. *Id.* at 316-17, 123 S.Ct. 2325. After an extensive bench trial, the district court "concluded that the Law School's use of race as a factor in admissions decisions was unlawful." *Id.* at 321, 123 S.Ct. 2325. The Sixth Circuit Court of Appeals, sitting en banc, reversed the district court's judgment and held that under Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), diversity was a compelling state interest and the Law School's use of race was narrowly tailored. *Id.* The Supreme Court affirmed, holding "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Id.* at 343, 98 S.Ct. 2733.

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In light of this Supreme Court jurisprudence, the Court now turns to the instant dispute.

**III. Compelling Governmental Interest**

*Grutter* clearly establishes that a public university “has a compelling interest in attaining a diverse student body.” *Id.* at 328, 123 S.Ct. 2325. “[A]ttaining a diverse student body is at the heart of the Law School’s proper institutional mission, and [ ] ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’” *Id.* at 329, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 318-19, 98 S.Ct. 2733). The Supreme Court noted several benefits stemming from a diverse student body:

These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” These benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.”

*Id.* at 330, 123 S.Ct. 2325 (citations omitted). Furthermore, student body diversity “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” *Id.* (citation omitted). “In order to cultivate a set of leaders

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with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.” *Id.* at 332, 123 S.Ct. 2325.

Crucial to the Supreme Court’s finding of a compelling interest was the fact the Law School did not attempt “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin,” but rather sought a “critical mass” of minority students. *Id.* (quoting *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733 (opinion of Powell, J.)). The Supreme Court noted that attempting to assure a specific percentage of a minority group would run afoul of the Supreme Court’s prohibition on racial quotas and “outright racial balancing.” *Id.* at 330, 123 S.Ct. 2325. Consequently, the definition of “critical mass” put forward by the Law School and approved by the Supreme Court was necessarily less than precise. Critical mass was described by Law School officials as “meaningful numbers,” “meaningful representation,” “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated,” or “numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.” *Id.* at 318-19, 123 S.Ct. 2325.

Following the Supreme Court’s decision in *Grutter*, the University of Texas Board of Regents passed a resolution authorizing each UT System school to decide “whether to consider an applicant’s race and ethnicity as part of the [institution’s] admission” policies, which must include “individualized and holistic review of applicant files

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in which race and ethnicity are among a broader array of qualifications and characteristics considered,” as well as periodic reviews to evaluate the efficacy and necessity of considering applicants’ race. Pls.’ Mot. for Part. Summ. J. Ex. 19, Aff. of Francie A. Frederick (“Frederick Aff.”) Ex. A at 4-5.

After conducting its review, UT issued its *Proposal to Consider Race and Ethnicity in Admissions*. See Defs.’ Cross-Mot. for Summ. J. Tab 11, Affidavit of N. Bruce Walker (“Walker Aff.”) Ex. A, *Proposal to Consider Race and Ethnicity in Admissions*, June 25, 2004 at 24-25 (“2004 Proposal”). The 2004 Proposal specifically addresses the rationale behind considering race as a part of the undergraduate admissions process:

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. This type of academic environment is a goal of the University of Texas at Austin and admission decisions must take into account this goal. The University of Texas at Austin handles a very large number of undergraduate applications and must select from among a highly qualified pool only the number of students in can accommodate. In light of the institutional goal, admission decisions result from both an assessment of the academic strength of each applicant’s record and an individualized, holistic review of each applicant,

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taking into consideration the many ways in which the academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging education environment of the University ...

Results indicate that, in a large percentage of [undergraduate] courses, some minority groups are represented by only one student or by none at all. The University of Texas at Austin did not have a critical mass of minority students sufficient to provide an optimal educational experience in 1996 (the pre-*Hopwood* period), and after seven years of good faith race-neutral admission policies, the University still has not reached a critical mass at the classroom level.

If The University of Texas at Austin is to accomplish its mission and fulfill its flagship role, it must prepare its students to be the leaders of the State of Texas. In the near future, Texas will have no majority race; tomorrow's leaders must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate. The University has a compelling educational interest to produce graduates who are capable of fulfilling the future leadership needs of Texas.

Because the University's educational mission includes the goal of producing future educational, cultural, business, and sociopolitical

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leaders, the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds. The proposal to consider race in the admission process is not an exercise in racial balancing but an acknowledgment that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission. In short, from a racial, ethnic, and cultural standpoint, students at the University are currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow. For the University to adequately prepare future leaders, it must include a critical mass of students from traditionally underrepresented backgrounds.

Critical mass, which is an adequate representation of minority students to assure educational benefits deriving from diversity, affects in a positive way all students because they learn that there is not "one" minority or majority view. In addition, the [Supreme] Court recognized that critical mass is essential in order to avoid burdening individuals with the role of "spokespersons" for their race or ethnicity. Thus, there is a compelling educational interest for the University not to

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have large numbers of classes in which there are no students-or only a single student-of a given underrepresented race or ethnicity.

The use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin. While the number of African American and Hispanic students has risen slightly above 1996 levels, these students still represent only 3% and 14%, respectively, of the entering freshman class. The race-neutral efforts have failed to improve racial diversity within the classroom. In fact ... for Fall, 2002, there were *more* classes with no or only one African American or Hispanic student than there had been in Fall, 1996. With so few underrepresented minorities in the classroom, the University is less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.

*2004 Proposal* at 23-25 (citation and footnote omitted).

As articulated in the *2004 Proposal*, UT's underlying interest in its decision to consider race as one of the factors in its admissions process closely mirrors the justification provided for the Michigan Law School's use of race and

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approved by the Supreme Court.<sup>8</sup> Both policies attempt to promote “cross-racial understanding,” “break down racial stereotypes,” enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as “spokespersons” for their race. *Grutter*, 539 U.S. at 319-20, 330-33, 123 S.Ct. 2325; 2004 Proposal at 23-25. Notably, the Supreme Court also recognized in *Grutter* that “[t]he Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.” 539 U.S. at 328, 123 S.Ct. 2325. Despite the obvious similarities between the admissions policy approved by the Supreme Court in *Grutter* and UT’s policy, the Plaintiffs still contend UT’s admissions program does not further a compelling governmental interest for two reasons. Pls.’ Mot. for Partial Summ. J. at 12-18.

