No. 11-345

In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

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

Respondents.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether this Court's jurisprudence regarding the Fourteenth Amendment's Equal Protection Clause, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permits the use of race in college admissions decisions.

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INTEREST OF THE *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

This case is important to Cato because it implicates the Institute's longstanding belief that all citizens should be treated equally before the law and that, accordingly, government's use of racial and ethnic classifications must be strictly circumscribed. Such classifications are, at the very least, in tension with the equal protection and due process guarantees of the Fifth and Fourteenth Amendments. Their use must therefore be subject to searching judicial review, not across-the-board deference.[1]

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk.

SUMMARY OF THE ARGUMENT

"The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989). Yet "blind deference" is the only possible characterization of the Fifth Circuit's decision to uphold the University of Texas at Austin's ("UT" or the "University") policy of according special preference to applicants of certain races as "underrepresented minorities." Though acknowledging that racial classification by government is subject to strict scrutiny, Petition Appendix ("Pet. App.") 35a, the Fifth Circuit declined to scrutinize "the merits of the University's decision" to employ racial classifications. Instead, it simply presumed the University's "good faith" in both choosing to discriminate among applicants based on their race and implementing that choice through a "personal achievement score." Pet. App. 41a. Thus, under the lower court decision, a public university's mere assertion of a "diversity" interest, no matter the university's precise circumstances, trumps the individual applicant's right to be regarded as an individual by her government, rather than as a specimen of a particular race or ethnicity.

I. *Grutter v. Bollinger*, 539 U.S. 306 (2003), certainly does not compel that result. *Grutter* did not overrule this Court's equal protection cases requiring that a "strong basis in evidence" support the necessity of a governmental entity's use of racial classifications,

even where its interest is one that the Court has recognized, in general terms, to be compelling. *See, e.g., Croson*, 488 U.S. at 500; *Miller v. Johnson*, 515 U.S. 900, 922 (1995). Absent such a showing in each instance, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493. Beyond serving to "smoke out" illegitimate motivation, a strong basis in evidence is essential to define the contours of the government's interest so as to make possible the narrow tailoring of racial preference that is required. *Id*. Only such specificity prevents general assertions of interest – for instance, a university's interest in diversity – from being used to "'justify' race-based decisionmaking essentially limitless in scope and duration." *Id*. at 498.

II. The importance of the strong-basis-in-evidence requirement is confirmed by UT's claim that its use of racial preferences was necessary to achieve a "critical mass" of underrepresented minorities. The evidence in *Grutter* demonstrated that, absent preferences, the University of Michigan Law School's minority student population would have plummeted to almost nothing. But UT has achieved real and substantial racial diversity – beyond that which Michigan accomplished with preferences – through Texas's race-neutral "Top 10% Law." For that reason, UT cannot demonstrate by a strong basis in evidence the necessity of its use of race or the scope of the

preferences that it assigns to different minority groups. In reality, the University's racial preferences have only a *de minimis* effect on the composition of the student body, far from commensurate with the heavy toll that consideration of race exacts. This aspect of its diversity program cannot survive strict scrutiny.

III. The result would be the same even if UT could demonstrate that racial preferences are necessary to achieve a "critical mass" of underrepresented minorities. The concept of "critical mass" is arbitrary in every respect, such that its use can be supported in every instance by manipulation of the racial groups for which a "critical mass" is sought or the level at which "critical mass" is applied. "Critical mass" is antithetical to individualized consideration and the true pluralism that is the hallmark of diversity. Far from necessary to realize any legitimate end, "critical mass" is a hindrance to achieving "the harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting). In no application can it survive strict scrutiny.

ARGUMENT

I. A University Must Demonstrate by a "Strong Basis in Evidence" that Its Use of Racial Classifications Is Necessary to Achieve a Compelling Interest

"'[B]ecause 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 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting)). To that end, the Court's precedents require that the necessity of racial classifications be supported by a "strong basis in evidence," not just generalized assertions of interest. The concerns that motivate this requirement – racial neutrality, individual dignity, and accountability – apply with special force to public universities' use of racial classifications to achieve "diversity," a vague and potentially limitless goal that may provide cover for politically-motivated or invidious discrimination. Accordingly, public universities bear the burden of demonstrating the necessity of their consideration of race in each instance.

