No. 11-345

In The Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

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

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

BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JAMES C. HO
GIBSON, DUNN & CRUTCHER, L.L.P.
2100 McKinney Avenue
Dallas, Texas 75201-6912

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

JOSEPH D. HUGHES
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@oag.state.tx.us
(512) 936-1700

COUNSEL FOR RESPONDENTS

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BRIEF IN OPPOSITION

The petition for certiorari should be denied for four reasons.

First, Fisher's petition is shot through with vehicle problems—all caused by her own decisions to sue as an individual plaintiff, and to demand relief that cannot redress the past injuries of which she complains. Fisher is scheduled to graduate from Louisiana State University in May 2012; at this point she cannot possibly assert an intent to apply to UT-Austin as a freshman or transfer student. She

therefore lacks the personal stake needed to pursue an injunctive remedy, and her failure to sue as a class representative means that she cannot maintain an Article III case or controversy over her claims for prospective relief. *See Fisher v. Univ. of Tex.*, 631 F.3d 213, 217 (5th Cir. 2011) ("*Fisher II*"); Pet. App. 3a-4a. Only a claim for retrospective relief could preserve a case or controversy in this Court.

Yet Fisher's complaint does not request nominal damages, nor does it seek any damages that could be traced to UT-Austin's rejection of her application, such as lost earning potential or higher tuition expenses. Fisher's sole demand for retrospective relief is for a refund of her $50 application fee and a $50 housing deposit that she paid the University—that is *all* that is at stake in her petition. But neither the application fee nor the housing deposit represents an "injury" caused by UT-Austin's admissions policies. Nor could refunding those fees possibly redress the denial-of-equal-treatment injury that Fisher alleges. Even if Fisher had been accepted (or rejected) by UT-Austin under race-neutral admissions, she *still* would be out-of-pocket for the nonrefundable application fee and housing deposit. And even if this Court were to think that Fisher could salvage an Article III case or controversy out of this situation, UT-Austin could moot these proceedings beyond any doubt simply by tendering $100 to Fisher. It would not be prudent to grant certiorari to resolve a $100 dispute, when a litigant in UT-Austin's position could settle and moot

the case rather than incur the massive expenses of litigating this case to conclusion in this Court.

Second, even if Fisher could somehow overcome these daunting and inescapable jurisdictional problems, her petition remains uncertworthy because it alleges no circuit splits and asks this Court to review a fact-bound application of *Grutter v. Bollinger,* 539 U.S. 306 (2003), to the unique circumstances of UT-Austin. Fisher argues that UT-Austin's race-conscious admissions policies are unconstitutional because they are unnecessary—because UT-Austin can (in her view) attain a "critical mass" of underrepresented minority students through the "Top Ten Percent Law." Pet. at 21-22, 34-35. But the Top Ten Percent Law exists only in Texas, and the two other States with similar "percentage plan" admission laws prohibit race-conscious admissions. Fisher therefore is seeking not merely error correction, but a Texas-specific form of error correction.

Third, Fisher's factual concessions below foreclose many arguments that appear in her petition. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2982-84 (2010). The parties moved for summary judgment on an undisputed factual record, and Fisher's own "Statement of Facts" admits that "UT Austin *has not established a goal, target, or other quantitative objective* for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008," Pls.' SOF at 16 ¶ 98 (emphasis

added), and further admits that "[u]sing race in admissions helps UT achieve racial diversity," *id.* at 15 ¶ 93. These factual stipulations leave Fisher no room to argue that UT-Austin engages in "blatant racial balancing," Pet. 29, or that UT-Austin's race-conscious admissions policies have no measurable impact on minority enrollment, *id.* at 23.

Finally, this Court should not grant certiorari to reconsider *Grutter*, as some of Fisher's amici curiae urge, because the question presented assumes *Grutter*'s correctness and asks only "[w]hether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger,* 539 U.S. 306 (2003), permit [UT-Austin's] use of race in undergraduate admissions decisions." Pet. at i. *See* SUP. CT. R. 14.1(a). Even if members of this Court are inclined to reconsider *Grutter*, this is a demonstrably improper vehicle, given the limited question presented, the fatal concessions that Fisher made below, and the intractable jurisdictional problems that plague her petition.

STATEMENT

Since 1997, UT-Austin has based admissions decisions on three factors: (1) high-school class rank; (2) the Academic Index ("AI"); and (3) the Personal Achievement Index ("PAI"). The AI predicts freshman-year grade-point average by combining high-school class rank with standardized test scores. The PAI comprises the applicant's average essay

score and her "personal achievement score," which considers leadership, extracurricular activities, honors and awards, work experience, community service, and special circumstances. "Special circumstances" include the applicant's socioeconomic background, the socioeconomic status of her high school, and any special family responsibilities.

Since 1998, Texas law has required UT-Austin to admit any applicant who graduates in the top ten percent of a Texas high-school class. TEX. EDUC. CODE § 51.803. Top Ten Percent applicants are guaranteed only admission to the University. Although many are also admitted to their preferred academic program based on Top Ten Percent status, others are admitted to a particular program based on AI/PAI. In addition, many academic programs admit all applicants who have a particularly high AI but graduated outside of the top 10% of their class. Thus, the vast majority of UT-Austin students are admitted solely on numerical academic criteria.

After *Grutter*, UT-Austin launched an extensive review to determine whether its admissions policies adequately served its broad interest in diversity. UT-Austin commissioned a thorough study to evaluate diversity throughout the university, in various departments and colleges, and within individual classrooms. The University consulted with legal scholars to interpret *Grutter* and with students, faculty members, and a leading expert on holistic review to evaluate whether UT-Austin was attaining the educational benefits of diversity.

At the conclusion of this intensive effort, UT-Austin officials determined that the University lacked critical mass and diversity, both across the student body and within the classroom. Consistent with *Grutter*'s framework, UT-Austin proposed to add race to the existing "special circumstances" subfactors that are considered holistically in developing an applicant's PAI. The proposal was adopted in August 2004 and took effect with the fall 2005 entering class.