First, Plaintiffs argue UT’s policy is “untethered to the educational benefits” of a diverse student body identified and approved by *Grutter*. *Id.* at 13. Specifically, Plaintiffs argue that because UT’s diversity goals are “open-ended”-or, in other words, because UT has made no effort to define a percentage of its student body that must be filled by underrepresented minorities in order to achieve critical mass that therefore UT’s use of race is not tied to the educational benefits of a diverse student body. Rather, Plaintiffs argue it “reflects a pursuit of racial

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8. UT’s policy is explicitly and admittedly based on the Law School’s policy and the *Grutter* case.

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balancing that reflects Texas' racial demographics." *Id.* at 14-15. Second, Plaintiffs also argue UT lacks a compelling interest because it has already achieved or exceeded "critical mass" through its race-neutral policies, most notably the Top Ten Percent law. *Id.* at 17. Plaintiffs argue that under Supreme Court precedent, "critical mass can be no greater than 20% minority enrollment." *Id.* at 18.

The Court finds both the Plaintiffs' arguments unpersuasive and finds UT has a compelling interest in student body diversity as articulated in *Grutter*. First and foremost, *nothing* in *Grutter* suggests a university must establish a specific percentage, or range of percentages, the achievement of which would satisfy critical mass. Plaintiffs cite evidence from the district court hearing and opinion in *Grutter* that the school officials considered "critical mass" to be somewhere between 10-20 percent of the student body. *Id.* at 15; *Grutter v. Bollinger*, 137 F.Supp.2d 821, 832 (E.D.Mich.2001). This evidence, however, is completely unpersuasive to prove the contention that a university must establish a specific percentage of minority enrollment for critical mass. To begin with, the district court that cited this evidence reached the opposite conclusion of the Supreme Court, and was reversed on appeal. Secondly, the actual policy adopted by the Law School *omitted* any reference to a specific figure or inclusion of a percentage "ceiling" because it "could be misconstrued as a quota." *Grutter*, 137 F.Supp.2d at 835. Finally, the *Grutter* decision clearly lacks any suggestion that there exists a specific percentage of minority enrollment that satisfies "critical mass" and above which a school lacks a compelling interest justifying

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the use of race in admissions. Instead, the Supreme Court implicitly endorses the Law School's general definition of "critical mass" as "meaningful numbers," "meaningful representation," "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated," or "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race" by citing these definitions in its decision. Furthermore, the Law School's policy, which was found to be constitutional, did not have a specific percentage of minority enrollment cited as its goal. *Grutter*, 539 U.S. at 318-19, 123 S.Ct. 2325.

In fact, *Grutter* stands for the opposite proposition—a school which articulates a specific percentage of its student body that must be filled by minority students would violate the constitutional prohibition of racial balancing or racial quotas. *Id.* at 329-30, 334, 123 S.Ct. 2325. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Id.* at 335, 123 S.Ct. 2325 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion)). "Quotas 'impose a fixed number or percentage which must be attained, or which cannot be exceeded.'" *Id.* (quoting *Sheet Metal Workers' v. EEOC*, 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (O'Connor, J., concurring in part and dissenting in part)). Establishing a specific percentage of minority student enrollment would violate the "paramount" characteristic of a constitutional race-conscious admissions program, namely a flexible and individual evaluation of each applicant. *Id.* at 336-37,

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123 S.Ct. 2325. Thus, under *Grutter* the establishment of a specific percentage for critical mass would be a strong indicator of an impermissible racial quota or racial balancing, and consequently critical mass must be defined based on the educational benefits provided by the admission of the individual students rather than on the satisfaction of a numerical percentage. As was the policy of the Michigan Law School, UT has not established a specific percentage of minority enrollment that must be met, but rather considers race as simply one factor in its admissions decisions.

The Plaintiffs' argument that "critical mass" of minority enrollment cannot exceed twenty percent of total enrollment, in light of the foregoing law, is similarly without merit. As explained above, *Grutter* does not require an articulation of a specific percentage of minority enrollment for the achievement of critical mass. Nor does the case indicate, in any way, shape, or form, that "critical mass" is limited to, at most, twenty percent minority enrollment. The Court disagrees with Plaintiffs' claim that "Supreme Court precedent demonstrates that critical mass can be no greater than 20% minority enrollment." Pls.' Mot. for Partial Summ. J. at 18. The first case Plaintiffs cite is the district court's decision in *Grutter*, which was reversed on appeal and in which the Supreme Court found the Law School's admissions policy to be constitutional despite the lack of any upper limit or cap on its minority enrollment. The second case cited, *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), did not even involve the use of race as a factor in admissions. Instead, the case involved the

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Virginia Military Institution's ("VMI") unconstitutional exclusion of women from admission. *Virginia*, 518 U.S. at 519, 116 S.Ct. 2264. The Supreme Court noted, "with recruitment, VMI could 'achieve at least 10% female enrollment'-'a sufficient "critical mass" to provide the female cadets with a positive educational experience.'" *Id.* at 523, 116 S.Ct. 2264 (citation omitted). Plaintiffs cite this statement, taken out of context, as support for its argument that public universities do not have a compelling interest that would justify the consideration of race as part of its admissions process once it has achieved 20 percent minority enrollment. This statement does not support the Plaintiffs' position. In context, the statement is made to support the claim that there was sufficient female interest in attending VMI such that, if admission was open to women, women would not be so isolated they would be unable to have a positive educational experience. *See Id.* The case in no way relates to the extent to which universities may consider an applicant's race, or for that matter her gender, in making admissions decisions. The last case Plaintiffs cite, *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F.Supp.2d 328, 357 (D.Mass.2003), also fails to establish a 20 percent ceiling for critical mass. In fact, reading beyond the cherry-picked sentences cited by Plaintiffs, *Comfort* recognizes the benefits derived from a diverse student body extend well beyond the 20% number:

... 20% is not a magical shut-off point for gains from intergroup contact. The gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is reduced and racial harmony and understanding increases.

