No. 09-50822

In the United States Court of Appeals for the Fifth Circuit

ABIGAIL FISHER,

Plaintiff - Appellant,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Defendants - Appellees.

On Appeal from the United States District Court
Western District of Texas, Austin Division

APPELLEES' RESPONSE TO APPELLANT'S PETITION FOR REHEARING EN BANC

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Appellees adopt Appellant's certificate of interested parties.

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INTRODUCTION

In the initial phase of this case, plaintiff and her amici mounted an aggressive challenge to the Supreme Court's framework for reviewing challenges to the consideration of race in college admissions, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J.). In response, the Supreme Court issued a 7-1 decision that accepted "as given" the Court's precedent—including *Grutter*—and that declined to find that any aspect of the admissions plan at issue was invalid. *Fisher v. University of Texas*, 133 S. Ct. 2411, 2417 (2013). Instead, the Court held that this Court had erred in applying *Grutter* by according too much deference to the University of Texas at Austin (UT) in the narrow-tailoring inquiry. *Id.* at 2421. The Supreme Court remanded for this Court to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Id.*

The panel's decision on remand answering that fact-bound question in the affirmative does not warrant en banc review. The panel's decision carefully, thoughtfully, and persuasively carries out the mandate ordered by the Supreme Court. The decision's conscientious analysis of the issues utterly belies plaintiff's claim that the panel "flagrant[ly]" (PFR 8) disregarded the Supreme Court's mandate and even was motivated by its own "enthusiasm" for UT's policy (*id.* at

9). Plaintiff does not even allege a conflict with any decision of this Court or other Circuit. And, as explained below, the panel's decision does not conflict with any decision of the Supreme Court, including *Fisher*. Moreover, because the panel's decision is explicitly grounded in the specifics of UT's unique admissions plan and experience, the decision "offers no template for others." Slip op. 39.

Those who disagree with *Grutter* will inevitably find fault with the conclusion that a university's consideration of race—no matter how modest, individualized, or necessary—is permissible. But plaintiff has identified no reason why the panel's painstaking narrow-tailoring analysis warrants rehearing by this Court. Like her amici, her real complaint is with the precedent that the Supreme Court accepted, again, in this very case. But this Court is bound by that precedent, and the panel faithfully applied it to the facts of this case.

ARGUMENT

I. THE PANEL'S DECISION FAITHFULLY AND CAREFULLY CARRIES OUT THE SUPREME COURT'S MANDATE

Plaintiff's primary contention is that the panel simply refused to follow the Supreme Court's mandate in this case. PFR 5. That argument fails.

1. The Supreme Court disagreed with this Court's prior decision in only one respect: it held that this Court gave undue deference to UT on the narrow-tailoring inquiry required by *Grutter*. *Fisher*, 133 S. Ct. at 2421. The Supreme Court accepted *Grutter* and *Bakke* "as given." *Id*. at 2417. The Court further reaffirmed

that "the interest in the educational benefits that flow from a diverse student body" is a "compelling interest that could justify the consideration of race," *id*., and that the "interest in securing diversity's benefits" is not an interest in ensuring that a "specified percentage of the student body" is from a particular ethnic group but in seeking "'diversity that … encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element,'" *id*. at 2418 (quoting *Bakke*, 438 U.S. at 315 (Powell, J.)).

The Court also explained what was required under the narrow-tailoring prong. Narrow tailoring tests whether the challenged "admissions process meets strict scrutiny *in its implementation*," *id.* at 2419-20 (emphasis added). "'To be narrowly tailored,'" the Court reiterated, "'a race-conscious admissions program cannot use a quota system,' but instead must 'remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" *Id*. at 2418 (quoting *Grutter*, 539 U.S. at 334, 337). The Court also instructed that, while "'[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,'" a "reviewing court must ultimately be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity." *Id*. at 2420 (alteration in original) (quoting *Grutter*, 539 U.S. at 339-40).