ARGUMENT

I. FISHER'S PETITION PRESENTS GRAVE VEHICLE PROBLEMS THAT WILL PREVENT THIS COURT FROM RESOLVING THE MERITS OF HER CONSTITUTIONAL CLAIMS.

An Article III case or controversy exists only when a litigant has suffered a concrete and particularized injury, caused by the challenged conduct, and redressable by the relief requested by the litigant. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The case or controversy must persist through *all* stages of litigation. *See Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990).

Fisher claims to have been wrongfully denied admission to UT-Austin, and her complaint demands declaratory and injunctive relief, a "refund of application fees and related expenses," attorneys'

fees and costs, and "[a]ll other relief th[e] Court finds appropriate and just." Pls.' 2d Am. Compl. ¶ 165(i) (5.CR.1262). In light of Fisher's impending graduation from college, none of these claims is capable of maintaining a case or controversy between Fisher and UT-Austin at this stage of the litigation.

A. Fisher Can No Longer Maintain an Article III Case or Controversy Based on Her Claims for Declaratory and Injunctive Relief.

Fisher seeks several types of declaratory and injunctive relief, but disappointed university applicants cannot secure standing to seek forward-looking relief by relying on the fact of past injury. *See Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). Instead, Fisher must show that UT-Austin's *future* use of race-conscious admissions threatens her with an "actual or imminent" injury. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-11 (1995); *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 493 (10th Cir. 1998) (litigants seeking to enjoin a university's admission policies must make "an adequate showing" that they "will re-apply to" that school "and will thus be evaluated under disputed policy again 'in the relatively near future'"). Fisher cannot make this showing; indeed, she has not even attempted to do so.

Fisher had standing to seek injunctive relief when she filed her lawsuit on April 7, 2008. At that time, Fisher had not yet matriculated at LSU, and

she could plausibly claim that she intended to seek admission to UT-Austin as a freshman or transfer. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (holding that a rejected applicant's intent to seek transfer admission confers standing to seek injunctive relief against a university's freshman admissions policies). But Fisher is now nearly halfway through her senior year at LSU.[1] She denies any intent to reapply to UT-Austin as a freshman or transfer*, see Fisher II*, 631 F.3d at 217 (Pet. App. 3a-4a), and she could not possibly do so at this point. Fisher therefore lacks any "actual or imminent" injury caused by UT-Austin's *future* use of race-conscious admissions, and she cannot seek prospective relief.

None of this would matter had Fisher brought this lawsuit as a class action. If Fisher were representing a class of rejected nonminority applicants, then her impending graduation would not preclude her from seeking prospective relief on behalf of that class, provided one of the class members could satisfy the requirements of Article III. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975). That is why Patrick Hamacher had standing in *Gratz* to seek to enjoin the University of Michigan's undergraduate admissions policies even after he had graduated from a different college; he was

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[1] *See* http://www.lsu.edu/studentorgs/bowlingclub/roster.html (LSU Bowling Club online roster listing "Abby Fisher" from Sugarland, Texas as a "senior") (last visited December 7, 2011).

representing a certified class of rejected nonminority applicants "for all academic years from 1995 forward." *Gratz*, 539 U.S. at 253.

Unlike Hamacher, Fisher chose to sue as an individual plaintiff rather than as a class representative. She therefore cannot maintain an Article III case or controversy over her claims for prospective relief at this point—just like Marco DeFunis, who challenged a law school's admissions policies as an individual litigant and found his case declared moot when it reached this Court during his final semester of law school. *See DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (per curiam). Fisher does not even challenge the Fifth Circuit's holding that she "lack[ed] standing" to seek prospective relief against UT-Austin. *See Fisher II*, 631 F.3d at 217 (citing *DeFunis*); Pet. App. 3a-4a.

Indeed, Fisher seems determined to sweep this problem under the rug. This litigation began with *two* plaintiffs—Abigail Fisher and Rachel Michalewicz—who appeared together throughout the proceedings in the district court and court of appeals. But on the certiorari petition, Michalewicz's name has vanished from the caption. The petition does not explain why Michalewicz abruptly left Fisher to go it alone in this Court, but it takes little imagination to understand her absence. Because Michalewicz has already graduated from college,[2] including her as a

[2] http://www.facebook.com/people/Rachel-Michalewicz/100002534130562 (last visited December 7, 2011).

co-petitioner would only highlight the *DeFunis* problem with this petition.[3] But Michalewicz's absence cannot conceal that Fisher will be joining her former co-plaintiff as a college graduate in just a few months—before any ruling from this Court could realistically issue—and that Fisher has forsworn any intention of reapplying to UT's undergraduate program. Fisher's failure to bring a class-action lawsuit is fatal to her claims for prospective relief.

B. Fisher's Demand for a Refund of Her Application Fee and Housing Deposit Will Not Enable This Court To Reach the Constitutional Issues in This Petition.

1. Fisher's $100 Refund Demand Does Not Establish an Article III Case or Controversy.

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[3] *See, e.g.*, *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128 (1975) (per curiam) (plaintiffs' graduation from high school mooted controversy over rules governing student newspaper, where plaintiffs' proposed class had not been certified, plaintiffs did not appeal district court's dismissal of their damages claims, and only their declaratory claims remained on appeal); *Fox v. Board of Trs. of State Univ. of N.Y.*, 42 F.3d 135, 137 (2d Cir. 1994) (plaintiffs' claims for declaratory and injunctive relief, premised on constitutional challenge to university regulation, became moot upon plaintiffs' graduation); *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (graduation of plaintiffs, who had successfully sued university under Title IX, rendered case moot on appeal).