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*Id.* Furthermore, the 20 percent number cited in *Comfort* is the “figure below which members of a racial minority in a given setting feel isolated or stigmatized.” *Id.* Thus, according to that logic, the *minimum* percentage of minority enrollment that must be achieved to avoid isolation or stigmatization is 20 percent, not the maximum, and that number applies to “a minority group,” rather than to minority students as a whole. *Comfort* also recognizes there is no “magic number” for critical mass. *Id.* *Comfort* in no way establishes, or even endorses, a maximum of 20 percent minority enrollment for the achievement of critical mass—if anything, it endorses 20 percent enrollment per minority group as a *minimum*. As a result, the Court finds the fact the combined minority enrollment at UT exceeds 20 percent of the freshman class does not mean UT lacks a compelling state interest that justifies its continued consideration of race as part of its admissions process.

Plaintiffs also argue UT’s use of race in admissions “is divorced from the educational benefits attained by the achievement of critical mass” because the policy primarily benefits African-American and Hispanic students and does not benefit other minority groups, specifically Asian-Americans. Pls.’ Mot. for Part. Summ. J. at 16. However, Plaintiffs cite no evidence to show racial groups other than African-Americans and Hispanics are *excluded* from benefitting from UT’s consideration of race in admissions. As the Defendants point out, “the consideration of race, within the full context of the entire application, may be beneficial to *any* UT Austin applicant—including whites and Asian-Americans.” Defs.’ Cross-Mot. for Summ. J. at 12; Ishop Dep. at 56:21-57:25.

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Moreover, nothing in *Grutter* requires a university to give equal preference to every minority group. As the Supreme Court recognized, the Michigan Law School's policy did not mention Asians or Jews "because members of those groups were already being admitted to the Law School in significant numbers." *Grutter*, 539 U.S. at 319, 123 S.Ct. 2325. Throughout the opinion, the Supreme Court recognizes the Law School's interest in ensuring the admission of "underrepresented" minority students. *Id.* at 316, 318-20, 335-363, 338, 341, 123 S.Ct. 2325. It is undisputed that UT considers African-Americans and Hispanics to be underrepresented but does not consider Asian-Americans to be underrepresented. *See* Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 92. However, the Court fails to see how UT's determination is improper or renders its consideration of race unconstitutional. As mentioned above, *Grutter* explicitly authorizes universities to exercise its discretion in determining which minority groups should benefit from the consideration of race and emphasizes the importance of including "underrepresented" minority groups.

The mere fact that the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT does not mean Hispanics are not an "underrepresented" minority group. Hispanic students remain underrepresented at UT when their student population as a percentage of the entire UT population is compared to Texas' Hispanic and Latino population. According to the latest statistics from the United States Census Bureau, Texas' population is 36

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percent Hispanic or Latino.<sup>9</sup> In contrast, in 2008 only 20 percent of admitted and/or enrolled UT students were Hispanic. *2008 Report* at Table 1.<sup>10</sup> Thus, compared to their percentage of Texas' population as a whole, Hispanics remain underrepresented. Asian-Americans, on the other hand, are largely *overrepresented* compared to their percentage of Texas' population. Plaintiffs suggest that any reference to demographic information in connection with the consideration of race in admissions constitutes an "attempt at engineering the racial demographics of UT Austin to correspond to the racial demographics of the State" and amounts to unconstitutional racial balancing. Pls.' Mot. for Part. Summ. J. at 16 n. 3. Plaintiffs are wrong. The mere concept of an "underrepresented" minority group, adopted and endorsed by the Supreme Court in *Grutter* and various other cases, necessarily involves the comparison of a minority group's representation at a university to its representation in society; otherwise, there would be no way to determine which minority groups qualify as underrepresented and which ones do not. The constitutional prohibition on racial balancing and racial quotas does not require universities to completely ignore societal demographics, but rather prohibits universities

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9. The Court takes judicial notice of the population estimates promulgated by the United States Census Bureau at <http://quickfacts.census.gov/qfd/states/48000.html>.

10. For comparison purposes, the Court notes the following statistics: African Americans-12 percent of the Texas population, 6 percent of UT's 2008 freshman class; Caucasians (non-Hispanic)-47.9 percent of the Texas population, 52 percent of UT's 2008 freshman class; and Asian-Americans-3.4 percent of the Texas population, 19 percent of UT's 2008 freshman class.

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from insulating minority applicants from competition with all other applicants or reserving a fixed number of positions for minority students. *Grutter*, 539 U.S. at 334-35, 123 S.Ct. 2325. There is no evidence even suggesting UT insulates minority students from competition or reserves a fixed number of positions for minority students.<sup>11</sup> In fact, Plaintiffs themselves allege UT does not have a specific number or percentage of minority student enrollment that must be achieved in order to create a “critical mass.” Thus, the Court finds the mere fact UT considers some minority groups “underrepresented” but not others does not indicate as a matter of law that UT’s consideration of race in admissions is “divorced from the educational benefits attained by the achievement of critical mass.” Pls.’ Mot. for Part. Summ. J. at 16.

Plaintiffs also criticize UT’s reliance on diversity statistics at the classroom level. Pls.’ Resp. & Reply at 18-20. In 2002, as the undisputed evidence shows, 79 percent of UT classes had zero or one African-American students.<sup>12</sup> *2004 Proposal* at Table 8. UT offered over

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11. If Defendants are in fact attempting to match minority enrollment to state demographics, they are doing a particularly bad job of it, since Hispanic enrollment is less than two-thirds of the Hispanic percentage of Texas’ population and African-American enrollment is only half of the African-American percentage of Texas’ population, whereas Asian-American enrollment is more than five times the Asian-American percentage of Texas’ population.

12. The Court refers to classes with five or more students. For classes with five to 24 students (a smaller sampling of classes, since it excludes classes with more than 24 students), 90 percent had one or zero African-American students.

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5,631 classes that year, meaning approximately 4,448 classes had one or zero African-American students. *Id.* Similarly, 30 percent of these classes had zero or one Hispanic students; in other words, 1,689 classes had zero or one Hispanic students. Plaintiffs argue there has been no recognition of “individual classroom diversity” as a compelling state interest. *Id.* at 18. But Plaintiffs misconstrue the importance of the classroom diversity numbers. Defendants have not asserted a compelling interest in obtaining diversity in every single class—as the Plaintiffs argue, such an attempt would be largely unworkable without unreasonable and unheard of control over each student’s schedule. Rather, the large-scale absence of African-American and Hispanic students from thousands of classes indicates UT has not reached sufficient critical mass for its students to benefit from diversity and illustrates UT’s need to consider race as a factor in admissions in order to achieve those benefits. The benefits *Grutter* recognizes occur largely within the classroom; thus, the absence of minority students from a large number of classes demonstrates UT’s ongoing need to improve diversity campus-wide.

