

No. 09-50822

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ABIGAIL NOEL FISHER,
Plaintiff - Appellant

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Defendants - Appellees

On Remand from the Supreme Court of the United States

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

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Dated: October 4, 2013

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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3. William Powers, Jr., President of the University of Texas at Austin
4. Board of Regents of the University of Texas System
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6. Wm. Eugene Powell, Member of the Board of Regents
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TABLE OF CONTENTS

Page(s)

CERTIFICATE OF INTERESTED PERSONSi

TABLE OF AUTHORITIESiv

INTRODUCTION 1

ARGUMENT3

I. THIS COURT CANNOT AND SHOULD NOT REMAND THE CASE BEFORE ADJUDICATING THE PARTIES’ CROSS-MOTIONS FOR SUMMARY JUDGMENT.....3

II. THERE ARE NO ISSUES OF STANDING.....10

III. UT CANNOT MEET THE HEAVY BURDEN OF JUSTIFYING ITS SYSTEM OF RACIAL PREFERENCES UNDER THE REQUISITE TRADITIONAL STRICT-SCRUTINY ANALYSIS.17

A. The Supreme Court Requires UT To Satisfy Traditional Strict Scrutiny Without The Aid Of Judicial Deference.....17

B. UT Fails Strict Scrutiny For Several Independent Reasons.....22

1. UT has failed to demonstrate with clarity that its use of race is necessary to achieve critical mass.22

2. Race-neutral alternatives have worked and would work about as well as racial preferences.....33

3. UT’s claimed interest in demographic representation, classroom diversity, and intra-racial diversity could never be implemented in a narrowly tailored way.....41

4. UT’s use of race is not narrowly tailored given its arbitrary manipulation of racial categories.47

CONCLUSION50

CERTIFICATE OF SERVICE51

CERTIFICATE OF COMPLIANCE.....52

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Adams v. Travelers Indemnity Co.</i> , 465 F.3d 156 (5th Cir. 2006)	8
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995).....	12, 18, 20
<i>Arbaugh v. Y&H Corp.</i> , 546 U.S. 500 (2006).....	13
<i>Arkwright-Boston Manufacteurs Mutual Insurance Co. v. Aries Marine Corp.</i> , 932 F.2d 442 (5th Cir. 1991)	9
<i>BGHA, LLC v. City of Universal City, Texas</i> , 340 F.3d 295 (5th Cir. 2003)	9
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993).....	5
<i>Bucolo v. Adkins</i> , 424 U.S. 641 (1976).....	10
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989).....	<i>passim</i>
<i>Deen v. Hickman</i> , 358 U.S. 57 (1958).....	10
<i>Deffenbaugh-Williams v. Wal-Mart Stores, Inc.</i> , 188 F.3d 278 (5th Cir. 1999)	7
<i>EEOC v. Westinghouse Electric Corp.</i> , 925 F.2d 619 (3d Cir. 1991)	7
<i>Fisher v. University of Texas at Austin</i> , 556 F. Supp. 2d 603 (W.D. Tex. 2008)	16

Fisher v. University of Texas at Austin,
631 F.3d 213 (5th Cir. 2011) *passim*

Fisher v. University of Texas at Austin,
644 F.3d 301 (5th Cir. 2011) (en banc)*passim*

Fisher v. University of Texas at Austin,
133 S. Ct. 2411 (2013).....*passim*

General Atomic Co. v. Felter,
436 U.S. 493 (1978).....10

Gratz v. Bollinger,
539 U.S. 244 (2003).....14

Grutter v. Bollinger,
539 U.S. 306 (2003).....*passim*

In re Holloway,
955 F.2d 1008 (5th Cir. 1992)8

LaShawn A. v. Barry,
87 F.3d 1390 (D.C Cir. 1996).....11, 12

LULAC v. City of Boerne,
675 F.3d 433 (5th Cir. 2012)4

*Northeastern Florida Chapter of Associated General Contractors
of America v. City of Jacksonville, Florida*,
508 U.S. 656 (1993).....12

Ozee v. American Council on Gift Annuities, Inc.,
143 F.3d 937 (5th Cir. 1998)8

Panasonic Co., Division of Matsushita Electric Corp. of America v. Zinn,
903 F.2d 1039 (5th Cir. 1990)9

Parents Involved in Community Schools v. Seattle School District No. 1,
551 U.S. 701 (2007).....*passim*

Regents of the University of California v. Bakke,
438 U.S. 265 (1978).....13, 25

Rice v. Cayetano,
528 U.S. 495 (2000).....40

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895).....4, 10

In re SeaQuest Diving, LP,
579 F.3d 411 (5th Cir. 2009)6

Shrink Missouri Government PAC v. Maupin,
71 F.3d 1422 (8th Cir. 1995)7

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998).....11

Sullivan v. Lemoncello,
36 F.3d 676 (7th Cir. 1994)7

United States v. Lee,
358 F.3d 315 (5th Cir. 2004)11

Vendo Co. v. Lektro-Vend Corp.,
434 U.S. 425 (1978).....10

Washington v. Finlay,
664 F.2d 913 (4th Cir. 1981)7

Wilkinson v. Austin,
545 U.S. 209 (2005).....4

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986)..... *passim*

STATE STATUTES

Tex. Educ. Code § 51.803(a-1).....35

OTHER AUTHORITIES

2010-2011 Impact Report, available at
www.utexas.edu/diversity/pdf/DDCE_ImpactReport.pdf (last visited Oct.
3, 2013)24