A. The Strong-Basis-in-Evidence Requirement Is Essential to Protect Individuals' Rights to Equal Dignity and Respect

The use of racial classifications by government threatens individuals' "personal rights to be treated with equal dignity and respect." *Croson*, 488 U.S. at 493 (internal quotation marks omitted). For that reason, the Court has long subjected the government's use of racial classifications to strict scrutiny. To defend its use of racial classifications, a governmental entity must not only identify a legitimate "compelling interest," but also demonstrate a "strong basis in evidence" that the consideration of race is necessary to further that compelling interest. *See, e.g., Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 277 (1986) (plurality op.); *Croson*, 488 U.S. at 500. This requirement is essential to carrying out strict scrutiny of racial classification schemes in several respects.

1. Enabling the Court's independent judgment

Most directly, the strong-basis-in-evidence requirement enables a court to exercise its independent judgment as to whether racial classification is truly necessary. The "presumptive skepticism of all racial classifications" prohibits a court "from accepting on its face" a government's conclusion that such classification is necessary. *Miller*, 515 U.S. at 922 (citation omitted). Uncritical acceptance of the government's asserted interest "would be surrendering [the Court's]

role in enforcing the constitutional limits on race-based official action." *Id*. This the Court "may not do." *Id*. (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Nor may the Court rely on sketchy facts to overcome the presumption against the racial classification of citizens by their government. The equal protection inquiry requires a precise balancing of the overriding interest of racial neutrality with more transient interests, such as remediating historical discrimination or encouraging diversity. These competing interests "are not always harmonious" and "reconciling them requires . . . extraordinary care" on the part of governments seeking to employ race-conscious policies and, by extension, the courts reviewing those policies. *Wygant*, 476 U.S. at 277 (plurality op.); *see also Ricci v. DeStefano*, 129 S.Ct. 2658, 2675 (2009) (importing the "strong-basis-in-evidence standard" to Title VII, where there is the same "tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other"). Imprecision is necessarily incompatible with that task.

Moreover, "context matters" in applying strict scrutiny. *Grutter*, 539 U.S. at 327. Absent the showing of a strong basis in evidence, a court simply lacks the relevant context upon which to conclude that the use of racial classifications is necessary in a particular circumstance.

Croson demonstrates the factual rigor required to balance these factors. There the Court considered five "predicate facts" proffered by a city in support of a minority-contractor quota. The quota ordinance's claim of remedial purpose was "entitled to little or no weight," as were "conclusory" statements that there had been discrimination within the region's construction industry. 488 U.S. at 500. Reliance on disparities between the number of contracts awarded to minority firms, or membership in local contracting organizations, and the city's minority population was "similarly misplaced," where the "city [did] not even know how many [minority firms] in the relevant market are qualified to undertake" construction projects. *Id*. at 501-02. And a congressional finding that there had been nationwide discrimination in the construction industry had little probative value where "the scope of the problem would vary from market area to market area." *Id*. at 504. "None of these 'findings,' singly or together," the Court found, provided a strong basis in evidence supporting the use of racial preference. *Id*. at 500.

The city's burden, the Court explained, was to provide evidence of necessity by "identify[ing] [the prior] discrimination, public or private, with some specificity before [it] may use race-conscious relief." *Id*. at 504. But what the city presented was "a generalized assertion as to the classification's relevance to its goal" and "sheer speculation" as to the impact and existence of any prior discrimination. *Id*. at 499, 500.

Absent the requisite factual detail, the Court's task was "almost impossible." *Id*. at 507.

The Court's recent decision in *Ricci* is also illustrative. The *Ricci* Court rejected the government's argument that it could discard the results of a promotional exam on the basis of its belief that certifying the result could expose it to disparate-impact liability from black firefighters. 129 S.Ct. at 2681. "[A] prima facie case of disparate-impact liability – essentially, a threshold showing of a significant statistical disparity and nothing more – is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results." 129 S.Ct. at 2678. To prevail in its defense that certifying the results could expose it to disparate-impact liability, the city was instead required to produce strong evidence that its exams were not job-related and consistent with business necessity or that there existed an equally valid, less-discriminatory alternative. *Id*. at 2678. The city's evidence, however, consisted of little more than "a few stray (and contradictory) statements." *Id*. at 2680. Thus, there was "no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability." *Id*. at 2680-81.

For good reason, "any racial preference must face the most rigorous scrutiny by the courts." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring). The courts, in turn, are reliant on the strong-basis-in-evidence requirement to carry out that task.

2. "Smoking out" illegitimate use of race

A strong basis in evidence is necessary to demonstrate, in objective terms, that the use of racial classifications by government actually furthers legitimate interests. "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493 (plurality op.). Thus, the requirement of a factual showing of necessity "'smoke[s] 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." *Id*.