In short, here is no “magic number” for the achievement of critical mass. The Michigan Law School policy, approved by the Supreme Court, did not include any specific percentage, or range of percentages, of minority enrollment that would automatically satisfy “critical mass.” Instead, as articulated in *Grutter*, critical mass is defined by the educational benefits diversity provides, both to underrepresented minorities and to the student body at large. 539 U.S. at 318-20, 324-25, 328-33, 123 S.Ct. 2325 (“the Law School’s concept of critical mass

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is defined by reference to the educational benefits that diversity is designed to produce.”). Despite the Plaintiffs’ assertions to the contrary, 20 percent minority enrollment is no universal “ceiling” over which additional diversity ceases to be a compelling state interest. After conducting a comprehensive study, UT concluded it had not achieved critical mass and was not adequately providing the benefits from diversity to its students. *See 2004 Proposal*. Thus, like the Michigan Law School, UT decided to consider race as one of several factors in its admissions process in order to increase diversity. Based on the clear holding of the Supreme Court in *Grutter* and the undisputed facts of this case, the Court finds UT “has a compelling interest in attaining a diverse student body” sufficient to justify its consideration of race as a part of its admissions process. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325.

**IV. Narrowly Tailored**

Having found UT has a compelling interest in attaining a diverse student body, the Court must next determine whether UT’s use of race in admissions is narrowly tailored to further that interest. *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325. *Grutter* specifically addresses what it means for a race-conscious admissions program to be narrowly tailored:

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.”

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*Bakke*, 438 U.S., at 315, 98 S.Ct. 2733 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” *Id.*, at 317, 98 S.Ct. 2733.

539 U.S. at 334, 123 S.Ct. 2325. Furthermore: Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups ... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.

*Id.* at 339, 123 S.Ct. 2325.

UT considers race in its admissions process as a factor of a factor of a factor of a factor. As described in exhaustive detail above, race is one of seven “special circumstances,”<sup>13</sup> which is in turn one of six factors that

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13. The other special circumstances factors are the applicant’s family’s socio-economic status, her school’s socio-economic status, her family responsibilities, whether she lives in a single-parent home, whether languages other than English are spoken at home, her SAT/ACT score compared to her school’s average score. *2008 Top Ten Report* at 2.

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make up an applicants personal achievement score. *2008 Top Ten Report* at 2. The personal achievement score is one of three factors, along with two essays, that together make up the Personal Achievement Index (“PAI”). Lavergne Dep. at 57:14-17, 21:23. Finally, the PAI score is one of two elements that make up an applicant’s ultimate AI/PAI score, which determines whether a non-Top Ten Percent applicant will receive admission. Ishop Aff. ¶ 12. At no point in the process is race considered individually or given a numerical value; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context. Bremen Dep. at 22:8-13; Ishop Dep. at 13:9-14:19. Although an applicant’s race is available throughout the application process, no admissions office employee or anyone else at UT monitors the racial or ethnic composition of the group of admitted students in order to decide whether an applicant will be admitted. Ishop Aff. ¶ 17.

UT’s admissions policy shares many of the same features as the Law School’s policy in *Grutter*, which is not surprising considering the parties agree UT’s policy was based on the Law School’s policy. The Supreme Court described the important features of the Law School’s policy as follows:

[T]he Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to

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applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single “soft” variable. Unlike the program at issue in *Gratz v. Bollinger* [539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003)] ... the Law School awards no mechanical, predetermined diversity “bonuses” based on race or ethnicity ... Like the Harvard plan, the Law School’s admissions policy “is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”

*Grutter*, 539 U.S. at 337, 123 S.Ct. 2325 (citations omitted). Furthermore:

“The Law School’s current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race.”

*Id.* at 340, 123 S.Ct. 2325. Similarly, UT’s admissions policy provides a “highly individualized, holistic review” of every applicant, regardless of race or ethnicity, and considers multiple factors that contribute to “diversity” aside from race or ethnicity. UT does not accept any applicant based solely on her race or ethnicity, nor does UT assign any predetermined or numerical value to a person based on those characteristics. At UT, race is “one factor among many,” which the University uses to assemble

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a diverse student body. Thus, based on the obvious similarities between UT's program and the Supreme Court-approved program in *Grutter*, UT's admissions policy on its face appears to be narrowly tailored.

Despite these similarities, Plaintiffs argue UT's use of race in admissions decisions is not narrowly tailored because: 1) "it produces only minimal gains in the enrollment of under-represented minorities;" 2) UT failed to consider race-neutral alternatives that would achieve UT's diversity goals; 3) UT's consideration of race is over-inclusive because it benefits Hispanic students, who are not underrepresented; and 4) UT's consideration of race has no logical end point. Pls.' Mot. for Part. Summ. J. at 19-30; Pls.' Resp. & Reply at 22-29.

Plaintiffs' first argument attempts to force UT into an impossible catch-22: on the one hand, it is well-established that to be narrowly tailored the means "must be specifically and narrowly framed to accomplish" the compelling state interest, *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), but on the other hand, according to the Plaintiffs, the "narrowly tailored" plan must have more than a minimal effect. In support of their argument, Plaintiffs cite *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Plaintiffs are correct that *Parents Involved* criticizes the "minimal effect" the school's racial classification had on the assignments of students. 127 S.Ct. at 2759-61. However, read in context, this criticism is not meant to establish a new element to the strict scrutiny analysis, but rather is offered as

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evidence that the school districts had failed to “consider[ ] methods other than explicit racial classifications to achieve their stated goals.” *Id.* at 2760. *Parents Involved* reaffirms *Grutter*’s standard that “[n]arrow tailoring requires ‘serious good faith consideration of workable race-neutral alternatives,’” and criticizes the school districts for rejecting race-neutral alternatives “with little or no consideration.” *Id.* (quoting *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325). Thus, as described by the Supreme Court in *Parents Involved*, the question is not whether the means adopted by UT exceeds some undefined “minimal effect” on diversity, but rather whether UT has demonstrated “serious, good faith consideration of workable race-neutral alternatives.”<sup>14</sup> *Id.* The undisputed evidence establishes that UT has done more than merely consider race neutral alternatives. The vast majority of UT students are admitted under the Top Ten Percent law, which Plaintiffs agree is a race-neutral policy, and the undisputed evidence establishes UT has instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment, expanded

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14. It should also be noted it is undisputed in the record before the Court that the consideration of race in admissions does increase the level of minority enrollment. The undisputed evidence establishes that even though it is not determinative, race is a meaningful factor and can make a difference in the evaluation of a student’s application. Pls.’ Mot. for Part. Summ. J. Mem. at 5; Pls.’ Mot. for Part. Summ. J. Ex. 8, Dep. of Bruce Walker (“Walker Dep.”) at 45:5-12. However, because race is not assigned any numerical value but rather considered as part of an individualized, holistic review of each applicant, the University does not have a specific number of admitted students who were admitted because of their race.

