No. 11-345

In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS 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.

Whether *Grutter* departed from this Court's long-standing equal protection jurisprudence and should be revisited to either clarify or overrule its holding.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF has litigated for the equality of all persons, regardless of race, and for the application of strict scrutiny to all governmental racial classifications. For example,

[1] Pursuant to Supreme Court Rule 37.2, letters indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. Petitioners have filed a "blanket" consent to the filing of amicus curiae briefs with this Court. Respondents have provided written consent to MSLF's amicus curiae brief in support of the Petitioner and have filed a "blanket" consent. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

MSLF attorneys represented the plaintiffs in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); and *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). MSLF has also actively participated as amicus curiae in a number of similar cases challenging racial preferences, most recently in *Ricci v. DeStefano*, ___ U.S. ___, 129 S. Ct. 2658 (2009).

MSLF can bring a unique perspective to bear in this case by examining the nature and requirements of strict scrutiny to demonstrate that the Fifth Circuit abandoned strict scrutiny. MSLF will demonstrate that this Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), upon which the Fifth Circuit relied, also departed from strict scrutiny, though not so far as did the Fifth Circuit. Therefore, MSLF submits that this Court should revisit and clarify or overrule *Grutter* so that other courts do not make the same mistake as the Fifth Circuit.

STATEMENT OF THE CASE

MSLF adopts Petitioner's thorough Statement of the Case.

SUMMARY OF ARGUMENT

This case involves the level of judicial scrutiny a court should apply when reviewing a university's racially discriminatory admissions policy, an issue of extraordinary, fundamental importance in this nation: "Racial classifications of any sort pose the risk of lasting harm to our society," which "may balkanize us into competing racial factions [and] carry us further from the goal of a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Here, the Fifth Circuit, approved the racially discriminatory admission practices at the University of Texas at Austin ("UT" or the "University"). In so doing, the Fifth Circuit abandoned strict scrutiny and instead deferred to the University's "serious good faith judgment" that a racially discriminatory policy was necessary to achieve student body diversity. In other words, it deferred to the discriminatory decision of the discriminator. The Fifth Circuit thus adopted the equivalent of rational basis review of a racially discriminatory university admissions policy, turning the entire body of this Court's equal protection jurisprudence on its head and giving universities carte blanche to engage in racially discriminatory admission decisions.

MSLF agrees with Petitioner and its arguments that the Fifth Circuit's decision is inconsistent with the holding in *Grutter* and that this Court should grant the Petition and reverse the Fifth Circuit

without revisiting *Grutter*. But the Fifth Circuit purported to follow *Grutter* when it made its radical departure from prior precedent.[2] The holding of the *Grutter* majority, because of its own departure from prior equal protection precedent, will inevitably spawn more such decisions if this Court does not grant the Petition and, in addition to reversing the Fifth Circuit, also clarify or overrule *Grutter*.

Accordingly, this Court should grant the Petition not only for the reasons stated in the Petition, but also to revisit and clarify or overrule *Grutter*, thereby returning to this Court's longstanding equal protection precedent by applying strict scrutiny to racially discriminatory university admissions policies.

[2] Indeed, Judge Garza, though he strongly disagreed with the majority holding in *Grutter*, upheld the University's racially discriminatory policy because he believed he was compelled to do so by *Grutter*. *Fisher v. Univ. of Tex. at Austin*, 631 F.2d 213, 247 (5th Cir. 2011) (Garza, J., specially concurring).

REASONS FOR GRANTING THE PETITION

I. THE EQUAL PROTECTION CLAUSE PROHIBITS CLASSIFICATIONS OF INDIVIDUALS BASED ON RACE EXCEPT IN THE RAREST OF CIRCUMSTANCES.

A. Racial Classifications Pose A Danger Of Lasting Harm To Society.

"Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw*, 509 U.S. at 657. Indeed, "[p]referment by race . . . can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality." *Grutter* 539 U.S. at 388 (Kennedy, J., dissenting). Thus, "[t]he equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand Constrs., Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring); *see also City of Richmond v. Croson*, 488 U.S. 469, 521 (1988) ("*Croson*"), 488 U.S. at 521 (Scalia, J., concurring) (discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society").

