No. 14-981

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

REPLY BRIEF

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REPLY BRIEF

The University of Texas at Austin's ("UT") Brief in Opposition ("BIO") continues UT's determined effort to avoid this Court's review of the precedentially important question presented: whether UT's pervasive use of racial preferences is necessary and narrowly tailored to achieve educational diversity. To evade the issue, UT rehashes meritless vehicle arguments, asks for deference to the Fifth Circuit's unsupported assurance there is record evidence justifying UT's policy, refashions its failure to substantiate a post hoc "qualitative" rationale as a lurking fact issue, and points to future challenges to this Court's equal-protection jurisprudence in the hope it will deflect attention from the refusal below to apply their teaching. UT's gambits should meet the same fate as they did when UT deployed them in opposing certiorari in *Fisher I*.

Occasionally, important cases are straightforward. This is one of them. Unless the settled rule that racial preferences only may be used as a "last resort" is abandoned, UT's system is unconstitutional. Throughout this litigation, UT has searched in vain for a constitutional justification for its use of race. It found the next best thing: an appellate court willing to defer to litigation-motivated rationalizations and stereotyping. Allowing this to pass as strict scrutiny, in disregard of *Fisher I* and the body of equal-protection cases that decision invoked, will have profound consequences. If UT's use of racial preferences can be sustained on this flimsy record, it is difficult to see how strict scrutiny could ever suffice to make even limited use of racial preferences constitutionally tolerable.

I. UT's Renewed Assertion That Vehicle Issues Plague This Case Is Meritless.

UT claims this is "an unseemly vehicle" for deciding the question presented. BIO 26. But UT only repeats arguments this Court previously rejected. UT again suggests this case is moot because Ms. Fisher lacks a damages claim, *compare* BIO 26-27, *with Fisher I* BIO 10-20. And UT again argues that Ms. Fisher lacks standing because she would have been denied admission to the Fall 2008 class if race were not considered, *compare* BIO 27-28, *with Fisher I* Resp. Br. 16-17 n.6. The Court did not overlook these arguments the first time, *Fisher I* Oral Argument Tr. 3-8, and nothing has changed since then. Given the Court's duty to assure itself of jurisdiction, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998), that is the end of the matter.

A second look would change nothing. Ms. Fisher's $100 restitution claim, Restatement (Third) of Restitution and Unjust Enrichment § 3, is traceable to denial of her "opportunity to compete for admission on an equal basis," *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003), and pleadings do not control availability of nominal damages, *Mitchell v. Horn*, 318 F.3d 523, 533 n.8 (3d Cir. 2003). Ms. Fisher also sought "[a]ll other relief this Court finds appropriate and just." *Fisher I* BIO 7. That demand includes nominal, *Mitchell*, 318 U.S. at 533 n.8, and compensatory damages, *Kursar v. TSA*, 751 F. Supp. 2d 154, 161 n.5 (D.D.C. 2010), relief that is likewise available here, *Fisher I* BIO 13, even setting aside that Ms. Fisher preserved the right to amend her damage claims in the bifurcated second phase of this litigation.

UT's standing argument is equally weak. The issue of "admission *vel non* is merely one of relief," not standing. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978). Because of bifurcation, admission *vel non* would be resolved after liability is adjudicated. Regardless, UT's argument conflicts with its statement that it could not evaluate her chances of admission under a race-neutral system without rerunning its entire process. Opp. to Mot. For Prelim. Injunction, *Fisher v. University of Texas*, No. 08-263, at 12 (W.D. Tex. May 5, 2008). Further, UT ignores that Ms. Fisher's application was also reviewed for individualized admission to the Summer 2008 class, and that "64 minority students with an AI score lower than [hers] received admission to the school of Liberal Arts" in that process. *Fisher v. University of Texas*, 556 F. Supp. 2d 603, 607 & n.2 (W.D. Tex. 2008). In sum, Ms. Fisher's injury is "likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).

Thus, no vehicle issue impedes review. But there is a greater concern here. In the initial Fifth Circuit review, UT did not question Ms. Fisher's standing or her damages claim. In opposing certiorari, UT argued mootness for the first time. It then acknowledged in its merits brief that damages were "still alive in this case," Resp. Br. 17 n.7, only then to argue that Ms. Fisher lacked standing because—contrary to what it told the district court—UT could in fact determine she would not have been admitted to the Fall 2008 class. Now, in a manner revealing its fear of this Court's further review, UT revives both arguments. As before, this Court should not be swayed.

II. UT Cannot Deny That This Petition Raises An Important Federal Question.

As the previous certiorari grant shows, the question presented is undoubtedly important. "Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality." *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting). Allowing a flagship university like UT to racially discriminate for reasons that cannot survive strict scrutiny will cause harm extending far beyond Texas. Petition ("Pet.") 29-33. That "refusal to apply meaningful strict scrutiny will lead to serious consequences." *Grutter*, 539 U.S. at 393 (Kennedy, J.).