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the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools. Orr Aff. ¶ 4. Despite these race-neutral efforts to expand diversity at UT, in 2004 the University determined it still lacked a diverse student body, as evidenced by the absence of African-American and Hispanic students in thousands of its classes. *2004 Proposal* at Table 8. To argue UT has failed to give serious, good faith consideration to race-neutral alternatives is to ignore the facts of this case—namely, that UT has used and continues to use race-neutral alternatives in addition to its limited consideration of race as part of its admissions process.

As the Supreme Court in *Parents Involved* recognized, “The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be “patently unconstitutional.”” 127 S.Ct. at 2753 (quoting *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325). The facts of *Parents Involved*, as set forth in that case, are clearly distinguishable from this case:

In the present cases, by contrast, race is not considered as part of a broader effort to achieve “exposure to widely diverse people, cultures, ideas, and viewpoints”; race, for some students, is determinative standing alone ... It is not simply one factor weighed with others in

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reaching a decision, as in *Grutter*, it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz*, the plans here “do not provide for a meaningful individualized review of applicants” but instead rely on racial classifications in a “nonindividualized, mechanical” way.

*Id.* at 2753-54 (citations omitted). UT’s admissions policy does not make race “*the*” factor nor rely on racial classifications in a “nonindividualized mechanical” way. UT has not only considered but continues to use race-neutral alternatives in addition to its consideration of race. Thus, the mere fact that UT’s consideration of race does not have a large effect on diversity, due largely to the overwhelming presence of the Top Ten Percent law, does not mean the policy fails to further UT’s compelling interest or is in some way not narrowly tailored for that goal.

These facts also address Plaintiffs’ second argument, that “UT Austin failed to undertake ‘serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.’” Pls.’ Mot. for Part. Summ. J. at 22 (quoting *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325). As described above, UT not only considered but in fact adopted race-neutral alternatives. However despite these efforts, UT concluded the diversity of its student body was lacking based, at least in part, on the absence of underrepresented minority students in thousands of classes. *2004 Proposal* at Table 8. UT thus determined it was necessary to consider race in

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admissions in addition to continuing to use those race-neutral alternatives. As *Grutter* indicates, courts should provide some level of deference to a university in determining whether additional diversity is needed. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”). Furthermore, the Supreme Court recognized that the mere existence of race-neutral alternatives, like percentage plans, that could improve diversity does not preclude universities from considering race in admissions, as long as the university has given those alternatives “serious, good faith consideration.” *Id.* at 339-40, 123 S.Ct. 2325. “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.” *Id.* at 339, 123 S.Ct. 2325. The Plaintiffs essentially argue UT must exhaust every conceivable race-neutral alternative before it could consider race, a proposition specifically rejected by the Supreme Court. The Court thus explicitly finds the undisputed record and evidence establishes that UT has given serious, good faith consideration to workable race-neutral alternatives as required by *Grutter*.

Next, Plaintiffs argue UT’s consideration of race is not narrowly tailored because it is over-inclusive in that it benefits Hispanic students, who are not underrepresented when compared to Asian-American students. This argument closely resembles the Plaintiffs’ argument regarding whether UT has stated a compelling state interest, and fails for the same reason. The undisputed evidence establishes that the percentage of UT students who are Hispanic is less than two-thirds the percentage

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of Texas' population that is Hispanic. Thus, in that sense, Hispanics are clearly an underrepresented minority group. The Constitution does not prohibit the government from considering demographic information in order to decide which groups are underrepresented. Instead, as *Grutter* indicates, the Constitution prohibits racial balancing and racial quotas, but there is no indication in *Grutter* or any other case cited by the Plaintiffs that universities are constitutionally required to ignore societal demographics. *Grutter*, 539 U.S. at 334-35, 123 S.Ct. 2325. The Court thus finds UT's intent to increase the enrollment of Hispanic students does not render their consideration of race in admissions unconstitutionally over-inclusive.

Finally, Plaintiffs argue UT's consideration of race in admissions is not narrowly tailored because it has "no logical end point." Pls.' Mot. for Part. Summ. J. at 30. The Plaintiffs are correct that in order to be narrowly tailored, the *Grutter* Court required that "race-conscious admissions policies must be limited in time." 539 U.S. at 342, 123 S.Ct. 2325. However, the Supreme Court also recognized that "[i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* The undisputed evidence establishes that every five years UT's admissions process is evaluated specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body, or whether race-neutral alternatives exist that would achieve

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the same results. Walker Aff. ¶ 16; *2004 Proposal* at 32. The first formal review of UT's use of race in admissions is scheduled to begin in the fall of 2009. *2004 Proposal* at 32. Thus, UT's admissions policy explicitly includes a periodic review to determine whether its consideration of race remains necessary to achieve a diverse student body, as required by *Grutter*.<sup>15</sup>

Accordingly, the Court finds UT's consideration of race in admissions is narrowly tailored. In fact, it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*. Nothing in *Grutter* prohibits a university from using both race-neutral alternatives and race itself, provided such an effort is necessary to achieve the educational benefits that stem from sufficient student body diversity. Such efforts should in fact be encouraged as the next logical step toward the day when consideration of a person's race becomes completely unnecessary. But, until that day, universities are not required to exhaust every possible race-neutral alternative as long as they consider those alternatives seriously and in good faith. UT not only considered several race-neutral alternatives, it implemented them and continues to use them to this day. But, despite those efforts, UT still found diversity lacking in its student body and thus decided to consider race as part of its admissions process. Under *Grutter* and *Parents Involved*, UT's decision and the ensuing admissions policy

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15. The Court further notes that the Supreme Court “[took] the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.” *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325 (citation omitted).