Furthermore, "[c]lassifications based on race carry a danger of stigmatic harm." *Croson*, 488 U.S. at 493. And such racial classifications "may in fact promote notions of racial inferiority and lead to a

politics of racial hostility." *Id.* Thus, a racial classification:

> [I]nevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become truly irrelevant[.]

Adarand, 515 U.S. at 229 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); *see also Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) ("The dangers of such classifications are clear [–] [t]hey endorse race-based reasoning and the conception of a nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."). Indeed, "[s]uch policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution." *Id*. at 604 (O'Connor, J., dissenting).

In short, the "central purpose [of the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV § 1] is to prevent the states from purposefully discriminating between individuals on the basis of race," *Shaw*, 509 U.S. at 642 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)), and thereby "do away with all governmentally imposed

discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

B. A Governmental Entity Must Establish A Compelling Interest By A Strong Basis In Evidence Before It Engages In Racial Preferences.

The essence of strict scrutiny is that a court may not defer to the judgment of the governmental discriminator, or its professions of good faith: "Blind judicial deference to legislative or executive pronouncements, of necessity, has no place in equal protection analysis." *Croson*, 488 U.S. at 501. "The presumption [of statutory validity] is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently 'suspect.'" *Parham v. Hughes*, 441 U.S. 347, 351 (1979). Therefore, "[a] racial classification, regardless of purported motivation, is *presumptively invalid* and will be upheld only upon an *extraordinary justification*." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (emphasis added).

Consequently, no governmental entity may institute a race-conscious policy for any reason unless it has a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 (1986) (plurality opinion); *Croson*, 488 U.S. at 510. Thus, a court must subject a governmental entity's race-conscious policy

to a "most searching examination," approaching the policy with "skepticism." *Adarand*, 515 U.S. at 223, 237. The use of racial preferences is "subject to the most exacting judicial scrutiny [and] it is . . . [the discriminator's] burden to satisfy the demands of the extraordinary justification." *Hunter v. Regents of the University of California*, 190 F.3d 1061, 1069 (9th Cir. 1999).[3] In fact, even in cases subject only to intermediate scrutiny, such as gender discrimination, "the burden of justification is demanding and it rests entirely on the state." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

C. So-Called "Benign" Racial Classifications Require Strict Judicial Scrutiny.

In *Croson*, this Court ruled that "recitation of a 'benign' or legitimate purpose for a racial classification[, such as racial diversity in education,] is entitled

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[3] *See also Johnson v. California*, 543 U.S. 499, 505 (2005) ("the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests") (quotations omitted); *Wessman v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) (the government bears "a heavy burden of justification [for] their use," because "*Croson* . . . leaves no doubt that only solid evidence will justify allowing race-conscious actions."); *Association of Gen'l Contr., Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) ("[T]he state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action is necessary."); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government.").

to little or no weight" because "racial classifications are suspect and . . . simple legislative assurances of good intention cannot suffice." 488 U.S. at 500. Later, this Court departed radically from *Croson*, holding that racial classifications to achieve broadcast diversity are "benign" and, therefore, subject only to intermediate scrutiny. *Metro Broadcasting*, 497 U.S. at 566-69. Five years later, this Court emphatically repudiated the holding in *Metro Broadcasting* and returned to the teachings of *Croson*. *Adarand*, 515 U.S. at 233-34 ("*Metro Broadcasting,* itself *departed* from our prior cases, [so] by refusing to follow *Metro Broadcasting*, . . . we do not depart from the fabric of the law; we restore it.") (emphasis in original).

Like *Croson*, *Adarand* ruled that "good intentions alone are not enough to sustain supposedly 'benign' racial classification[s,]" because such classifications would "inevitably [be] perceived by many as resting on the assumption that those who are granted this special preference are less qualified . . . purely by their race." *Id*. at 228-29. "Benign" racial classifications serve only to "exacerbate rather than reduce racial prejudice" and "will delay the time when race will become . . . truly irrelevant." *Id.* Consequently, "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed . . . under strict scrutiny." *Id.* at 227.

Indeed, "[t]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." *Id.* at 241 (Thomas, J., concurring).