The message will be clear if the remand opinion stands unreviewed: the command that traditional strict scrutiny applies to higher education may be readily evaded; lower courts need only invoke the rhetoric of strict scrutiny while practicing rational-basis review. Pet. 14-19. The key insight of *Fisher I* was that "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts." Pet. App. 113a-114a. The Court must confront the decision below if that important directive is to be taken seriously.

UT tries to minimize the case's importance on the ground that this is not a class-action lawsuit. BIO 26-27. But UT ignores that equal protection is an individual, not group-based, constitutional guarantee. "It follows from that principle that all governmental action based on race … should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of

the laws has not been infringed." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Thus, "when governmental decisions 'touch upon an individual's race or ethnic background, [s]he is entitled to a judicial determination that the burden [s]he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'" Pet. App. 105a. UT's pretense that this case is unimportant because Ms. Fisher seeks relief "solely on behalf of herself," BIO 26, confirms that it has a distorted view of the Equal Protection Clause.

Regardless, UT's argument ignores the far-reaching importance of the equal-protection issue presented. First, UT conveniently ignores the broader consequence for its admissions system and race preferences arising from the legislature's conditional capping of the Top 10% Law to 75% of the freshman class. Tex. Educ. Code § 51.803(a-1). Texas law provides that the Top 10% Law will be uncapped if Ms. Fisher prevails. *Id.* § 51.803(k)(1). If the decision below is reversed, future freshman classes almost certainly will be filled though a democratically chosen, race-neutral system.

Second, the many thousands of applicants who have been, are now, and will be subject to disparate treatment because of UT's restoration of racial preferences share Ms. Fisher's injury and will share in her victory. Try as it might, UT cannot deny that its system categorizes *every* applicant by race, scores them all (partially based on race), and plots them on a grid to make admissions decisions even though the race-neutral Top 10% admissions policy has made UT one of the most diverse public universities in the nation. If UT's use of race is properly recognized as unconstitutional, universities across the nation will have to

seriously confront whether their use of race preferences are based on a record that could survive traditional strict scrutiny.

Recent events confirm that elite universities, all of which are monitoring this proceeding, BIO 3 (citing *Fisher* Amicus Br. for Amherst and 36 Additional Private Colleges and Universities), will evade their responsibilities so long as they feel insulated from close judicial scrutiny. Only a "breathtakingly cynical," *Grutter*, 592 U.S. at 393 (Kennedy, J.), culture could explain UT's decision to run a secret, race-based admissions program for well-connected applicants. Cato Amicus Br. 8-12. And only such a culture could imbue administrators with the confidence to believe they can systematically destroy application files, Joseph Pomianowski, *Yale Law School Is Deleting Its Admissions Records, and There's Nothing Students Can Do About It*, New Republic (Mar. 15, 2015), yet prove to "[p]rospective students, the courts, and the public … their process is fair and constitutional in every phase of implementation," *Grutter*, 539 U.S. at 394 (Kennedy, J.). This is all "further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decision-making." *Id.*

The stakes therefore could not be higher. Policies like the Top 10% Law advance the "moral imperative of racial neutrality," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring), by recognizing socioeconomic challenges shared by students from all backgrounds are the "special circumstances" that should be "considered in order to improve their educational opportunities," *Grutter*, 539 U.S. at 394 (Kennedy, J.). Not only do such policies achieve the benefits of diversity, they

do so in a way "more effective" than racial preferences "in bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Id.* at 394-95. For that reason, *Fisher I* was clear that "before turning to racial classifications," universities must investigate whether "a nonracial approach ... could promote the substantial interest about as well and at tolerable administrative expense." Pet. App. 112a. But if UT may justify racial preferences over a proven race-neutral Top 10% policy on shifting, post hoc, and groundless theories, "educational institutions" will have no incentive "to seriously explore race-neutral alternatives." *Grutter*, 539 U.S. at 394 (Kennedy, J.). Only "[c]onstant and rigorous judicial review forces" universities officials "to undertake their responsibilities … in this most sensitive of areas with utmost fidelity to the mandate of the Constitution." *Id.* at 393.

The way in which this case is styled therefore has no bearing on the overriding issue: whether UT has provided a record-supported justification showing it was "'necessary' … to use race" because "no workable race-neutral alternatives would produce the educational benefits of diversity." Pet. App. 111a-112a. It is understandable that UT would prefer to avoid defending its policy as narrowly tailored under traditional strict scrutiny and instead posture this case as about the larger battle over whether there is a compelling interest in diversity, BIO 28-29, an issue over which people of goodwill may disagree, *Schuette v. BAMN*, 134 S. Ct. 1623, 1638-39 (2013) (Roberts, C.J., concurring). But Ms. Fisher had no need to challenge that interest to restore racial neutrality to UT's process so long as it remains true that "individual racial classifications … may be considered legitimate only if they are a last resort

to achieve a compelling interest." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring).

A constitutional battle over the validity of a racial diversity interest may someday be fought. But when and if that issue is ultimately resolved, it will be cold comfort to the countless number of high school students who will have suffered racial discrimination in the intervening years. Nor will these students "find solace in knowing the basic protection put in place by Justice Powell will be suspended" indefinitely. *Grutter*, 539 U.S. at 394 (Kennedy, J). Needless to say, affirming that race only may be used as a last resort (as the Court rightfully thought it achieved with near unanimity in *Fisher I*) will do far more to eliminate classifications that "are by their very nature odious to a free people," App. 108a (citations and quotations omitted), than allowing a Fifth Circuit decision that rubber stamped UT's indefensible system to be the final word.