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is narrowly tailored to further a compelling governmental interest.

**CONCLUSION**

The Texas Solicitor General summarized this case best when he stated, “If the Plaintiffs are right, *Grutter* is wrong.” Absent Texas’ Top Ten Percent law and the effect it has on UT admissions, the Court has difficulty imagining an admissions policy that could more closely resemble the Michigan Law School’s admissions policy upheld and approved by the Supreme Court in *Grutter*. But if the Plaintiffs are right, and if the Top Ten Percent law somehow acts to make UT’s consideration of race in admissions unconstitutional, then every public university in the United States would be prohibited from considering race in their admissions process because the same type of “percentage plan” which the Top Ten Percent law embodies could be established at any state university, and thus their failure to implement such a plan would constitute a failure to consider race-neutral alternatives. *Grutter* stands for exactly the opposite, as the decision explicitly permitted the consideration of race despite the existence and availability of race-neutral alternatives like percentage plans or lotteries. 539 U.S. at 340, 123 S.Ct. 2325. Consequently, as long as *Grutter* remains good law, UT’s current admissions program remains constitutional.

In accordance with the foregoing:

IT IS ORDERED that LULAC’s Motion for Leave to File *Amicus Curiae* Brief In Support of Defendants Out of Time [# 104] is GRANTED.

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IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment [# 94] is DENIED.

IT IS FURTHER ORDERED that Defendants' Cross-Motion for Summary Judgment [# 96] is GRANTED and the Court GRANTS summary judgment in favor of all Defendants on all claims.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Withdraw Suzzette Rodriguez Hurley as Attorney [# 115] is GRANTED as unopposed.

IT IS FINALLY ORDERED that all pending motions are DISMISSED AS MOOT.

***JUDGMENT***

BE IT REMEMBERED on the *17th* day of August 2009 the Court entered its order granting summary judgment on behalf of the Defendants, the Court enters the following:

IT IS ORDERED, ADJUDGED, and DECREED that the Court finds the University of Texas at Austin's admissions policy, and specifically its consideration of race as part of the admissions process, to be narrowly tailored to further a compelling government interest and thus constitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and the federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*

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IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Plaintiffs Abigail Fisher and Rachel Michalewicz TAKE NOTHING in this cause against the Defendants the State of Texas; the University of Texas at Austin; Kenneth Shine, Chancellor of the University of Texas System in his official capacity; David B. Pryor, Executive Vice Chancellor for Academic Affairs in his official capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in his official capacity; William Powers, Jr., President of the University of Texas at Austin in his official capacity; the Board of Regents of the Texas State University System; John W. Barnhill, Jr., H. Scott Caven, Jr., James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, and Printice L. Gary, as Members of the Board of Regents in their official capacities; and Bruce Walker, Vice Provost and Director of Undergraduate Admissions in his official capacity,<sup>1</sup> and that all costs of suit are taxed against the Plaintiffs, for which let execution issue.

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1. Plaintiffs previously voluntarily dismissed Defendants the State of Texas and Burgdorf, and substituted Kenneth Shine for Mark Yudof. To any extent necessary, this judgment shall also apply to the previously dismissed or substituted defendants.

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**APPENDIX C — ORDER DENYING PETITION  
FOR REHEARING EN BANC OF THE UNITED  
STATES COURT OF APPEALS, FIFTH CIRCUIT,  
DATED JUNE 17, 2011**

United States Court of Appeals,  
Fifth Circuit.

644 F.3d 301

No. 09–50822.  
June 17, 2011.

Abigail Noel FISHER; Rachel Multer Michalewicz,

Plaintiffs–Appellants,

v.

UNIVERSITY OF TEXAS AT AUSTIN; David  
B. Pryor, Executive Vice Chancellor for Academic  
Affairs in His Official Capacity; Barry D. Burgdorf,  
Vice Chancellor and General Counsel in His Official  
Capacity; William Powers, Jr., President of the  
University of Texas at Austin in His Official Capacity;  
Board of Regents of the University of Texas System;  
R. Steven Hicks, as Member of the Board of Regents  
in His Official Capacity; William Eugene Powell,  
as Member of the Board of Regents in His Official  
Capacity; James R. Huffines, as Member of the Board  
of Regents in His Official Capacity; Janiece Longoria,  
as Member of the Board of Regents in Her Official  
Capacity; Colleen McHugh, as Chair of the Board of  
Regents in Her Official Capacity; Robert L. Stillwell,

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as Member of the Board of Regents in His Official Capacity; James D. Dannenbaum, as Member of the Board of Regents in His Official Capacity; Paul Foster, as Member of the Board of Regents in His Official Capacity; Printice L. Gary, as Member of the Board of Regents in His Official Capacity; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; Francisco G. Cigarroa, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants–Appellees.

Before *KING*, *HIGGINBOTHAM* and *GARZA*, Circuit Judges.

PER CURIAM:

The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Voting for en banc rehearing were: Chief Judge Edith H. Jones, Judge E. Grady Jolly, Judge Jerry E. Smith, Judge Edith B. Clement, Judge Priscilla R. Owen, Judge Jennifer Walker Elrod, and Judge Catharina Haynes.

Voting against en banc rehearing were: Judge Carolyn Dineen King, Judge W. Eugene Davis, Judge Emilio M. Garza, Judge Fortunato P. Benavides, Judge Carl E.

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Stewart, Judge James L. Dennis, Judge Edward C. Prado, Judge Leslie H. Southwick, and Judge James E. Graves.\*

Upon the filing of this order, the clerk shall issue the mandate forthwith. *See* FED. R.APP. P. 41(b).

*EDITH H. JONES*, Chief Judge, with whom *E. GRADY JOLLY*, *JERRY E. SMITH*, *EDITH BROWN CLEMENT* and *OWEN*, Circuit Judges, join, dissenting:

By a narrow margin, this court has voted not to rehear this case en banc. I respectfully dissent. This panel decision essentially abdicates judicial review of a race-conscious admissions program for undergraduate University of Texas students that favors two groups, African-Americans and Hispanics, in one of the most ethnically diverse states in the United States. The panel purports to apply the Supreme Court’s decision in *Grutter v. Bollinger*,<sup>1</sup> which authorized some race conscious admissions to Michigan Law School to foster educational “diversity.” The panel’s opinion, however, extends *Grutter* in three ways. First, it adopts a new “serious good faith consideration” standard of review, watering down *Grutter*’s reliance on strict narrow tailoring. Second, it authorizes the University’s race-conscious admissions program although a race-neutral state law (the Top Ten Percent Law) had already fostered increased campus

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\* In 2009, the court decided to begin identifying the judges voting for or against en banc rehearing where a poll is taken and the request for en banc rehearing is denied.