After finding that this Court erred in its narrow-tailoring analysis by affording "'a degree of deference to the Universit[y],'" *id.* at 2420 (alteration in original) (quoting *Fisher v. University of Texas*, 631 F.3d 213, 232 (5th Cir. 2011)), the Court remanded for this Court to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity," *id*. at 2421.

2. Applying the exacting scrutiny that the Supreme Court demanded, the panel properly concluded that—absent any deference—UT met its burden of establishing that its plan was narrowly tailored. To begin with, the panel found that, in terms of how it works in practice, UT's holistic plan is "nearly indistinguishable from the … program in *Grutter.*" Slip op. 29; *see id.* at 39; *accord Fisher*, 631 F.3d at 259 (Garza, J., concurring). In *Grutter*, the focus of the narrow-tailoring analysis—and the principal point of disagreement between the majority and Justice Kennedy—was whether the plan's consideration of race was sufficiently modest and individualized in practice. *See* 539 U.S. at 334-39; *id.* at 389-93 (Kennedy, J., dissenting). Here, plaintiff has not even challenged that aspect of UT's plan in her petition for rehearing, and scarcely at all in this case.

As the Supreme Court reiterated, another key aspect of the narrow-tailoring inquiry is whether the university has shown that it resorted to the consideration of race only after giving "'serious, good faith consideration of workable, race-neutral

alternatives.'" *Fisher*, 133 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 339). Here again, there is no serious question that this requirement is met. As the panel explained, "[p]ut simply, this record shows that UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program—in addition to an automatic admissions plan not required under *Grutter* that admits over 80% of the student body with no facial use of race at all." Slip op. 22; *see id.* at 19-23. Judge Garza himself agreed that "the University's many efforts to achieve a diverse campus learning environment without resorting to racial classifications are commendable." *Id.* at 66 (Garza, J., dissenting). Yet, despite these many efforts, the record establishes that "minority representation then remained largely stagnant, within a narrow oscillating band." *Id.* at 23; *see* UT Suppl. Br. 35. The petition does not challenge those findings.

The panel also correctly found that "UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission—as described by *Bakke* and *Grutter*." Slip op. 35; *id.* at 38. Despite its benefits, the Top 10% law "mechanical[ly]" looks only to one factor—class rank. *Id.* at 15-16. As the panel explained in detail, UT's holistic plan "mitigat[es] in an important way the effects of th[is] single dimension process" and directly advances UT's objective to achieve

student body diversity in the *full* sense recognized by the Supreme Court—*i.e.*, by seeking students with a "'broad[] array of qualifications and characteristics'" among all racial groups. Slip op. 29; *Fisher*, 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 315 (Powell, J.)). As the panel explained, the record amply supports UT's judgment—shared by countless other schools—that holistic review enriches student body diversity in ways that cannot be accomplished through rote application of class rank. Slip op. 24, 29-30. That is why the Supreme Court has recognized that percentage plans are *not* a complete, workable alternative to holistic review, *Grutter*, 539 U.S. at 339-40, and why no selective college in America admits its students based on graduating high school class rank alone.

Contrary to plaintiff's assertion (at 8, 12-14), admissions data also establishes that underrepresented minorities admitted through holistic review in the years at issue were, on average, more likely than their Top 10% admit counterparts to have more varied socioeconomic backgrounds and have higher SAT scores. *See* UT Suppl. Br. 33-34; UT S. Ct. Br. 33-34. Moreover, as the record establishes, holistic review allows UT to examine students "in their totality," S. Ct. JA 204a, including what their experiences show about how students "maneuver in their own world" and "someone else's world," *id.* at 210a, which can be key to promoting cross-racial understanding on campus. *See id.* at 208a-211a, 285a. Holistic admits

are among the most talented, academically promising, and well-rounded students at UT, and have especially strong potential to be change agents on campus.