Because Fisher "will never again be required to run the gantlet of [UT's] admission process," these proceedings are moot—unless Fisher's claims for retrospective relief can establish an Article III case or controversy. *DeFunis*, 416 U.S. at 319.[4] Yet Fisher has eschewed many possible grounds for retrospective relief in this case. Her complaint does not request nominal damages, nor does it seek compensation for losses potentially caused by UT's rejection of her application, such as lost future earnings or higher tuition. The only retrospective relief that Fisher seeks is a refund of her $50 application fee and $50 housing deposit. *See* Pls.' 2d Am. Compl. ¶ 165(g) (5.CR.1262) (demanding "[m]onetary damages in the form of refund of application fees and all associated expenses incurred by Plaintiffs in connection with applying for admission to UT"); *id.* ¶ 104 (5.CR.1252) (alleging

[4] Fisher's claims do not qualify as "capable of repetition, yet evading review." That exception to mootness can apply only when (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *See, e.g.*, *DeFunis*, 416 U.S. at 319. Neither condition is met here, for the same reasons as in *DeFunis*. Fisher is about to graduate from LSU and will never again seek freshman admission to UT. And a future plaintiff could challenge UT's undergraduate admissions policy by bringing a class action or alleging a viable damages claim. *Cf. Turner v. Rodgers*, 131 S. Ct. 2507, 2515 (2011) ("*DeFunis* was moot . . . because the plaintiff himself was unlikely to again suffer the conduct of which he complained (and others likely to suffer from that conduct could bring their own lawsuits).").

payment of application fee and housing deposit). That demand is insufficient to maintain an Article III case or controversy at this point in the litigation.[5]

First, Fisher would have incurred those expenses even if UT-Austin had employed the race-neutral admissions process that she demands. The application fee is a condition of applying to UT-Austin and is nonrefundable; accepted applicants do not get their money back. The housing deposit is likewise an expense that Fisher would have paid even if she had been accepted (or rejected) by UT-Austin under a race-neutral admissions system. Fisher therefore cannot establish a causal link between those "injuries" and UT-Austin's alleged wrongdoing—which means she cannot establish Article III standing over this claim. *See Lujan*, 504 U.S. at 560 ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'"). To avoid this result, Fisher would have to demonstrate that UT-Austin's use of race-conscious admission policies *induced her to apply* to UT-Austin and incur the expenses of applying, even though those policies

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[5] Fisher's claim for attorney's fees cannot establish an Article III case or controversy. *See, e.g.*, *Lewis*, 494 U.S. at 480 ("[An] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.").

decreased her odds of gaining admission. Fisher cannot plausibly make that illogical assertion.

In addition, the refund-of-fees remedy that Fisher requests cannot possibly redress the denial-of-equal-treatment injury that she claims to have suffered. The only redress for that *past* injury is damages aimed at restoring Fisher to the position she would have occupied had UT-Austin considered her application under solely race-neutral criteria. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). These damages could include compensation for the higher tuition costs or lost future income incurred by attending another university—all contingent on a judicial finding that Fisher *would have been admitted* to the university under a race-neutral admissions process. *See Texas v. Lesage*, 528 U.S. 18, 21 (1999); *see also Hopwood v. Texas*, 999 F. Supp. 872, 901-10 (W.D. Tex. 1998). Yet Fisher does not seek *any* compensatory damages along these lines—doubtless because she knows she cannot establish that she would have been admitted to UT-Austin under a race-neutral policy.[6]

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[6] Fisher's highest combined SAT score was 1180, Pls.' 2d Am. Compl. ¶12 (5.CR.1234), significantly lower than the 1290 scored by her former co-plaintiff Rachel Michalewicz, and lower than thousands of other unsuccessful applicants to UT-Austin in 2008. Fisher had an AI of 3.1, well below the minimum AI of 3.5 needed for fall admission in 2008. Ishop Aff. ¶ 18

Fisher therefore encounters Article III problems no matter how she characterizes the injury she allegedly suffered at UT-Austin's hands. If her "injury" is the lost $100 spent on her application fee and housing deposit, then she fails the "causation" requirement of *Lujan*. If she instead characterizes her "injury" as a denial of equal treatment, then she cannot establish redressability because her complaint presents no claim for nominal or compensatory damages. *See Vt. Agency of Natural Res.*, 529 U.S. at 771 (holding that to "demonstrate redressability," a plaintiff must show "a substantial likelihood that the *requested relief* will remedy the

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(7.CR.1927). The undisputed evidence demonstrated that Fisher would not have been offered fall admission in 2008 even if she had scored a perfect "6" on her PAI—the portion of the admissions process where race is considered as "a factor of a factor of a factor of a factor." *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009) ("*Fisher I*"), *aff'd*, 631 F.3d 213 (5th Cir. 2011). Although Fisher theoretically could have been admitted through the summer admission process, the reality is that her academic credentials could not overcome the particularly stiff competition among in-state applicants who graduated outside the top 10% of their high-school class. In 2008, 92% of the admissions spaces available for Texas residents were awarded to Top Ten Percent applicants. Ishop Aff. ¶ 16 (7.CR.1926). After subtracting the admission places automatically awarded to Top Ten Percent applicants, Fisher was one of "approximately 16,000 students" competing for the "1,216 fall admissions slots" available to in-state, non-Top Ten Percent applicants for undergraduate admission in fall 2008. *Fisher II*, 631 F.3d at 241 (Pet. App. 59a). The acceptance rate for those applicants was only 7.6%—lower than Harvard's undergraduate acceptance rate for fall 2008. *Id.* at 241 n.155.

alleged injury in fact") (emphasis added) (citation and internal quotation marks omitted); *see also Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004) (abandoned claims cannot be considered in determining "redressability" under Article III). And Fisher herself characterizes the "depriv[ation] of the opportunity to attend . . . UT Austin" as "an injury that cannot be redressed by money damages." Pls.' 2d Am. Compl. ¶ 124 (5.CR.1262).

This Court has also recognized that litigants cannot preserve an Article III case by invoking "insubstantial" claims for retrospective relief after their claims for injunctive relief become moot. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978) ("Although we express no opinion as to the validity of respondents' claim for damages, *that claim is not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed.*") (emphasis added). *Memphis Light* reflects the approach of *Bell v. Hood*, 327 U.S. 678 (1946), which limits federal-question jurisdiction to cases that present *colorable* federal-law claims; both cases preclude litigants from manufacturing Article III jurisdiction by invoking "insubstantial or frivolous" theories of relief. *Id.* at 683.