The Court has had ample grounds for suspicion on this score. In attempting to justify the necessity of its race-conscious anti-layoff policy, the school board in *Wygant* presented no contemporaneous evidence of prior discrimination and was reduced to "lodging" extra-record materials with the Court. 476 U.S. at 278 n.5 (plurality op.). The Court was appropriately wary of this *post hoc* effort: "If the necessary factual predicate is prior discrimination . . . then the very nature of appellate review requires that a factfinder determine whether the employer was justified in instituting a remedial plan." *Id*. at 278 n.5. On the facts before it, the Court could only conclude that the school board's motivation was outright racial

balancing. *Id*. at 276; *see Croson*, 488 U.S. at 497-98 (discussing *Wygant*).

Similarly, the Court in *Croson* inferred improper motive from the absence of a strong basis in evidence to support particular aspects of the city's minority-contractor preference scheme. The city presented "*absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." 488 U.S. at 506. Yet these groups were awarded preferences. This "random inclusion of racial groups," unsupported by any evidence of prior discrimination, "strongly impugns the city's claim of remedial motivation." *Id*.

The *Croson* Court also found it relevant that the racial preferences, chiefly benefiting black contractors, had in fact been enacted by a majority-minority city council. *Id*. at 495 (noting that "blacks constitute approximately 50% of the population of the city" and that "[f]ive of the nine seats on the city council are held by blacks"). Given the absence of "[p]roper findings" regarding prior discrimination against black contractors, the Court could not dismiss the possibility that the city's preference scheme was simply the product of "racial politics." *Id*. at 510. "'If there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its

members.'" *Id*. at 510-11 (quoting *Fullilove*, 488 U.S. at 539 (Stevens, J., dissenting)).

Most recently, the invidious results of racial politics were particularly pronounced in *Ricci*. The absence of any strong basis in evidence to support the city's asserted reason for scrapping its promotional exam – concern for disparate-impact liability – confirmed that its explanation "was a pretext and that the City's real reason was illegitimate, namely, the desire to placate a politically important racial constituency." 129 S.Ct. at 2684 (Alito, J., concurring).

The Court has also relied on the strong-basis-in-evidence standard in other cases to expose motivations that, although well-meaning, were nevertheless illegitimate. In *Miller*, for example, the Court identified and rejected the Justice Department's policy of "maximizing majority-black districts" through enforcement of Section 5 of the Voting Rights Act, rather than "grounding its objections [to proposed redistricting maps] on evidence of a discriminatory purpose." 515 U.S. at 924. Similarly, in *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (hereinafter "*Shaw*"), the Court found that "an interest in ameliorating past discrimination did not actually precipitate the use of race in [a state's] redistricting plan." In each case, what revealed the improper motivation was the absence of a strong basis in evidence to support race-conscious redistricting. *See id*. at 908 n.4 (discussing standard and evidence).

Because "[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system," *Adarand v. Pena*, 515 U.S. 200, 226 (1995) (quotation marks and citation omitted), the courts must be in a position to satisfy themselves that consideration of race serves a legitimate end. Nothing short of a strong basis in evidence allows them to do so.

3. Tailoring the use of race

The strong-basis-in-evidence requirement facilitates the evaluation of whether racial classifications are narrowly tailored. Under strict scrutiny, racial classifications are "constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326. Indeed, "[t]he purpose of the narrow tailoring requirement is to ensure that 'the means chosen "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.'" *Id*. at 333 (quoting *Croson*, 488 U.S. at 493). Absent a precise delineation of the government's compelling interest – and, in particular, the necessity of employing racial classifications – it may be "impossible to assess" whether the use of racial classifications "is narrowly tailored" to fit that interest. *Croson*, 488 U.S. at 507. In short, no court can possibly evaluate the relationship between race-conscious remedies and their purpose when that purpose is adduced only in the most general terms.

See Grutter, 539 U.S. at 388 (Kennedy, J., dissenting) (the use of racial classifications must be "supported by empirical evidence" to facilitate "rigorous judicial review, with strict scrutiny as the controlling standard"); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring) (explaining how "the district fails to account for the classification system it has chosen").

Further, it is precision in defining the government's compelling interest that prevents "race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498. As the *Croson* Court explained, "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It has no logical stopping point." *Id*. (internal quotation marks omitted). The permissible means to address that interest would likewise be without limit.