The panel also correctly found that the record establishes that UT's "holistic use of race plays a necessary role in enabling it to achieve diversity." Slip op. 36. Indeed, African-American enrollment at UT doubled from 2002 to 2008—from 3% to 6%, S. Ct. Suppl. JA 156a—and rose in 2005, 2006, 2007, and 2008, slip op. 32-33. Hispanic enrollment likewise gained under the plan. *Id.* The holistic consideration of race also offset the declining odds of admission that African-American and Hispanic applicants had experienced in the ultra-competitive holistic pool. *Id.* at 35-36. Yet, despite these incremental gains, minority representation at UT—especially among African Americans—remained alarmingly low, which plaintiff seeks to mask by crudely lumping together different minority groups. UT Suppl. Br. 47. Again, plaintiff has not disputed the figures.

3. Plaintiff's attempts to impugn the panel's careful analysis are unpersuasive. Her central claim (at 6) that the Court disregarded the Supreme Court's holding that UT is not entitled to deference on narrow tailoring is directly contradicted by the decision. The panel repeatedly emphasized that it was required to give "exacting scrutiny to UT Austin's efforts to achieve diversity," slip op. 2; that the university bears the burden in establishing that its plan is narrowly tailored, *id.* at 13; and that the university "'receives no deference' on this point," *id.*

(quoting *Fisher*, 133 S. Ct. at 2420). *See also id.* at 10 ("exacting scrutiny" required); *id. at* 13-14 (university bears burden on narrow tailoring); *id. at* 17 ("no deference"); *id.* ("[c]lose scrutiny of the data in this record"). "Such a verification," the Court stressed, "requires a 'careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.'" *Id.* at 13-14 (citation omitted). The panel meant what it said. "Affording no deference" and with "[c]lose scrutiny of the data in this record," the panel meticulously and painstakingly examined the facts before it to determine whether UT's plan was narrowly tailored. *Id.* at 17. The fact that the panel reached the same result in no way means that it did not faithfully carry out the remand order.

Likewise, contrary to plaintiff's contention (at 7-9), the panel grounded its decision in the record. The opinion meticulously examines the data *in the record* in finding that the policy in 2008 was necessary, individualized, and meaningful. "Close scrutiny of the data in *this record*" convinced the Court that UT had shown that student body diversity had suffered or remained stagnant before the enactment of the challenged plan (slip op. 17, 22-23 (emphasis added)); the Top 10% law crowded out available spaces and thereby increased the competition for holistic review spaces and the underrepresentation of minority students in the holistic admit pool (*id.* at 17-18); UT tried numerous race-neutral tools before adding race in holistic review (*id.* at 19-22); and holistic review with race as a factor attracted

better qualified and more well-rounded students (*id.* at 18-19) and ultimately had a meaningful impact on student body diversity (*id.* at 32-35).

The opinion also notes—predominantly in footnotes—that the trends established by the record hold true in subsequent years as well and cites data publicly available on UT's website or from amicus briefs and published academic sources. Plaintiff herself has relied on post-2008, publicly available material. *E.g.*, Pl. Suppl. Br. 24 n.2. But in any event, these references underscore the thoroughness of the panel's scrutiny (and soundness of UT's judgments). They do not detract from the majority's painstaking scrutiny of the facts *in the record* (which plaintiff notably does not challenge), or from its well-supported ultimate conclusion that UT's policy was indeed narrowly tailored in 2008—the year that matters for purposes of plaintiff's backward-looking claim. *See* UT Suppl. Br. 7; UT S. Ct. Br. 44 n.9. Likewise, the panel's indisputable observations about the practical realties underlying the operation of the Texas Top 10% law provide no basis for second-guessing the panel's decision. *See Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting). These realities are not new, and plaintiff has never denied the existence of de facto segregation due to residential patterns in Texas's public school system. *See* UT S. Ct. Br. 33. Nor could she.

Tellingly, while she aggressively attacks the panel's decision and even the panel's motives (PFR 9), plaintiff does not challenge any specific facts explained

by the panel based on the record evidence—either with respect to the jarring lack of diversity UT faced before the plan at issue, the exhaustive efforts UT initially took to address that problem through race-neutral means, or the gains UT has realized in promoting student body diversity through its limited consideration of race under the challenged plan. Applying exacting scrutiny, the panel correctly found that those facts confirm that UT's plan is "narrowly tailored to obtain the educational benefits of diversity." *Fisher*, 133 S. Ct. at 2421.