Courts of appeals have followed *Memphis Light* in refusing to allow legally baseless theories of retrospective relief to stave off mootness after the claims for prospective relief disappear. *See, e.g.*, *Gottfried v. Med. Planning Servs., Inc.*, 280 F.3d 684,

691 (6th Cir. 2002) (citing *Memphis Light* in holding that "[t]he key question therefore is whether Gottfried has a *viable* claim for damages"); *Henschen v. Houston*, 959 F.2d 584, 588 (5th Cir. 1992) (citing *Memphis Light* in holding that litigants "must advance a viable, not insubstantial damage claim" to avoid mootness); *see also Tanner Adver. Group, L.L.C. v. Fayette County*, 451 F.3d 777, 786 (11th Cir. 2006) ("A request for damages that is barred as a matter of law cannot save a case from mootness."); *Sanchez v. Edgar*, 710 F.2d 1292, 1295-96 (7th Cir. 1983) (citing *Memphis Light* for the proposition that "a viable claim for monetary relief, with the possible exception of a claim for only nominal or insubstantial damages, preserves the saliency of an action."). "Insubstantial" is the best face one can put on Fisher's demands for a refund of her application fee and housing deposit—a theory of damages that bears no relation whatsoever to the harms she allegedly suffered because of UT-Austin's race-conscious admissions policies. *See Carey v. Piphus*, 435 U.S. 247, 254 (1978) ("[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights.").

Fisher might respond in one of two ways. First, Fisher may ask that her complaint be construed to preserve claims for nominal and compensatory damages, perhaps relying on her catch-all demand for "[a]ll other relief this Court finds appropriate and just." But federal courts of appeals have rejected

attempts to infer claims for nominal or compensatory damages from similar boilerplate. In *Fox v. Board of Trustees of State University of New York*, 42 F.3d 135 (2d Cir. 1994), the plaintiffs tried to stave off mootness by asking the Second Circuit to infer a claim for nominal damages from their request for "such other relief as the Court deems just and proper." *Id.* at 141. But the court declined to "read a damages claim into the Complaint's boilerplate prayer for 'such other relief as the Court deems just and proper,'" in part because the state university defendants would have asserted immunity defenses against those claims. *Id.* at 141-42.

Numerous other courts have similarly refused to allow such boilerplate to establish a claim for nominal or compensatory damages. *See, e.g., Thomas R.W. ex rel. Pamela R. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) ("[A] general prayer for 'such further relief as this court deems just and proper' [does not] operate to preserve a request for damages in order to avoid mootness where there is no specific request and no evidence to sustain a claim for reimbursement."); *Goichman v. City of Aspen*, 590 F. Supp. 1170, 1173 (D. Colo. 1984) (plaintiff unable to avoid mootness by belatedly invoking a claim for nominal damages because "no prayer appears in the Complaint for such nominal damages"); *Daskalea v. Wash. Humane Soc'y*, 710 F. Supp. 2d 32, 42 (D.D.C. 2010) (rejecting plaintiffs' attempt to avoid mootness by belatedly invoking a claim for nominal damages because their

complaint "does not include a request for nominal damages," and noting that "it is 'inappropriate' to 'strain[ ] to find inferences that are not available on the face of the complaint' in order to permit an otherwise moot claim to go forward") (quoting *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (rejecting reliance on a "claim for nominal damages, extracted late in the day from [plaintiff's] general prayer for relief and asserted solely to avoid otherwise certain mootness").[7]

Fisher might also try to invoke Federal Rule of Civil Procedure 54(c), which provides that a final judgment should generally "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." But Rule

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[7] These holdings reflect the general principle that a claim for damages not specifically requested in the plaintiff's complaint cannot prevent a case from becoming moot on appeal. *See Lillbask v. Conn. Dep't of Educ.*, 397 F.3d 77, 91 (2d Cir. 2005) ("Lillbask's equitable challenge . . . is moot and . . . she cannot now revive that claim by raising a compensatory education prayer for relief not mentioned in her Fourth Amended Complaint."); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("A request for damages . . . will not avoid mootness if it was inserted after the complaint was filed in an attempt to breathe life into a moribund dispute.") (quotation marks and citation omitted); *Harris v. City of Houston*, 151 F.3d 186, 190 (5th Cir. 1998) (finding "no support for the appellant's notion that we may fashion relief not requested below in order to keep a suit viable").

54(c) comes into play only when a court enters judgment for the prevailing party—and Fisher did not prevail at any stage below. *See Fox*, 42 F.3d at 142. And Rule 54(c) does not authorize courts to allow an unpleaded claim for nominal or compensatory damages to preserve an otherwise moot case. If it did, then this Court could have reached the merits in *DeFunis*; instead, the Court declared that case moot because DeFunis sought only prospective relief—even though a properly pleaded claim for compensatory damages would have kept that case alive. 416 U.S. at 317 ("DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School.").

Second, Fisher might ask for an opportunity to amend her complaint to assert another claim for damages. But Fisher cannot amend her complaint on appeal. *See, e.g.*, *Scott v. Schmidt*, 773 F.2d 160, 163 (7th Cir. 1985); 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1489 (3d ed. 2011). And it is too late for Fisher to amend her complaint in the district court. In 2008, the district court ordered the parties to "file all motions to amend or supplement pleadings or to join additional parties **by July 14, 2008**," and it never modified this deadline. Even if the district court were inclined to indulge pleading amendments three years past the deadline, it cannot do so if the case has become moot in the interim. *See Fox v. Bd. of Trs. of State Univ. of N.Y.*, 148 F.R.D. 474, 487

(N.D.N.Y. 1993) ("Rule 15(a) does not appear to support allowing the original plaintiffs to amend their complaint after a finding of mootness."), *aff'd*, 42 F.3d 135 (2d Cir. 1994); *see also Flynt v. Weinberger*, 762 F.2d 134, 135 (D.C. Cir. 1985) (per curiam) (district court's mootness dismissal before discovery "preclud[ed] [plaintiffs] from amending their complaint to avoid a dismissal for mootness"); *Alvarez*, 130 S. Ct. at 580 (refusing to allow a belated "motion in the District Court seeking damages" to avoid a mootness dismissal when the complaint sought only declaratory and injunctive relief).