Imprecision in defining government's interest in employing racial classifications also undermines the requirement that it undertake "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. If race-conscious policies are to be permitted only as a "last resort," *Croson*, 488 U.S. at 519 (Kennedy, J., concurring), a reviewing court must be able to satisfy itself that no race-neutral alternative exists. This it cannot do where the governmental entity is free to define its "compelling interest" (including the necessity of the use of racial

classifications) in terms calibrated to "fit" its preferred race-conscious policy, rather than the facts actually demonstrating the need for consideration of race. If the government may simply assert the necessity of racial classifications, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Id*. at 504.

4. Limiting racial stigma and hostility

When the use of racial classifications extends beyond what is necessary and narrowly tailored, the "unhappy consequence" is "to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). In particular, "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493. Instead of promoting inclusiveness and cross-racial understanding, they may bring about the perverse result of "reinforc[ing] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978) (Powell, J.).

A strong basis in evidence supporting the necessity of racial preferences limits this harm by preventing overinclusiveness in race-conscious policies. By

forcing government to identify and work to achieve its interest with precision, such a showing ensures that these harms will be minimized or, where race-neutral means may be substituted, entirely eliminated. By contrast, imprecision – that is, adopting racial preferences that are not necessary to achieve a compelling interest in all applications – only amplifies the "inequity in forcing innocent persons . . . to bear the burdens" of what may understandably appear to be arbitrary or invidious classifications, *Bakke*, 438 U.S. at 298 (Powell, J.). This can only stoke racial divisiveness and hostility.

5. Transparency and accountability

The strong-basis-in-evidence requirement reinforces transparency and accountability where public institutions are involved. In light of the nation's experience, recent and historical, in racial relations, the use of racial classifications by government is understandably a matter of intense public interest. But racial classification schemes often lack the clarity and transparency necessary for public understanding and scrutiny. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 253-57 (2003) (presenting a mere "summary" of college's admissions guidelines); *Parents Involved*, 551 U.S. at 785-86 (Kennedy, J., concurring) (describing "problematic" discrepancies and ambiguities in a "complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools"); *see also Bakke*, 438 U.S. at 316-17 (Powell, J.)

(describing Harvard College's more straightforward diversity program).

As Justice Kennedy observed in his *Grutter* dissent, loose standards give universities "few incentives to make the existing minority admissions schemes transparent." 539 U.S. at 394. By facilitating transparency and disclosure, the strong-basis-in-evidence requirement empowers citizens to "hold . . . elected officials accountable for their positions," *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 916 (2010), usually well before the courts have an opportunity to pass judgment on challenged governmental action. And democratic accountability through the political process is the hallmark of "enlightened self-government," *id*. at 898, preferable in fundamental respects to remedial judicial action. By contrast, where "programs have not been openly adopted and administered . . . , they have not benefited from the scrutiny and testing of means to ends assured by public deliberation." Drew Days, III, Fullilove, 96 Yale L.J. 453, 458-59 (1987).

B. The Concerns Motivating the Strong-Basis-in-Evidence Requirement Apply with Special Force to Universities' Use of Racial Classifications to Achieve Diversity

"[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized," including the use of racial preferences in public

university admissions. *Gratz*, 539 U.S. at 270. It follows that a public university's use of racial classifications must be supported by a strong basis in evidence that the consideration of race is necessary to achieve a legitimate and compelling interest. *Wygant*, 476 U.S. at 277 (plurality op.); *Croson*, 488 U.S. at 500; *Shaw v. Reno*, 509 U.S. 630, 656 (1993); *Miller*, 515 U.S. at 922; *Shaw v. Hunt*, 517 U.S. at 908 n.4, 910; *Bush v. Vera,* 517 U.S. 952*,* 910 (1996). While deference may be due to a school's choice of educational objectives, *Grutter*, 539 U.S. at 328-29, the Court has never suggested that public universities need not meet this basic evidentiary standard when they employ racial classifications to achieve student-body diversity. Indeed, this requirement carries special weight when diversity is offered as a justification for the use of racial classifications, because the problems of improper motive, unlimited duration, and imprecise tailoring are acute.