II. THE PANEL'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR ANY OTHER COURT

Plaintiff's claim (at 10-15) of a conflict with other Supreme Court precedent also fails. While the alleged conflict really just boils down to a disagreement with the panel's application of law to facts, she asserts two generalized conflicts.

1. Plaintiff alleges (at 10) that the panel erroneously adopted a "qualitative" conception of critical mass, essentially recycling plaintiff's arguments that the constitutional flaw in UT's plan is actually that UT has not adopted hard targets (or quotas). PFR 10-11. Yet, as the panel explained, a qualitative concept of critical mass is precisely what *Grutter* embraces. Slip op. 34. In *Grutter*, which the Court explicitly accepted in *Fisher*, the Supreme Court explained that the law school "did not quantify critical mass in terms of numbers or percentages," but rather "defined [critical mass] by reference to the educational benefits that diversity is designed to produce." 539 U.S. at 318-19, 330. Likewise, in this case, the Court not only

reiterated that the compelling interest in student body diversity is diversity in the broad—rather than numerical (*i.e.*, "'specified percentage'")—sense, but specifically framed the inquiry on remand in terms of whether UT's plan was "narrowly tailored to obtain the *educational benefits of diversity*." *Fisher*, 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 315 (Powell, J.)), 2421.

As the panel explained, "[plaintiff] points to numbers and nothing more in arguing that race-conscious admissions were no longer necessary because a 'critical mass' of minority students had been achieved by the time Fisher applied for admission—a head count by skin color or surname that is not the diversity envisioned by *Bakke* and a measure it rejected." Slip op. 34. Judge Garza agreed. *See id.* at 54 n.11 (Garza, J., dissenting) ("[Plaintiff] effectively asks us to ratify racial quotas, which we cannot, and will not, do."). Conversely, recognizing that critical mass is a qualitative concept does not mean that it is unmeasurable. As UT has explained, it has looked to several data points in gauging whether it has achieved its interest in student body diversity, including hard data on minority admissions, enrollment, and reports of racial isolation at UT, as well as direct feedback from students and faculty. UT Suppl. Br. 45-46; UT S. Ct. Br. 41. And Judge Garza, who criticized the "critical mass" concept, nevertheless agreed that UT had shown that it had *not* reached a "'critical mass' in 2004." Slip op. 54 n.11 (Garza, J., dissenting). So even Judge Garza recognized it is measurable.

Plaintiff likewise errs (at 5) in attacking UT's interest in seeking diversity within racial groups as well as among them. This interest is not new. The Harvard Plan embraced by the Supreme Court in *Bakke* recognized this interest, *Bakke*, 438 U.S. at 324 (describing Harvard plan), and UT similarly recognized that students from different backgrounds bring different perspectives, *see* S. Ct. JA 207a-211a, 285a. Moreover, "diversity within diversity" is not some independent objective—it is the very essence of the type of broad student body diversity that the Supreme Court has embraced since *Bakke*. Ensuring a diversity of backgrounds—within racial groups—is one of the best ways to help breakdown racial stereotypes and promote cross-racial understanding, and often students who come from integrated environments are particularly successful in bridging racial barriers. UT Suppl. Br. 48. And the data shows that holistic minority admits had more varied socioeconomic and other circumstances than Top 10% plan admits. *Supra* at 6.

2. Plaintiff also alleges (at 7) that the decision conflicts with the Court's observation in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 734 (2007), that the race-conscious plan had only a "minimal impact." That argument is doubly wrong. To begin with, it misreads *Parents Involved*. Instead of announcing a "bedrock equal-protection rule" (PFR 7), the Supreme Court's "minimal impact" reference in *Parents Involved* has to be understood in the context of the plan at issue in that case—a crude, binary racial

classification. *Parents Involved*, 551 U.S. at 734-35. As Judge Garza himself recognized, it does not follow that a "minimal impact" would doom a *Grutter*-type, individualized holistic plan. *See* slip op. 55 (Garza, J., dissenting). Indeed, the whole point of such a plan is to consider race only in a *modest* way. That presumably is why Justice Kennedy observed, "I see an inconsistency here" (S. Ct. Oral Arg. Tr. 23), when plaintiff tried to advance this point at oral argument.