1. 539 U.S. 306, 123 S.Ct. 2325 (2003).

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racial diversity. Finally, the panel appears to countenance an unachievable and unrealistic goal of racial diversity at the classroom level to support the University's race-conscious policy. This decision in effect gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires.

Texas today is increasingly diverse in ways that transcend the crude White/Black/Hispanic calculus that is the measure of the University's race conscious admissions program. The state's Hispanic population is predominately Mexican-American, including not only families whose Texas roots stretch back for generations but also recent immigrants. Many other Texas Hispanics are from Central America, Latin America and Cuba. To call these groups a "community" is a misnomer; all will acknowledge that social and cultural differences among them are significant. Whether the University also misleadingly aggregates Indians, Pakistanis and Middle Easterners with East "Asians" is unclear, but Houston alone is home to hundreds of thousands of people from East Asia, South Asia and the Middle East. In Texas's major cities, dozens of other immigrant groups reside whose families have overcome oppression and intolerance of many kinds and whose children are often immensely talented. Privileging the admission of certain minorities in this true melting-pot environment seems inapt. But University administrators cherish the power to dispense admissions as they see fit, which might be reasonable except for two things: the Texas legislature has already

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spoken to diversity, and the U.S. Constitution abhors racial preferences. Because even University administrators can lose sight of the constitutional forest for the academic trees, it is the duty of the courts to scrutinize closely their “benign” use of race in admissions.

1. That *Fisher* deviates from *Grutter*’s legal analysis is evident from a brief comparison of the cases. In *Grutter*, the Court approved the Michigan Law School’s holistic, individual consideration of applications that included a student’s race as a factor in addition to many other non-academic factors when the school pursued the “compelling interest” of having a “diverse” student body. The result of the policy was consequential, a tripling of the number of African–American and Hispanic law students, from 4% to 14.5% of the student body. *Grutter*, 539 U.S. at 320, 123 S.Ct. at 2334. Unlike the *Fisher* panel, however, the Supreme Court mentioned deference to university administrators’ decisions at only two points in its opinion. *Grutter* expressly followed the narrow tailoring inquiry used in other cases assessing race-conscious governmental policies.

First, recognizing the unique constitutional interests of the academy, the Court “presume[d]” the good faith of the university within its discussion leading to the “conclusion that the Law School has a compelling interest in a diverse student body ....” *Grutter*, 539 U.S. at 328–29, 123 S.Ct. at 2338–39. But even for this purpose, the Court awarded only “a degree of deference” to administrators’ academic decisions. *Id.* at 2339.

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Second, the Court stated that narrow tailoring “require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” 539 U.S. at 339, 123 S.Ct. at 2345. This discussion of university decisionmaking was meant to *challenge the university*, not to bless whatever rationale it advances for racially preferential admissions. *Grutter* emphasized, by repeated references to prior decisions concerning racial preferences, that the government “is still ‘constrained in how it may pursue [a compelling interest]: [T]he means chosen to accomplish the ... asserted purpose must be specifically and narrowly framed to accomplish that purpose.’ ” 539 U.S. at 333, 123 S.Ct. at 2341 (citing *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), a redistricting decision). Further, it held, narrow tailoring “must be calibrated to fit the distinct issues raised” by promoting racial diversity in higher education. *Grutter*, 539 U.S. at 334, 123 S.Ct. at 2341. Far from diluting narrow tailoring in order to defer to university administrators, the *Grutter* Court cited *Adarand*<sup>2</sup>—an employment case—to demonstrate consistency with prior equal protection jurisprudence. The Court explained in detail how the racial “plus factor” in *Grutter* still required minority applicants to compete with nonminority applicants; why this program was not an impermissible quota system; how nonminority candidates with lower academic scores were often admitted over minority candidates; why race-neutral alternative admission programs would not serve the university’s particular interests; why nonminority students were not

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2. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

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“unduly burdened” by the racial factor in the admissions process; and finally, why an end point or periodic review of the process was necessary to comply with the Constitution.

Certainly, *Grutter* authorizes university officials, in certain circumstances, to pursue campus “diversity” using race as one factor in their decisionmaking. But on its face, *Grutter* does not countenance “deference” to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications.

The *Fisher* panel opinion, although occasionally difficult to understand, supplants strict scrutiny with total deference to University administrators.<sup>3</sup> First, the opinion’s Standard of Review section mentions strict scrutiny in the first sentence, but goes on for several paragraphs counseling deference to universities. The panel, contrary to the Supreme Court’s requirement that every race-conscious governmental decision bears a heavy burden of proof, issues this blanket approval:

*Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university’s good faith determination that certain race-conscious

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3. I do not disagree with the panel’s conclusion that following *Grutter*, we may presume a university’s good faith in the decision that it has a compelling interest in achieving racial and other student diversity. But that is as about as far as deference should go.

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measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.

*Fisher*, 631 F.3d 213, 233 (5th Cir.2011). This statement apparently conflates the University’s compelling interest with narrow tailoring, or at least it misleads as to the importance of each prong of strict scrutiny analysis.

Second, immediately following this summary, the panel seeks support from the *Parents Involved* case, which followed *Grutter* and reiterated the Supreme Court’s disapproval of “benign” race-based student assignment decisions in public schools. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). But *Fisher* misquotes *Parents Involved* in saying that “[ *Parents Involved* ] invoked *Grutter*’s ‘serious, good faith consideration’ standard, rather than the strong-basis-in-evidence standard that Appellants would have us apply [to the narrow tailoring inquiry].” *Fisher*, 631 F.3d at 234 (emphasis added). There is no support in *Parents Involved* for this artificial dichotomy, nor for *Fisher*’s later assertion that *Parents Involved* might have turned out differently—*i.e.*, racially discriminatory assignments might have been allowed—had there been no “other, more narrowly tailored means” to serve the school districts’ purposes. *Id.* On the contrary, *Parents Involved* juxtaposed the narrow tailoring inquiries of *Grutter* and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (Kennedy, J., concurring), an employment decision. *Parents Involved*, 551 U.S. at 735, 127 S.Ct. at 2760. This

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parallelism illustrated that *Grutter*'s "serious, good faith consideration" statement is not a new standard at all, but rather a way to express the classic requirement that narrow tailoring be more than a rote exercise in dismissing race-neutral alternatives.<sup>4</sup> With due respect to the panel, *Fisher* fails to apply the avowed continuity in principle of the Court's decisions. The panel's "serious, good faith consideration" standard distorts narrow tailoring into a rote exercise in judicial deference.