Diversity is particularly susceptible to abuse as a pretext for illegitimate purposes. The Court has had little difficulty determining when remedial purpose has been employed as a pretext for other ends, by focusing on evidence of prior discrimination and the lingering effects of such discrimination – both relatively straightforward factual inquiries. *E.g., Parents Involved*, 551 U.S. at 720-21; *Croson*, 488 U.S. at 499-500. By contrast, evaluating the necessity of racial preferences to accomplish a diversity goal is a more complex inquiry. Universities' views of the meaning of diversity, its specific benefits and the proper means of

achieving it may differ; diversity programs operate on more complex statistical terrain than remedial efforts targeting a discrete number of racial groups; and courts may not simply look backwards at historical evidence to assure themselves that a firm basis exists for the use of racial classifications.

Absent clear and specific evidence of the need to consider race, it is impossible to distinguish invidious racial balancing from permissible diversity-related preference, so long as a university espouses a diversity interest and provides some measure of individual consideration. *See* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 Tex. L. Rev. 617, 543 (2007). This risk is not hypothetical: "Many academics at other law schools who are 'affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.'" *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (quoting Peter Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Policy Rev. 1, 34 (2002)). Only a clear accounting – in the form of strong evidence showing a need for racial preferences in light of the institution's circumstances and goals – can guard against the risk that a diversity program, even one justified using language from *Bakke* and *Grutter*, may in fact operate "as a cover for the functional equivalent of a quota system." *Bakke*, 438 U.S. at 318 (Powell, J.).

Greater factual scrutiny is also necessary to prevent claims of diversity from being "used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498. Though the *Grutter* Court "expect[ed]" that the use of racial preferences would no longer be necessary in 25 years, 539 U.S. at 343, its conception of universities' interest in diversity provides no apparent means of limiting the scope or duration of preferences. *See Ayres & Foster*, *supra*, at 543. But where universities are required both to justify with precision their asserted need and then to tailor their use of race narrowly to that need, such limits will reveal themselves, as an incident of the demonstration of a strong basis in evidence that the consideration of race is necessary. *Cf. Croson*, 488 U.S. at 506 (holding that city may not give preferences to particular groups for which there was "absolutely no evidence of past discrimination"). This requirement also facilitates the adaptation of diversity programs to account for progress along the way. "Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives." *Grutter,* 539 U.S. at 394 (Kennedy, J., dissenting). At some point, racial preferences would necessarily fall by the wayside.

"'[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Gratz*, 539 U.S. at 270 (quoting *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting)). In light of the heightened risk of pretext,

universities claiming a diversity interest should not be absolved from having to demonstrate the factual necessity of racial preferences to achieve that end; if anything, judicial scrutiny should be more searching than for purely remedial programs.

C. Public Universities Must Demonstrate that Racial Preferences Are Necessary To Achieve Diversity

Commensurate with the heavy toll that consideration of race exacts, the strong-basis-in-evidence standard compels a public university employing racial classifications to come forward with evidence that justifies their use. "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." *Adarand*, 515 U.S. at 228. To that end, a public university bears the burden of demonstrating by a strong basis in evidence that racial classifications are necessary to achieve its educational objectives. This logically entails three discrete showings:

First, the university must demonstrate, by empirical evidence or precedent, that its particular conception of racial diversity among students actually furthers a legitimate educational objective. *See Grutter*, 539 U.S. at 388 (Kennedy, J., concurring). This showing is essential to uncovering pretextual

use of the diversity rationale, identifying forbidden quota systems implemented in *sub rosa* fashion, and ensuring that the university's interest is, in fact, sufficiently compelling to warrant consideration of race.

Second, the university must present evidence that minority enrollment is sufficiently low as to necessitate the use of the "highly suspect tool" of racial classifications, *Croson*, 488 U.S. at 469, to achieve its legitimate educational objectives. In effect, this requires the university to apply its diversity theory to its unique situation, proving that an interest compelling in the abstract is also compelling in fact in this instance. *See Croson*, 488 U.S. at 505 ("We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another.").

To that end, a school espousing the "critical mass" theory of diversity approved in *Grutter* must present a strong factual basis that, prior to consideration of race, its student body lacks the "meaningful numbers" of minority students necessary to achieve the educational benefits of diversity. *Grutter*, 539 U.S. at 338. Moreover, the school must show that its use of racial preferences has more than a "minimal effect" and so is in fact superior to race-neutral alternatives; otherwise, consideration of race would hardly be "necessary." *Parents Involved*, 551 U.S. at 734. Racial preferences that have only a *de minimis* effect on minority enrollment fail this test. *Id*. Only in this way may the university carry its burden of proving

that its use of race "outweigh[s] the cost of subjecting [thousands] of students to disparate treatment based solely upon the color of their skin." *Id*.