Fisher chose to sue as an individual rather than a class representative. Her imminent graduation precludes this Court from considering her claims for declaratory or injunctive relief. And her only pleaded claim for retrospective relief is incapable of satisfying the requirements for an Article III case or controversy. Her case is already moot, and its mootness will only become more pronounced when Fisher graduates from college in May.

2. Even If Fisher Could Maintain an Article III Case or Controversy by Demanding a Refund of Her Application Fee and Housing Deposit, Her Petition Still Presents Grave Vehicle Problems.

Finally, even assuming that Fisher's demand for a refund of her application fee and housing deposit could keep this case alive, UT-Austin could end the controversy simply by tendering Fisher a check for $100. *See, e.g.*, *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011) (agreeing that "the case was moot after [defendant] agreed to pay the benefits [plaintiff] requested in her complaint"); *Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1331 (Fed. Cir. 2005) ("[T]he tender of the entire amount of the damages claimed by a plaintiff moots the damages claim."); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate."); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) ("Since . . . defendants had offered [plaintiff] the full amount of damages . . . to which she claimed individually to be entitled, there was no longer any case or controversy.").

Granting certiorari would force UT-Austin to choose between incurring the trivial expense of tendering $100 to Fisher and incurring the massive expense of litigating the merits of this case. *See, e.g.*, David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5

INT'L REV. L. & ECON. 3 (1985). To grant certiorari, this Court would have to conclude not only that Fisher could somehow cobble together an Article III case or controversy, but also that UT-Austin would decline to maximize its economic interests. *Cf. Piscataway Twp. Bd. of Educ. v. Taxman*, 522 U.S. 1010 (1997).

* * *

Choices have consequences. Fisher chose to litigate this case as an individual rather than as a class representative, a decision that gave her many advantages below. But there are downsides to that decision, and *DeFunis* gave Fisher fair warning that her chosen strategy came with built-in jurisdictional problems that would emerge as her graduation date drew near.

The burden is on Fisher, as the petitioner, to establish a clear pathway for this Court to address her constitutional claims, and she has not even attempted to make this showing in her certiorari petition. Regardless of what Fisher may offer in her reply brief, she cannot escape the fact that a grant of certiorari will drag this Court into a thicket of procedural and jurisdictional disputes. That alone warrants a denial of her petition. Another lawsuit brought by a class representative will raise the constitutional issues in Fisher's petition without compromising the constitutional requirements of Article III. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

II. FISHER ALLEGES NO CIRCUIT SPLITS AND SEEKS ONLY FACT-BOUND, TEXAS-SPECIFIC ERROR CORRECTION.

Fisher does not allege that the Fifth Circuit's ruling conflicts with any decision from another court of appeals. She alleges only that it conflicts with *Grutter*. This Court rarely grants certiorari in response to this type of error-correction request, particularly when a petitioner alleges nothing more than the "the misapplication of a properly stated rule of law." SUP. CT. R. 10.

A writ of certiorari is further inappropriate because Fisher's constitutional arguments are relevant only to the admissions policies used by UT-Austin. Fisher insists that UT-Austin attained sufficient student-body diversity under the race-neutral Top Ten Percent law, and that race-conscious admissions are therefore unnecessary to achieve the State's compelling interest in student-body diversity. *See* Pet. 33-35. But the Top Ten Percent Law is unique to Texas public-university admissions, and a ruling from this Court on that issue will have little effect outside of Texas. Although Florida and California have adopted percentage plans similar to Texas's Top Ten Percent law, those States prohibit consideration of race in public-university admissions. *See* CAL. CONST. art. I, § 31(a); 6 FLA. ADMIN. CODE 6C-6.002(7). Fisher's claim that UT-Austin has engaged in forbidden "outright racial balancing," Pet. 30, and her complaints about UT-Austin's efforts to attain diversity in the classroom, *id.* at 32, likewise

seek a Texas-specific form of error correction that does not merit this Court's review.

Gratz and *Grutter* addressed the constitutionality of race-conscious admissions in higher education—a broad legal issue that had produced a circuit split and affected every public university in the nation. Fisher, by contrast, is litigating a narrow and fact-intensive question: whether UT's consideration of race was sufficiently *necessary* in light of the racial diversity produced by the Top Ten Percent law. *See, e.g.*, *Fisher II*, 631 F.3d at 234 ("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-Austin *needs* a *Grutter*-like policy.") (Pet. App. 42a). This dispute (to the extent one remains) involves only whether UT-Austin's pre-existing level of minority enrollment was below or above the "*Grutter*-approved 'critical mass.'" *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part); *see also id.* ("I do not look forward to any of these cases.").

III. FISHER'S FACTUAL CONCESSIONS BELOW FORECLOSE NUMEROUS ARGUMENTS IN HER CERTIORARI PETITION.

As if the jurisdictional problems discussed in Part I were not enough to sink Fisher's petition, additional vehicle problems arise from Fisher's factual concessions in the district court. The parties moved for summary judgment based on an undisputed factual record, which precludes Fisher from contradicting the facts that she endorsed—or failed to contradict—in the district-court proceedings. *See Christian Legal Soc'y*, 130 S. Ct. at 2982-84.

Fisher has stipulated to several key facts that cannot be reconciled with the arguments in her certiorari petition. In the Statement of Facts she filed in the district court, Fisher acknowledged that:

> UT Austin *has not established a goal, target, or other quantitative objective* for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008.

Pls.' SOF ¶ 98 (6.CR.1378) (emphasis added). Fisher also conceded that "UT Austin added race as a factor in its admissions decisions because it views race as an important credential that helps the University understand the applicant and evaluate his or her circumstances." Pls.' SOF ¶ 85 (6.CR.1376). These concessions directly contradict Fisher's claims that

UT-Austin "pursu[es] demographically proportional African-American and Hispanic admissions." Pet. 12. *See also id.* at 20 (accusing UT-Austin of "aligning racial demographics and the UT student population"); *id.* at 29 (accusing UT-Austin of establishing "diversity goal[s]"); *id.* at 30 (accusing UT-Austin of "attempt[ing] to replicate the racial demographics of Texas high schools"). Efforts to match the racial composition of a student body with state demographics are the very definition of a "goal," "target," or "quantitative objective." Fisher must either withdraw these accusations, or else explain how this Court can entertain them in light of the fatal concessions that she made below. *See Christian Legal Soc'y*, 130 S. Ct. at 2982-84.