Moreover, the argument rests on an erroneous premise concerning the impact of UT's plan. Far from showing that the plan had but a "*de minimis*" impact (PFR 7), the record demonstrates that the plan has had a difference-making impact on student body diversity, both qualitatively and quantitatively. *See* slip op. 33-34; UT Suppl. Br. 36-37. Indeed, plaintiff herself has admitted that UT's consideration of race is "meaningful." *See* S. Ct. JA 113a. Plaintiff nevertheless repeats (at 15) her misleading claim that race mattered for "likely only a few dozen" minority students. As UT has explained, this figure not only erroneously looks at diversity from a single discrete perspective, but it fails to account for the unique context of the 2008 admissions cycle. UT Suppl. Br. 38.

Notably, plaintiff relies most extensively in her petition on dissenting or non-controlling opinions (a fact that is disguised by the omission of "dissenting" once an opinion is first cited) and cites to the majority decision in *Grutter* just once (at 12). That lays bare that plaintiff has little interest in litigating this case under

existing law—the precedent that the Supreme Court accepted "as given" in *Fisher*. Plaintiff's amici are even more forthright in challenging existing Supreme Court precedent. But the panel was bound by that precedent—and properly applied it.

III. ADDITIONAL FACTORS WEIGH AGAINST EN BANC REVIEW

Plaintiff argues (at iv) that it "would be difficult to find a case more worthy of rehearing en banc." But plaintiff has failed to show any conflict of authority with this Court's or the Supreme Court's precedent. Moreover, plaintiff's argument on the importance of this case rests on the premise that the panel's decision will give a "green light" to the use of race generally in college admissions across the country. PFR 9 (internal quotation marks omitted); *see id.* at iv. That concern rings hollow when considered against plaintiff's complaint that UT has considered race in a *more modest* fashion than the plan in *Grutter*. And in any event, the panel's decision not only repeatedly emphasizes the "exacting scrutiny" that courts must apply in this context (slip op. 2, 10, 13-14, 17), but is grounded in the unique features of UT's own plan and history in seeking to achieve student body diversity, including Texas's one-of-a-kind Top 10% law. Those features are not replicated at any other university in this Circuit—or country. The panel's decision, as the panel stressed, thus "offers no template for others." *Id.* at 39.

Furthermore, when it comes to secondary considerations, what stands out is not the importance of this case outside Austin—but the serious questions over

whether this case has become simply an "empty vehicle for ideological struggle." Adam D. Chandler, *How (Not) To Bring An Affirmative-Action Challenge*, 122 Yale L.J. Online 85, 95 (2012). Plaintiff graduated from another university in 2012 and has only a backward-looking claim remaining challenging the denial of her application in 2008. Slip op. 5. She did not bring a class claim. It is undisputed that, given plaintiff's academic index score, she would have been denied admission in 2008 even if she had received a perfect personal achievement index score (and, thus, no matter what her race). *Id.* at 5 & n.17. Plaintiff's sole remaining claim for relief is a request for damages consisting of a $100 application fee, *id.* at 5—which she would have paid even if UT's policy had not considered race and even if she had been admitted. And plaintiff did not request nominal damages. *See* S. Ct. JA 79a. The peculiar if not flawed way in which plaintiff framed this case provide all the more reason to forego en banc review.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be denied.

Respectfully submitted,

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Dated: August 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2014, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of the Court via the CM/ECF system and transmitted to counsel registered to receive electronic service.

I also caused true and correct copies of the foregoing to be delivered via first-class mail to the following counsel of record not registered to receive electronic service:

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