Third, the university must present evidence that validates each aspect of its use of racial preferences. *See Shaw*, 517 U.S. at 909 (before states may take race-conscious action to remedy prior discrimination, "they must identify that discrimination . . . with some specificity" because a "generalized assertion of past discrimination . . . provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy"). In particular, there must be a measure of consistency in the treatment of similarly situated minority groups for a court to conclude that preferences are in fact necessary in each instance. *Cf. Grutter*, 539 U.S. at 381-83 (Rehnquist, C.J., dissenting) (explaining how "disparate admissions practices with respect to [Hispanics, blacks, and Native Americans] demonstrate that [the university's] alleged goal of 'critical mass' is simply a sham"). Just as prior discrimination against black-owned businesses cannot support preferences benefiting Eskimos or Aleutian Islanders, *Croson*, 488 U.S. at 506, failure to achieve a "critical mass" of blacks through race-neutral means, for example, would not justify preferences for Hispanics. Such over-inclusiveness "strongly impugns" a university's asserted interest, suggesting that improper considerations are at work. *Id*.

To the extent that a university is unable to make these most basic showings, it has no possible

legitimate basis upon which to discriminate on the basis of race.

II. Even if the "Critical Mass" Concept Is Consistent with the Strong-Basis-in-Evidence Requirement, UT's Use of Racial Classifications Is Not

Even before addressing narrow tailoring, UT must demonstrate, by a strong basis in evidence, that its consideration of race is "necessary to further its compelling interest in securing the educational benefits of a diverse student body." *Grutter*, 539 U.S. at 333. Its showing falls far short.

Grutter held that a university "has a compelling interest in attaining a diverse student body," *id*. at 328, and that sufficient evidence supports the proposition that "a 'critical mass' of underrepresented minorities is necessary to further [that interest]." *Id*. at 333. This holding was said to be "in keeping with [the Court's] tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Id*. at 328. UT expressly relies on this theory of diversity and its endorsement in *Grutter*. Supplemental Joint Appendix ("SJA") 24a-25a.

Nowhere in *Grutter*, however, did the Court suggest that a university's present circumstances are irrelevant to proving the necessity of race-conscious admissions – that is, that a public university may satisfy its burden of demonstrating necessity merely

by asserting its goal of enrolling a "critical mass" of minority students. To the contrary, the Court's decision rests on the uncontroverted factual determination that minority enrollment would have plummeted in the absence of racial preferences:

> Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a "'very dramatic,'" negative effect on underrepresented minority admissions. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. Under this scenario, underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.

Id. at 320 (citations omitted); *see also id*. at 340 (race-neutral alternatives would "require a dramatic sacrifice of diversity"). Thus, the points of contention in *Grutter* were the law school's interest in diversity as measured by "critical mass," *compare id*. at 328-33 (diversity is a compelling interest) *with id*. at 364-66 (Thomas, J., dissenting), and the narrow tailoring of its diversity program, *compare id*. at 333-43 (the law school's program is narrowly tailored) *with id*. at 389-94 (Kennedy, J., dissenting). None of the six opinions contended that, assuming the school's compelling

interest in diversity and the narrow tailoring of its program, racial preferences were not necessary to achieving its asserted interest. *See Parents Involved*, 551 U.S. at 734-35 (explaining that, in *Grutter*, "the consideration of race was viewed as indispensable in more than tripling minority representation at the law school – from 4 to 14.5 percent").

By contrast, the uncontroverted evidence in the instant case is that UT was among the nation's most diverse universities in 2004, immediately before its reintroduction of racial preferences,[2] and that its consideration of race since then has had only a negligible impact on the racial composition of the student body, Pet. App. 107a (Garza, J.). Even proceeding under the assumption that its consideration of race is narrowly tailored to its asserted interest, UT fails to demonstrate that enrollment of minorities is sufficiently low as to necessitate the use of the "highly suspect tool" of racial classifications.

First, the University enrolls more than "meaningful numbers," *Grutter*, 539 U.S. at 338, of both black and Hispanic students under Texas's race-neutral Top 10% Law. The entering freshman class of 2004, for example, was 4.5 percent black (309 students), 16.9 percent Hispanic (1,149), and 17.9

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[2] *See, e.g.*, Press Release, *The University of Texas at Austin ranked fifth-best producer of degrees for minority undergraduates* (Jul. 12, 2005), *available at* http://www.utexas.edu/news/2005/07/12/rankings/.

percent Asian (1,218), out of a total of 6,796 students. UT, Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law* 6 (2008), SJA 156a. Indeed, through race-neutral means, the University had managed to restore minority enrollment levels "to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies." Larry Faulkner, President, UT, *The 'Top Ten Percent Law' Is Working for Texas* (2000), JA 343a. Even since the University reintroduced consideration of race for some admissions decisions, enrollment of minority students through *racial-neutral* means has continued to climb. *See* SJA 157a (reporting Top 10% Law admissions).