Fisher's Statement of Facts also admits that "[u]sing race in admissions helps UT achieve racial diversity." Pls.' SOF ¶ 93 (6.CR.1377). This stipulation precludes Fisher from arguing that UT-Austin's race-conscious admissions program is not "narrowly tailored" because it fails to advance the cause of student-body diversity. Yet Fisher's certiorari petition repeatedly attacks UT-Austin's admissions policies on precisely those grounds. *See* Pet. 23 (asserting that UT-Austin's race-conscious admissions policies fail *Grutter*'s "narrow tailoring" requirement because they produce only a "negligible increase in minority enrollment" and no "impact on classroom diversity"); *id.* at 30 ("[T]he 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."); *id.* at 35 ("[T]he Top Ten Percent Law alone produces a similar level of minority enrollment."). All of these arguments must be pitched out because Fisher has stipulated that the use of race-conscious admissions "helps UT achieve racial diversity."

Worse still, Fisher failed to dispute the Statement of Facts that UT-Austin submitted when it moved for summary judgment, and Fisher remains bound by that undisputed factual record. University officials testified by affidavit that UT-Austin had reinstated race-conscious admissions because (among other reasons) "officials discovered when talking with students that minority students still felt isolated." *See* Defs.' SOF ¶ 92 (7.CR.1815). Fisher did not contest that testimony below, yet she now insists that "UT does not seek racial diversity to enhance the educational dialogue by keeping minority students from feeling 'isolated or like spokespersons for their race.'" Pet. 30 (quoting *Grutter*, 539 U.S. at 319). That line of argument is closed to Fisher, creating yet another vehicle problem for her certiorari petition.

IV. FISHER'S CONTENTION THAT THE FIFTH CIRCUIT'S RULING "CONFLICTS" WITH *GRUTTER* IS BASELESS.

Even if this Court were willing to consider a request for mere error correction—in a petition plagued by insurmountable jurisdictional defects and contradicted by the litigant's earlier factual

stipulations—it *still* should deny Fisher's petition. The question presented asks this Court to review only whether the Fifth Circuit's ruling comports with *Grutter*, and there are no conflicts between the Fifth Circuit's ruling and *Grutter*.

A. UT-Austin's Holistic Consideration of Race Is More Narrowly Tailored Than the Admissions Program Approved in *Grutter* Because UT-Austin Does Not Consult Demographics When Making Individual Admissions Decisions.

UT-Austin's holistic consideration of race was not only patterned after the *Grutter*-approved practices, it also avoids a key feature of the University of Michigan Law School program that troubled the *Grutter* dissenters. Unlike in *Grutter*, UT-Austin does not consult demographics when making individual admissions decisions. *See* 631 F.3d at 235 ("UT's policy improves upon the program approved in *Grutter* because [UT] does not keep an ongoing tally of the racial composition of the entering class during its admissions process."); Pet. App. 45a. This distinction avoids the concern that Justice Kennedy raised in his *Grutter* dissent, in which he criticized the University of Michigan Law School for "keep[ing] ongoing tallies of racial or ethnic composition of their entering students," even as he acknowledged that race-conscious admission policies can serve a compelling state interest. *See Grutter*, 539 U.S. at 391-92 (Kennedy, J., dissenting).

Fisher's insistence that UT-Austin pursues "demographically proportional African-American and Hispanic admission" contradicts not only her own factual stipulation in the district court, *see* Part III, *supra*, but also the findings of the district court and the Fifth Circuit panel. *See Fisher I*, 645 F. Supp. 2d at 607 n. 11 (noting that "[i]f Defendants are in fact attempting to match minority enrollment to state demographics, they are doing a particularly bad job of it") (Pet. App. 156a); *Fisher II*, 631 F.3d at 235 ("UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas. Its methods and efforts belie the charge.") (Pet. App. 45a). In *Grutter*, by contrast, the dissenters accused the University of Michigan Law School of consistently admitting twice as many black students as Hispanic students in an apparent effort to mirror the racial and ethnic makeup of its applicant pool. *See Grutter*, 539 U.S. at 383-85 (Rehnquist, C.J., dissenting). Because UT-Austin's admissions data do not reflect the suspicious correlation between application and admissions demographics that so troubled the *Grutter* dissenters, the district court and the Fifth Circuit each concluded that *Grutter*'s holding logically compelled approval of UT-Austin's program. *See Fisher I*, 645 F. Supp. 2d at 612 ("If the plaintiffs are right, *Grutter* is wrong.") (Pet. App. 169a); *Fisher II*, 631 F.3d at 238 (Pet. App. 52a); *id.* at 259 (Garza, J, concurring) ("I concur in the opinion because I believe today's decision is a faithful application of *Grutter*'s teachings . . . .") (Pet. App. 98a).

B. isher's Attacks on the Fifth Circuit's Ruling Are Meritless.

Fisher claims that the Fifth Circuit defied *Grutter* by applying an excessively deferential variant of strict scrutiny, allowing UT-Austin to consider state demographics when defining "underrepresented" minorities, and approving UT-Austin's race-conscious admissions policies as "narrowly tailored." None of this supports Fisher's claim that the Fifth Circuit "'decided an important question in a way that conflicts with relevant decisions of this Court.'" Pet. 19 (quoting SUP. CT. R. 10(c)).