III. UT's Ever-Shifting Defense Of Its Use Of Race Confirms That Review Is Needed.

UT's defense of the decision below shows how far it will go to avoid review. Strict scrutiny is framed by two preconditions: (1) the rationale for using racial preferences may not be a post hoc response to litigation; and (2) that rationale must be grounded in the record. Pet. 15-16. UT's attempt to reverse-engineer fidelity to these preconditions renders its position virtually incomprehensible. At this juncture, only one thing is clear: UT's shifting arguments are merely "rationale[s] of convenience for a policy" it would "prefer to justify on other grounds." *Grutter*, 539 U.S. at 393 (Kennedy, J.) (citation omitted).

After spending years chiding Petitioner for arguing that the level of minority enrollment was central to the critical-mass question, UT now acknowledges it reinitiated racial preferences to "boost minority enrollment." BIO 3; *id*. 4 ("decline in enrollment of underrepresented minorities"); *id*. 5 ("minority enrollment remained stagnant or worsened"); *id.* 8 ("enrollment increased after UT adopted its race-conscious policy"); *id*. 17 ("minority enrollment increased after adoption of the plan"); *id.* 20 ("diversity had suffered or remained stagnant"). The concession is welcome, but does not help UT. If minority enrollment numbers are determinative, UT's use of race in 2008 is constitutionally indefensible. Pet. 28.

Likely because adding race to holistic admissions was so ineffectual in increasing minority enrollment, UT then downplays that interest. Pet. 28. Changing direction, UT argues that "the diversity that matters in this context is *qualitative*." BIO 23. But that truism has nothing to do with this case. *Grutter's* premise is that racial diversity will improve the quality of education for all. Yet adding race to UT's existing holistic admissions system could not increase "qualitative" diversity; all adding race to holistic admissions does is distinguish applicants on the basis of their race. Pet. 30-31. UT's "diversity within diversity" interest is merely a justification for perpetual use of racial preferences when a critical mass of minority students was otherwise achievable.

UT responds that adding race to holistic admissions was needed to admit a certain kind of minority applicant, one that is "more likely, because of their backgrounds to enrich the educational experience for all students at UT." BIO 24. The problems with UT's claim that minorities

admitted via the Top 10% law are somehow less likely to have these desirable traits are almost too numerous to mention. Pet. 19-29. Foremost, UT had no idea if, in 2008, its campus lacked such minority students because it never looked. Pet. 17-18. UT points to two sentences from its 2004 Proposal to Consider Race. BIO 23. The first parrots *Grutter*, Supp. JA 1a, and the second describes admission criteria, *id.* 23a. Neither shows that UT studied whether the pre-2004 race-neutral system led to a deficiency in intraracial diversity nor how adding race to the holistic factors would address that issue.

The Proposal's classroom diversity and demographic analyses reveal what UT actually studied in 2004. But UT has abandoned those interests. BIO 25 n.3. Accordingly, there are no disputed liability facts. BIO 21-22. On this fully developed summary-judgment record, UT simply lacks the record evidence necessary to meet its strict-scrutiny burden.

UT then falls back to the Fifth Circuit's general assurance that it closely examined the record and found supporting evidence. BIO 20. But surely UT would have been able to muster more than two irrelevant Proposal citations if that were true. The panel's assertion that there is record evidence is not the same as there actually being record evidence. Pet. 16-18. UT's defense devolves into a plea for successive deference: UT convinced the Fifth Circuit to defer to it and now would like this Court to defer to the Fifth Circuit. Both premises are unacceptable.

Last, UT invokes *Bakke* to support its diversity-within-diversity rationale. BIO 22-25. But Justice Powell's *Bakke* opinion assumed an individualized, essentially

race-neutral, admissions system where competition for a few remaining places might include consideration of race. Pet. 27-28. UT, in contrast, makes score-driven, impersonal admissions decisions where race is a universal scoring element and seeks to justify going beyond the substantial minority representation generated by the Top 10% Law by using sweeping generalizations about the "socioeconomic backgrounds" and average SAT scores of Top 10% minority admits. BIO 16-17. The two admissions systems could not be more different.

"The purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that … the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493. But instead of smoking out such prejudice, the decision below endorsed it. UT had no support for its claim that an "African American fencer" or "Hispanic who has … mastered classical Greek," Oral Argument Tr. 61, would only be found outside the Top 10% of the Texas high school graduating class or even that it had found such rare students through its so-called holistic process. Worse still, the assertion that minority students admitted via the Top 10% Law could not enrich UT's educational experience is stereotypical and disparaging to those who overcame life's disadvantages to find success at majority-minority schools. UT's reliance on stereotyping, rather than conforming to *Bakke,* "should warn us something is amiss here." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 632 (1995) (Kennedy, J. dissenting).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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