Third, the panel disturbingly implies that only procedural, not substantive, consideration of a university's race-conscious admissions program is necessary. *Fisher*, 631 F.3d at 231 ("Rather than second-guess the merits of the University's decision, ... we instead scrutinize the University's decisionmaking process ..."). *Grutter* nowhere countenances this radical dilution of the narrow tailoring standard.

Finally, the panel reinforces its overbroad approval or, more precisely, judicial abdication, in its Conclusion, which mentions a "serious, good faith consideration" standard twice and opines that the University's plan "is more a process than a fixed structure that we review." *Id.* at 246–47.

2. The effect of the panel's wholesale deference becomes clear when one considers the important factual distinction

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4. The *Fisher* panel is simply wrong in attempting to divorce *Grutter*'s standards from those of employment discrimination cases. *Fisher*, 631 F.3d at 233 (holding that employment cases "have little purchase in this challenge to university admissions."). Both *Grutter* and *Parents Involved* routinely invoke those cases.

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between this case and *Grutter*. In *Fisher*, the plaintiffs challenged a post-*Grutter* University plan whereby 19% of the entering freshman class were subject to a race-conscious admissions process to increase diversity.<sup>5</sup> As Judge Garza's concurrence demonstrates, the number of students actually admitted under this racial preference policy is unclear, but it amounted to no more than a couple hundred out of more than six thousand new students. 631 F.3d at 260–61 (Garza, J., specially concurring).

The panel opinion asserts that the University's admission process is constitutionally acceptable because it is modeled closely after *Grutter*. Yet the difference is obvious. The Texas legislature statutorily mandated increased diversity in admissions by means of the Top Ten Percent Law. Under that race-neutral law, covering 80% of University admissions, the top ten percent of graduates from every Texas high school were automatically admitted, and many African-American and Hispanic students matriculated to the University. The challenged preferential policy was adopted on top of the unprecedentedly high numbers (compared to many other universities) of preferred minorities entering under the Top Ten Percent Law.<sup>6</sup>

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5. I follow Judge Garza's convention of using figures for enrolled Texas students for the same reasons identified in his concurrence. See 631 F.3d at 260 n. 19. If we were to expand consideration to out-of-state students, then 23.8% of enrollees would not have gained admission through the Top Ten Percent Law.

6. In dicta, the author of *Fisher* questions the efficacy, indeed the constitutionality of the Top Ten Percent Law, but no such issue was before the panel.

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The pertinent question is thus whether a race-conscious admissions policy adopted *in this context* is narrowly tailored to achieve the University's goal of increasing "diversity" on the campus. Contrary to the panel's exercise of deference, the Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment. *Parents Involved*, 551 U.S. at 734–35, 127 S.Ct. at 2760. As the *Parents Involved* Court explained, "In *Grutter*, the consideration of race was viewed as indispensable in more than tripling minority representation at the [Michigan] law school—from 4 to 14.5 percent." *Id.* Despite the *Fisher* panel's artful use of statistics to describe the effect of the University of Texas's race-conscious plan, the contrast with *Grutter* is stark. As noted by the panel, more than 20% of the entering freshmen are already African-American and Hispanic, resulting in real diversity even absent a *Grutter* plan. The additional diversity contribution of the University's race-conscious admissions program is tiny, and far from "indispensable." It is one thing for the panel to accept "diversity" and achieving a "critical mass" of preferred minority students as acceptable University goals. It is quite another to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic.

3. Finally, in an entirely novel embroidering on *Grutter*, the panel repeatedly implies that an interest in "diversity" *at the classroom level*—in a university that offers thousands of courses in multiple undergraduate schools and majors—justifies enhanced race-conscious

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admissions. *Fisher*, 631 F.3d at 225 (citing studies that motivated the University’s race-conscious plan based on classroom-level diversity); 237 (discussing the state’s interest in classroom-level diversity as a constitutional matter); *see also* 240, 241, 243, 244, 245. Although the opinion may not expressly render a “holding” on the permissibility of fostering diversity at the classroom level, it conveys a clear message. The message is reinforced in Judge Garza’s concurrence, which rejects the panel majority’s implication that (“a university’s asserted interest in racial diversity could justify race-conscious policies ... not merely in the student body generally, but major-by-major and classroom-by-classroom.”) 631 F.3d at 253–54. (Garza, J., specially concurring).

The pernicious impact of aspiring to or measuring “diversity” at the classroom level seems obvious upon reflection. Will the University accept this “goal” as *carte blanche* to add minorities until a “critical mass” chooses nuclear physics as a major? Will classroom diversity “suffer” in areas like applied math, kinesiology, chemistry, Farsi, or hundreds of other subjects if, by chance, few or no students of a certain race are enrolled? The panel opinion opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be “underrepresented.” It offers no stopping point for racial preferences despite the logical absurdity of touting “diversity” as relevant to every subject taught at the University of Texas. In another extension of *Grutter*, the panel opinion’s approval of classroom “diversity” offers no ground for serious judicial review of a terminus of the racial preference policy. *Cf. Grutter*, 539 U.S. at 343, 123

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S.Ct. at 2347 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”)

In the end, this case may determine the admissions policies of institutions of higher learning throughout the Fifth Circuit, or beyond, for many years. Reasonable minds may indeed differ on the extent of deference owed to universities in the wake of *Grutter*, but the panel’s effective abandonment of judicial strict scrutiny in favor of “deference” at every step of strict scrutiny review contradicts *Grutter* and *Parents Involved*. The panel approves race conscious admissions whose utility is highly dubious in comparison with the effect of the Top Ten Percent Law. And the opinion’s hints supporting “classroom diversity” are without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs. I respectfully dissent from the denial of en banc rehearing.