1. Deference to university administrators

Fisher misrepresents *Grutter* by asserting that it allows courts to defer to university administrators only when deciding whether diversity qualifies as a "compelling state interest." Pet. at 26. Instead, *Grutter* makes clear that deference also extends to the *means* by which a university elects to pursue that compelling interest. 539 U.S. at 333-34 (concluding that "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"). *Grutter* invokes a broad "tradition of giving a degree of deference to a university's academic decisions," and recognizes that courts should respect the "educational autonomy" of universities given their unique role in our society. *Id.* at 328-29. And *Grutter* holds that these

generalized principles of deference remain applicable when courts review a university's implementation of a race-conscious admissions program. For example, *Grutter* refused to require universities to exhaust "every conceivable race-neutral alternative"; instead, it held that "narrow tailoring" requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339-40. Even Judge Garza, who denounced *Grutter* as a "misstep," described the panel's deference to university administrators as a "faithful" application of *Grutter*. *Fisher II*, 631 F.3d at 247 (Garza, J., concurring) (Pet. App. 72a).

Fisher also faults the Fifth Circuit for requiring her to "rebut UT's claim that its use of race was in good faith." Pet. 28. But *Grutter* makes clear that "[g]ood faith on the part of a university is presumed absent a showing to the contrary." 539 U.S. at 329 (internal quotation marks omitted). Fisher cavalierly accuses the Fifth Circuit of defying *Grutter* without even acknowledging the crucial passage from *Grutter* on which the panel relied.

2. UT-Austin's identification of underrepresented minorities

As noted earlier, UT-Austin does not consider state demographics when deciding whether to admit applicants. And there is nothing objectionable under *Grutter* about UT-Austin's consideration of demographics in determining whether Hispanics qualify as an "underrepresented minority," because the very concept of "underrepresented minority"

presupposes some comparative baseline. *See Fisher II*, 631 F.3d at 237 ("Identifying *which* backgrounds are underrepresented . . . 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.") (Pet. App. 49a). And defining "underrepresented" status with some reference to state demographics as a comparative baseline is particularly appropriate for UT-Austin, which—as Texas's flagship public university—has a unique mission to prepare students to become leaders of this uniquely diverse state. *See Grutter*, 539 U.S. at 332 ("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.").

Fisher also cannot escape the fact that *Grutter* approved the University of Michigan Law School's admissions program even though it devoted "some attention" to the racial demographics of its applicant pool. 539 U.S. at 336 (majority opinion); *see also id.* at 383-85 (Rehnquist, C. J., dissenting); *id.* at 392 (Kennedy, J., dissenting). Although *Grutter* condemns "outright racial balancing," it does not forbid a university to consider state demographics in its admissions policies, provided it pursues critical mass (and the educational benefits of diversity) through individualized consideration rather than fixed quotas. *See id.* at 329-30, 335. In this case, the

undisputed evidence established that UT-Austin has no such rigid set-asides. See *supra* Part IV.A.

3. The Fifth Circuit's analysis of "narrow tailoring"

Fisher also asserts that UT-Austin's admissions program fails *Grutter*'s "narrow tailoring" requirement in several respects. First, she claims that UT-Austin did not adequately consider "workable, race-neutral alternatives" before adopting race-conscious admissions, and specifically touts Texas's Top Ten Percent plan as one such alternative. *See, e.g.*, Pet. 21. But *Grutter* requires only "serious, good faith consideration of workable race-neutral alternatives," and expressly rejects any requirement that universities adopt "percentage plans" in place of holistic race-conscious admissions. *See Grutter*, 539 U.S. at 340. If UT-Austin is permitted to use a race-conscious holistic method for the *entirety* of its admissions process (as *Grutter* endorses), then surely it may employ a holistic method for only a portion of the process. And it is undisputed that UT-Austin added race to its race-neutral holistic admissions process only upon concluding—following a year-long study undertaken in the wake of *Grutter*—that its existing race-neutral admission policies (including the Top Ten Percent law) were insufficient to attain the educational

benefits of diversity. *See Fisher II*, 631 F.3d at 225-26 (Pet. App. 21a-23a).[8]

Second, Fisher argues that UT-Austin's admissions policy is not narrowly tailored because she claims that it has had a "negligible increase in minority enrollment" and no "impact on classroom diversity." Pet. 23. But Fisher is bound by her stipulation in the district court that "[u]sing race in admissions helps UT Austin achieve racial diversity." Pls.' SOF ¶ 93 (6.CR.1377). *See* Part III, *supra*; *Christian Legal Soc'y*, 130 S. Ct. at 2982-84. And in all events, the Fifth Circuit recognized that "[t]he current policy has produced noticeable results" in improving student-body diversity. *Fisher II*, 631 F.3d at 226 (Pet. App. 26a). Although the policy has not produced sweeping changes in the admissions or enrollment demographics in any particular year, that is to be expected given (1) the dominant role played by the Top Ten Percent law; and (2) that race is but one of many "special circumstances" subfactors considered holistically in UT-Austin's admissions process. *See id.* at 228-29 (Pet. App. 29a-30a).[9]

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[8] Fisher's claim that "UT did not . . . present evidence that it was necessary to supplement its pre-existing race-neutral admissions plan to achieve the compelling interest in racial diversity," Pet. 29, simply ignores the undisputed summary-judgment evidence. *See* Walker Aff. ¶¶ 11-12 (7.CR.2123); Walker Depo. 18-21 (7.RR.1904); Defs.' SOF ¶ 92 (7.CR.1814).

[9] Fisher asserts (without citation) that in 2008, "race was decisive for only 33 African-American and Hispanic students"

V. THERE IS NO JUSTIFICATION FOR THIS COURT TO GRANT CERTIORARI TO RECONSIDER OR OVERRULE *GRUTTER*.

Several of Fisher's amici are clamoring for this Court to reconsider or overrule *Grutter*. *See* Br. of Amicus Curiae Mountain States Legal Found. ("MSLF") at 12-21; Br. of Amici Curiae Gail Heriot et al. at 4-23; Br. of Amicus Curiae AALF at 20-22; Br.