"These [benign] programs stamp minorities with a badge of inferiority[.]" *Id.* Thus, "government-sponsored [benign] racial discrimination . . . is just as noxious as discrimination inspired by malicious prejudice[;] each . . . is racial discrimination, plain and simple." *Id.*

D. Any Interest Sufficiently Compelling To Justify A Racially Discriminatory Admissions Policy Must Be Clearly Identified And Specific.

In *Croson*, this Court made it clear that, without defining a sufficiently detailed and specific compelling interest, it is impossible to craft a narrowly tailored remedy:

> Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be *clearly identified and unquestionably legitimate*.

Croson, 488 U.S. at 505 (emphasis added). "[P]roper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects," and "[s]uch findings . . . assure all citizens that the deviation from the norm of equal

treatment . . . is a temporary measure." *Id*. at 510. Thus:

> *Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the court should not uphold this kind of statute. . . . "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Croson*, 488 U.S. at 516-17.

Adarand, 115 U.S. at 229 (emphasis in original).

An interest so amorphous or indistinct that its scope and nature cannot be defined and identified with particularity cannot be "clearly articulated" or "narrowly tailored" and is not compelling. A compelling interest must be sufficiently concrete to "define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510.

Societal discrimination is an example of an interest that does not meet this test: "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 497. "Relief for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority contractors] mirrored the percentage of minorities in the population as a whole." *Id*. "Societal discrimination is insufficient and over expansive [and] . . . could uphold remedies that are ageless in their reach into the past, and timeless in their ability

to affect the future." *Id.* at 497; *Wygant*, 476 U.S. at 276.

As demonstrated below, the Fifth Circuit failed to apply these longstanding principles of strict scrutiny analysis to the racially discriminatory admissions policies of the University. Accordingly, the Petition should be granted.

II. *GRUTTER* ABANDONED LONGSTANDING EQUAL PROTECTION PRECEDENT.

The Fifth Circuit purported to base its ruling upholding the racially discriminatory admissions practices of Respondents on *Grutter*.[4] *Fisher*, 631 F.3d at 231-47. In *Grutter*, this Court held that achieving the ostensible educational benefits that flow from diversity constitutes a compelling interest, permitting the University of Michigan Law School to racially discriminate in its admissions policies to achieve a so-called "critical mass" of preferred minority students, which is necessary to achieve diversity. *Grutter*, 539 U.S. at 333, 343.

In so holding, this Court abandoned strict scrutiny of the racially discriminatory admissions policy of the law school. In so doing, this Court presumed the law school's good faith, and deferred to its judgment that

[4] Justice O'Connor wrote for this Court in a 5-4 decision; Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas dissented.

a "critical mass" of minority students was lacking and that only discriminatory admissions policies could achieve it. *Id*. at 328-29. Moreover, a "critical mass," like societal discrimination, is such an amorphous and indefinable concept that a narrowly tailored remedy cannot address it.

A. *Grutter* Did Not Utilize Strict Scrutiny, But Instead, Simply Deferred To The Judgment Of The Law School.

In *Grutter*, the University of Michigan Law School argued that the compelling interest for its racially discriminatory admissions policy was to obtain "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. The law school asserted that these benefits could be achieved only when a "critical mass" of underrepresented minority students had been admitted, *id*. at 329, but could neither describe nor quantify "critical mass":

> "[C]ritical mass" means "meaningful numbers" or "meaningful representation," which . . . [is] a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. . . . [T]here *is no number, percentage, or range of numbers . . . that constitute critical mass*.

Id. at 318 (emphasis added). The law school further elaborated that "critical mass means numbers such that underrepresented minority students do not feel . . . like spokespersons for their race." *Id.* at 319.

Unfortunately, this Court accepted this definition and did not require the law school to either define or quantify "critical mass" or establish how it might determine when "critical mass" was absent or was present. *Id*. at 335 ("[A] permissible goal . . . requires only a good faith effort . . . to come within a range demarcated by the goal itself.") (internal quotations omitted). As demonstrated below, this Court did not engage in a searching and skeptical examination of the nature, details, and scope of the claimed compelling interest. Nor did it apply skepticism of the law school's position or require the law school to bear the substantial burden of identifying "critical mass" with sufficient clarity so that a court could determine whether the law school had made the most exact connection between justification and remedy.