In light of the success of the Top 10% Law in achieving diversity, the University has failed to demonstrate that racial preferences are necessary to achieve a "critical mass" of underrepresented minorities. *Grutter* held that a total underrepresented-minority population (i.e., excluding Asians) of between 13.5 and 20.1 percent was sufficient to establish a "critical mass" to achieve the educational benefits of diversity. 539 U.S. at 336. In 2008, the year that Abigail Fisher sought admission to UT, blacks and Hispanics admitted under the race-neutral Top 10% Law constituted fully 22 percent of the student body and 29 percent of the portion of the incoming class admitted under the Top 10% Law. SJA 157a. (Including Asians, minority students comprised a majority of students admitted under the Top 10% Law in 2008. *Id.*) Under the logic of *Grutter*, these

students constitute a "critical mass" sufficient "[t]o ensure . . . 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 re-examine stereotypes." *Grutter*, 539 U.S. at 380 (Rehnquist, J., dissenting) (describing University of Michigan Law School's policies). The University having demonstrated its ability to achieve "critical mass" through race-neutral means, racial classifications become unnecessary to achieve diversity's benefits as identified in *Grutter* and embraced by UT. *See* SJA 24a (discussing *Grutter*).

Second, the University fails to show that its use of racial preferences has more than a "minimal effect" on student-body diversity, such that its consideration of race is in fact necessary. Judge Garza's opinion below demonstrates why this is so. In 2008, 80.9 percent (5,114) of Texas residents in the incoming freshman class were admitted under the Top 10% Law. Pet. App. 102a. The remaining 19.1 percent, or 1,208 students, were admitted based on their Academic Index ("AI") and Personal Achievement Index ("PAI") scores, the latter of which takes account of race as a "special circumstance." *Id*. Of the 363 in-state blacks enrolled (6 percent of in-state students), 58 (0.92 percent) were admitted based on their AI and PAI scores. Pet. App. 102a-03a. And of the 1,322 in-state Hispanic students enrolled (21 percent), only 158 (2.5 percent) were admitted based on their AI and

PAI scores. Pet. App. 103a. "[A]ssuming the University gave race decisive weight in each of these 58 African-American and 158 Hispanic students' admissions decisions" – which would be, in itself, unconstitutional, *Grutter*, 539 U.S. at 329 – "those students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman." Pet. App. 104a.

But even those small numbers overstate the contribution to diversity of the University's racial preferences. The University maintains that its consideration of AI and PAI scores is "holistic"; that race is but one of seven "special circumstances," which in turn comprise one of six PAI factors; and that race plays only a minor role, as a "factor of a factor of a factor of a factor." Pet. App. 104a. Even assuming that race is determinative in fully 25 percent of decisions – still a more-than-minor role – the University's consideration of race would yield only 15 additional black students (0.24 percent) and 40 additional Hispanic students (0.62 percent). Pet. App. 105a. Out of a class of 6,175 students, these numbers – which reflect a greater use of race than that to which the University admits – are *de minimis*. The "minimal impact . . . on school enrollment" of the University's racial classifications "casts doubt on the necessity of using racial classifications." *Parents Involved* at 734. Indeed, the infinitesimal effect of racial preferences in this instance throws into sharp relief the far-more-substantial "cost of subjecting [thousands] of students

to disparate treatment based solely upon the color of their skin." *Id*.

Third, the University fails to justify the scope of its racial preferences and, in particular, its choice to accord preferences to Hispanic applicants while denying them to Asians, who comprise a smaller portion of the student body. The entering freshman class of 2008 contained 1,249 Asian students and 1,338 Hispanic students, roughly in line with the numbers in each group over the preceding five years. SJA 156a. The former racial group, Asians, apparently amounts to a "critical mass," such that racial preferences are unnecessary. Meanwhile, the University maintains preferences for the latter group, Hispanics, despite their greater enrollment. The number of Hispanic students thus necessarily exceeds what the University considers to be a "critical mass," which renders its use of preferences "gross[ly] overinclusive[ ]." *Croson*, 488 U.S. at 506. The inconsistency in the University's treatment of different racial groups "'leave[s] one with the sense that the racial and ethnic groups favored by the [preferences] were added without attention to whether their inclusion was justified by evidence. . . .'" *Id*. (quoting Days, Fullilove, *supra*, at 482).