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who were both admitted to UT-Austin and enrolled there. Pet. 10. Fisher apparently derives this figure by comparing the percentage of blacks and Hispanics among the non-Top Ten Percent Texas enrollees in 2008 against the percentage from 1999-2003. This methodology is flawed and misleading. First, it is undisputed that race—like the other "special circumstances" subfactors—is never decisive for any UT applicant. *See* Defs.' SOF ¶97 (7.CR.1816). In addition, 2008 was an unusual year because the number of non-Top Ten Percent Texas enrollees reached an all-time low, on account of the ever-increasing role of the Top Ten Percent law in UT's admissions. The total number of non-Top Ten Percent Texas enrollees in 2008 (1,208) was only one-third of the 1998 number (3,597), even though the total enrolled class from Texas high schools that year was more than double its 1998 levels (5,114 versus 2,513). A sounder approach might compare the average annual percentage of blacks and Hispanics among the non-Top Ten Percent enrollees for 1998-2003 (15.2%) against the average annual percentage for 2004-2008 (19.2%). But even that comparison would be flawed because it treats blacks and Hispanics as fungible when determining critical mass—a theory that *Grutter* implicitly rejects (and even Fisher denied below). *See Grutter*, 539 U.S. at 319-20; 2.RR.19:18-23 (acknowledging that "the African-American student would have a diverse point of view from the Hispanic student").

of Amici Curiae Richard Sander et al. at 4-23. But the question presented in Fisher's petition for certiorari avoids this request and assumes *Grutter*'s correctness. *See* Pet. at i. And it is highly unusual for this Court to reconsider a precedent when the question presented fails to challenge it. *See Yee v. City of Escondido*, 503 U.S. 519, 535-37 (1992).

It would be particularly ill-advised for the Court to reconsider *Grutter* when Fisher has been unwilling to challenge the core premise of that decision: that state universities have a "compelling interest" in assembling a racially diverse student body. *See* Pls.' 2d Am. Compl. ¶ 145 (5.CR.1258) ("To the extent UT Austin articulates an interest in promoting 'student body diversity,' Plaintiffs do not challenge this interest."); Pls.' Mot. for Prelim. Inj. at 15 (2.CR.194) (recognizing UT-Austin's "legitimate governmental interest" in "boosting [its] minority enrollment"); Pet. 29 (acknowledging UT's "compelling interest in racial diversity"). And it is doubly inappropriate to reconsider *Grutter* when five members of this Court reaffirmed these propositions in *Parents Involved*, declining pleas to overrule *Grutter* from the amici supporting Fisher in this case. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring) (noting that "[d]iversity, depending on its meaning and definition, is a compelling educational goal"); *id.* at 865 (Breyer, J., dissenting). By leaving in place *Grutter*'s framework, and the distinction it draws between holistic and mechanical

considerations of race, *Parents Involved* has further induced universities to rely on *Grutter* and order their admissions policies around the guidelines that it established. *See id.* at 722 (majority opinion) ("[W]e have recognized as compelling for purposes of strict scrutiny . . . the interest in diversity in higher education upheld in *Grutter*).

And Fisher's *amici* encounter another serious obstacle in their quest to overrule *Grutter*: Those who drafted and ratified the Fourteenth Amendment did not establish the principle of "colorblind" government that opponents of race-conscious admissions so often invoke. The Equal Protection Clause requires only that States provide "the equal protection of the laws," *not* "the protection of equal laws," [10] and the 39th Congress considered and rejected a proposed revision to the Fourteenth Amendment that would have required colorblind government. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1287 (Mar. 9, 1866) (7-38 Senate vote defeating proposed language providing that "no State . . . shall . . . recognize any distinction between citizens . . . on account of race or color or previous condition of slavery," and that "all citizens, without distinction of race, color, or previous condition of slavery, shall be protected in the full and equal enjoyment and exercise of all their civil and political rights"). *See also* Melissa L. Saunders, *Equal Protection, Class*

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[10] *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1390 (1992).

Legislation, and Colorblindness, 96 MICH. L. REV. 245, 275-81 (1997) (discussing history of Fourteenth Amendment); *cf. Parents Involved*, 551 U.S. at 788 (2007) (Kennedy, J., concurring) ("[A]s an aspiration, Justice Harlan's axiom [that 'our Constitution is color blind'] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.").

What's more, around the time it approved the Fourteenth Amendment, Congress enacted many explicitly race-conscious laws to help black Americans—without regard to the formally race-neutral criterion of previous condition of servitude. *See* Act of Feb. 14, 1863, ch. 33, 12 Stat. 650, 650 (incorporating and appropriating funds for the "'National Association for the Relief of Destitute *Colored Women and Children*,' for the purpose of supporting such aged or indigent and destitute *colored women and children* . . .") (emphasis added); Act of July 28, 1866, ch. 296, 14 Stat. 310, 317 (resolution appropriating additional funds for the "National association for the relief of destitute *colored women and children*," which had been incorporated under a previous Act of Congress.) (emphases added); Resolution of Mar. 16, 1867, No. 4, 15 Stat. 20 (resolution appropriating funds "for the relief of freedmen *or destitute colored people* in the District of Columbia") (emphasis added); Resolution of Mar. 29, 1867, No. 25, 15 Stat. 26 (special rules for handling the compensation claims of black servicemen); *see generally* Eric Schnapper,

Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 VA. L. REV. 753, 762-75, 778-82 (1985); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-31 (1997); ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

Fisher insists that judicial nullification of UT-Austin's admissions policies will "restore the integrity of the Fourteenth Amendment's guarantee of equal protection." Pet. 35. But Fisher clearly is not seeking to "restore" the understandings of equal protection that prevailed in 1868, and she therefore cannot overcome the strong presumption of correctness accorded to *Grutter* under the doctrine of stare decisis. In light of this history, it is hardly surprising that scholars from across the political spectrum have offered sophisticated and elegant defenses of the constitutionality of public-university affirmative-action programs. *See, e.g.*, John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense*, 100 MICH. L. REV. 2036 (2002).

When the original meaning of the Fourteenth Amendment *combines with* stare decisis to support the outcome in *Grutter*, it presents an insurmountable one-two punch against the efforts to overrule that decision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JAMES C. HO
GIBSON, DUNN & CRUTCHER, L.L.P.
2100 McKinney Ave.
Dallas, Texas 75201

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

JOSEPH D. HUGHES
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@oag.state.tx.us
(512) 936-1700

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