Instead, this Court abandoned strict scrutiny and deferred to the law school's judgment, ruling that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Grutter*, 539 U.S. at 328. Indeed, the *Grutter* majority seemed to suggest that this Court lacked competence to strictly scrutinize the law school's racially discriminatory action, ruling that such "complex educational judgments . . . lie primarily within the expertise of the university." *Id.*

Astonishingly, *Grutter* ignored the teachings of *Adarand* and *Croson* that a court should not defer to, but critically and skeptically analyze, any justifications offered. Contrary to *Adarand* and *Croson*, the *Grutter* majority ruled that " 'good faith' on the part of

a university is 'presumed' absent 'a showing to the contrary' " by the injured party against whom the law school discriminated. *Id*. at 329. Of course, "good faith" is not the standard by which this Court reviews governmental race discrimination: "[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 (internal quotation omitted). In contrast, the *Grutter* majority "t[ook] the Law School at its word[.]" *Id.* at 343.

The *Grutter* majority's deferral to the judgment of the discriminator is antithetical to the concept of strict scrutiny and constitutes the "blind judicial deference" so emphatically condemned in *Croson*. 488 U.S. at 501. The presumption of validity afforded to the law school's racially discriminatory admissions policy violates the longstanding principle that any racial classification is "presumptively invalid." *Pers. Adm'r of Mass.*, 442 U.S. at 272. Indeed, the "most searching examination" with "skepticism" required by *Adarand*, 515 U.S. at 223, 227, was replaced by the *Grutter* majority with trust in the pronouncements of the law school.[5]

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[5] Under this reasoning, a university might determine, based in its expertise in educational matters, that classes should be segregated by race because it would enhance learning opportunities for minority students, who would feel more free to express themselves and participate than if in classes with non-minorities, resulting in greater achievement. Courts would be

(Continued on following page)

In short, the majority's analysis in *Grutter* bears a striking resemblance to rational basis scrutiny, rather than intermediate or strict scrutiny. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) ("The Court . . . does not apply strict scrutiny [and] undermines both the test and its own controlling precedents.") Thus, the *Grutter* majority's decision violated well-established equal protection jurisprudence, including *Adarand* and *Croson*, and this Court should grant the Petition so that it may revisit *Grutter*, which, like *Metro Broadcasting*, departed from the longstanding equal protection jurisprudence of this Court.

B. "Critical Mass," Like Societal Discrimination, Is An Amorphous And Indefinable Concept That Cannot Be Addressed By A Narrowly Tailored Remedy.

An "exact connection between justification and classification," as required by *Adarand*, 115 U.S. at 229, is impossible when one relies on "critical mass." It is impossible to determine the presence or absence of a "critical mass" of "underrepresented" minority students because "[t]here is no number that constitutes 'critical mass.'" *Grutter*, 539 U.S. at 318. In

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obligated to defer to that "complex educational judgment" and presume that the university acted in good faith. Indeed, under the *Grutter* majority's reasoning, a university might determine that it could best serve the educational needs of its students by providing a separate, but equal, higher education system.

other words, "critical mass" is an indefinable pedagogical concept, created out of thin air by educators who can't define it, but apparently "know it when they see it." *Cf. Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing pornography). To make matters worse, under *Grutter*, this Court will presume that judgment correct. Yet, because "[t]here is no number that constitutes 'critical mass,'" *Grutter*, 539 U.S. at 318, no court is able to determine whether a "critical mass" of minority students is present or lacking and whether racially discriminatory admissions policies are required.

In other words, the concept of "critical mass," like that of societal discrimination, is insufficiently particular in its scope or nature to determine "the extent of the remedy necessary to cure its effects," as required by *Croson*. 488 U.S. at 510. Also, like societal discrimination, the concept of "critical mass" "is too amorphous a basis for imposing a racially classified remedy . . . [and] has little probative value in supporting a race-conscious measure." *Id.* at 497.

Moreover, attempts to achieve "such an ill-defined [goal] could extend until [university admissions of minority students] mirrored the percentage of minorities in the population as a whole," a measure also forbidden by *Croson*. *Id.* at 498. Indeed, achieving "critical mass" may require even more than admissions proportionate to the minority population if the minority student-age population in a State is so small that it is impossible to enroll a "critical mass." Under

such a circumstance, the process of achieving "critical mass" is "timeless in [its] ability to affect the future" and has no end in sight, a situation categorically prohibited by *Croson*. *Id.* at 497.