Rather than demonstrate by a strong basis in evidence that its use of racial preferences is necessary to achieve legitimate educational goals, UT attempts to deflect attention from the success of the race-neutral Top 10% Law in increasing the enrollment of underrepresented minorities. But the University may

not assume the need for racial classifications; it must prove their necessity. This it has failed to do.

III. Attaining a "Critical Mass" of Minority Students Cannot Be a Compelling Interest Because It Cannot Be Supported By a Strong Basis in Evidence

Although *Grutter* accepted it, "critical mass" as a theory or measure of diversity is incompatible with strict scrutiny and, in particular, the strong-basis-in-evidence requirement, because it admits no logical stopping point and is unsusceptible to any demonstration of necessity. A theory sufficiently capacious to support the use of racial preferences in every instance *proves* their necessity in none.

The concept itself may be stated simply: "Critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. *Grutter* provided no further definition and limited the concept in only one respect: a "critical mass" program may not reserve "a certain fixed number or proportion of opportunities . . . for certain minority groups." *Id*. at 335. In other words, a university may not announce the precise "critical mass" of any particular racial group that it hopes to attain.

Even so limited, "critical mass" applies in entirely arbitrary fashion to those groups whose participation it claims to promote, such that the necessity of extending preferences to any particular group is

equally arbitrary. One problem is the inherent factual complexity of race, which is hardly more amenable to division into discrete "masses" than the "binary conception" the Court rejected as arbitrary and "extreme" in *Parents Involved*. 551 U.S. at 735. Chief Judge Jones's dissent from rehearing *en banc* describes the insusceptibility of Texas's diverse population to facile categorization:

> 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.

Pet. App. 175a.

Yet "White/Black/Hispanic" is essentially where the University drew its lines, *see* SJA 156a, and may well continue to do so without end. Defined with sufficient precision, no racial group need ever achieve a "critical mass," and the continuing necessity of racial classification could never be in doubt. Even should this Court strike down the University's preferences for Hispanics as over-inclusive, *see supra* § II,

while upholding the "critical mass" concept, the University would stand on *terra firma* achieving the same result through separate preferences aimed at establishing "critical masses" for Mexican-Americans, Cuban-Americans, etc. It could thus continue to deny preferences to "Asian" applicants, broadly defined, while still favoring underrepresented Eskimos.

And, of course, the assignment of race to individual applicants, for purposes of tabulating a "critical mass" and applying preferences, may be no less arbitrary. *E.g.,* Laura Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 Fordham L. Rev. 843, 898 (1997) ("Harvard Law School hired its first woman of color, Elizabeth Warren, in 1995.").

As well, a "critical mass" may be applied at any possible level where students may interact with one another. *Grutter* measured diversity at the "student body" level, 539 U.S. at 318, while UT asserts an interest in achieving a "critical mass" within every classroom and every major. Pet. App. 66a. Indeed, under the *Grutter* rationale, UT's goal may actually be more closely tailored to the aim of "encourag[ing] underrepresented minority students to participate in the classroom and not feel isolated." 539 U.S. at 318. But it is impossible to extract from that generalization any firm sense of necessity on which a court might pass judgment. Anything goes.

And overriding all is the problem that treating public university students as components of one or

another "critical mass" is contrary to any legitimate educational interest in "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races." *Id*. at 330 (internal quotation marks omitted). Students who are diverse in fact – like all individuals – are lumped together in a "mass" and treated as interchangeable with others who share the same badge of race or ethnicity. And this badge is all too often affixed by a government official who lacks understanding of the complex historical, genealogical, and cultural nuances that define and delineate various groups, racial and otherwise. Taken as a measure of diversity, "the concept of critical mass is a delusion. . . ." *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

Because "critical mass" is incompatible with individualized consideration, *see Bakke*, 438 U.S. at 317-18 (Powell, J.), it retards the "beneficial educational pluralism," *id*. at 317, that true diversity would promote. Far from necessary to achieve any legitimate end, it stymies our progress as a nation toward "the harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting). In no application can it survive strict scrutiny.

CONCLUSION

The Court "should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. UT's rationale for classifying its applicants according to their races is not compelling. Unsupported by any basis in evidence, it is a sham.

For the foregoing reasons, this Court should reverse the decision of the court of appeals.

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