Consequently, an "exact connection between justification and classification," as required by *Adarand*, 115 U.S. at 229, is impossible for the concept of "critical mass." In other words, if lack of diversity is the absence of a "critical mass" of minority students, and "critical mass" cannot be defined, it is impossible to know whether it is present or absent or when it has been achieved. Therefore, diversity cannot constitute a compelling interest because its presence or absence ("critical mass") is impossible to ascertain. Nor, for the same reason, can there be a narrowly tailored remedy to achieve "critical mass," if it were absent.

Therefore, this Court should grant the Petition not only to reverse the Fifth Circuit, but also to revisit *Grutter* and correct its departure, like that taken in *Metro Broadcasting*, from the longstanding equal protection jurisprudence of this Court.

III. THE FIFTH CIRCUIT'S DECISION DEMONSTRATES WHY THIS COURT SHOULD REVISIT *GRUTTER*.

A. Attempting To Follow *Grutter*, The Fifth Circuit Concluded That Diversity Does Not Exist Until There Is Diversity In All Major Fields Of Study.

The Fifth Circuit found that "minority students remain clustered in certain programs limiting the beneficial effects of educational diversity." *Fisher*, 631 F.3d at 240. Therefore, if "UT is to have diverse interactions for a greater variety of colleges, not more students disproportionately enrolled in certain programs," it must racially discriminate in admissions. *Id*. Thus, without a racially discriminatory admissions policy, the University cannot "achieve the maximum educational benefits of a truly diverse student body." *Id*. In other words, the Fifth Circuit held that diversity is not achieved until a "critical mass" of minority students has enrolled in all the major areas of study. It is unlikely that this could be achieved even if the favored minorities enrolled in direct proportion to their numbers in the general population.

Importantly, this Court has rejected the concept that, in the absence of discrimination, minorities will be equally likely to choose any particular profession or field of study as non-minorities. Such an assertion "rests on the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in

the local population[.]" *Croson*, 488 U.S. at 507. Indeed, it is "'completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination.'" *Id*. (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)); *see Eng'g Contr. Ass'n of S. Fla. v. Metro. Dade County*, 122 F.3d 895, 922 (11th Cir. 1997) ("In a pluralistic and diverse society, it is unreasonable to assume that equality of opportunity will inevitably lead different groups with similar human and financial capital characteristics to make similar career choices.").

It is equally unrealistic for the Fifth Circuit to predict that racial preferences in university admissions will result in an equal distribution of all minority candidates throughout all major areas of study, much less that they will constitute the ethereal and illusive "critical mass," in each such field. Nothing in *Grutter* purported to require diversity not only at the university level, but also in all major fields of study. But it is not surprising that a court, purporting to follow the teachings of the *Grutter* majority, would make such a mistake, given *Grutter*'s abandonment of strict scrutiny and adoption of a compelling interest it could not define.

B. Worse Yet, The Fifth Circuit, Relying On *Grutter*, Determined That Diversity Does Not Exist Until There Is Diversity In Each Classroom.

The district court found that "a large percentage of [undergraduate] courses [of between 5 and 24 students] are represented by only one student or by none at all" so "the University still has not reached a critical mass at the classroom level." *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 602 (W.D. Tex. 2009). The Fifth Circuit affirmed, ruling that there was "no reason to doubt UT's considered, good faith conclusion that the university still has not reached a critical mass at the classroom level." *Fisher*, 631 F.2d at 244. This is really just a corollary to the unrealistic finding that diversity requires "critical masses" of minorities across all major fields of study. Common sense dictates that this will never occur. Moreover, nothing in *Grutter* purports to require diversity at the classroom level. The Fifth Circuit has thus approved limitless racial discrimination in university admissions that are "timeless in their ability to affect the future." *Croson*, 488 U.S. at 497.

Given *Grutter*'s departure from strict scrutiny, its deference to pedagogues, and its identification of a new compelling interest that it is unable to define, the *Grutter* majority invites just such expansive decisions by lower courts. This Court should grant

the Petition so that it may reverse the Fifth Circuit and, perhaps, revisit *Grutter* to clarify or overrule it.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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