Bill Keller, *Affirmative Reaction*, New York Times, June 9, 201338

Class of First-Time Freshmen Not a White Majority This Fall Semester at
the University of Texas at Austin (Sept. 14, 2010), available at
www.utexas.edu/news/2010/09/14/student_enrollment_2010/.....24

Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access &
Diversity*, 7 Harv. L. Pol’y Rev. 367 (2013)38

INTRODUCTION

In its decision vacating and remanding this Court’s prior decision, *see Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011), the Supreme Court instructed that this Court undertake the responsibility of applying traditional standards of strict scrutiny to UT’s racial admissions preferences in the first instance, *see Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). In particular, the Supreme Court ordered 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. The Supreme Court circumscribed the limited area in which this Court could defer to UT’s academic judgment. It made clear that the burdens of strict scrutiny remain on UT at all times. And, the Supreme Court emphasized that UT must demonstrate “with clarity” that: (1) its asserted “critical mass” goal is constitutionally permissible and that the means chosen to achieve it are narrowly tailored to that end; (2) its resort to racial preferences is constitutionally necessary and that a race-neutral approach would not work about as well; and (3) it can meet these obligations without the benefit of judicial deference. Were it otherwise, strict-scrutiny analysis would be “strict in theory but feeble in fact.” *Id.*

Rather than expressing confidence in its admissions program and welcoming the opportunity to prove to this Court that Texas’s flagship university exercises the

public trust within constitutional bounds, UT has resorted to an endless stream of evasive tactics, including an effort to reargue a so-called “standing” challenge rejected by the Supreme Court and a call for a gratuitous remand to the District Court for no specified purpose. This Court should reject these strategic machinations and proceed directly to strict-scrutiny evaluation required by the Supreme Court’s mandate. Only by doing so can the Court honor Ms. Fisher’s right to equal protection, instruct courts throughout this Circuit on precisely how their duty to closely review racial admissions preferences—the necessary concomitant of allowing any encroachment on individual equal-protection rights—should be carried out, and provide guidance to universities nationwide on whether and how racial preferences may be employed in their own admissions programs.

Given its foot-dragging response, UT seems now to understand that its gratuitous and reflexive use of racial preferences will end in inevitably fatal judicial review. UT’s resort to evasion to preserve a flawed system of racial preferences that have no end point is the wrong response to the Supreme Court’s decision. Above all else, the Constitution forbids “racial classifications except as a last resort,” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring), and UT has no educational need to employ them. But racial preferences nevertheless remain the only answer for UT. “Because even University administrators can lose sight of the constitutional forest for the

academic trees, it is the duty of the courts to scrutinize closely their ‘benign’ use of race in admissions.” *Fisher v. University of Texas*, 644 F.3d 301, 304 (5th Cir. 2011) (Jones, J., dissenting from the denial of rehearing en banc).

Allowing UT to prolong the use of its unsustainable racial preferences by thwarting proper judicial review would subject additional UT admissions classes to constitutional infringement and wrongly seek to deny Ms. Fisher her day in court. It would be legally and morally wrong. UT should recall that history teaches that institutional intransigence ultimately will force the courts to conclude that the difficulty of judicially weeding out unconstitutional programs case-by-case outweighs any marginal educational benefit that might arise from racial preferences in admissions.

ARGUMENT

I. THIS COURT CANNOT AND SHOULD NOT REMAND THE CASE BEFORE ADJUDICATING THE PARTIES’ CROSS-MOTIONS FOR SUMMARY JUDGMENT.

This Court has asked whether it “should ... in its discretion remand to the district court for further proceedings?” Letter from Lyle W. Cayce, Clerk, to Bert W. Rein of Sept. 12, 2013, at 1 (“Supplemental Briefing Directive”). As Appellant has thoroughly explained, however, the Supreme Court’s mandate forecloses this Court from remanding before adjudicating constitutional liability. *See* Appellant’s Proposed Schedule for Supplemental Briefing and Response to Appellees’

Statement Concerning Further Proceedings on Remand at 2-3 (July 24, 2013) (“Appellant’s Proposed Schedule”); Appellant’s Reply in Support of Proposed Schedule for Supplemental Briefing at 2-6 (Aug. 1, 2013) (“Appellant’s Reply”).

The Supreme Court’s instruction on remand is clear and unequivocal: “*the Court of Appeals* must 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.” *Fisher*, 133 S. Ct. at 2421 (emphasis added). Thus, “[w]hether this record—and not ‘simple assurances of good intention,’ *Croson*, 488 U.S. at 500—is sufficient *is a question for the Court of Appeals in the first instance.*” *Id.* (emphasis added). The instruction is binding. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895); *LULAC v. City of Boerne*, 675 F.3d 433, 438 (5th Cir. 2012). The only course “consistent” with the Supreme Court’s mandate is for the “Court of Appeals” to apply the correct strict-scrutiny standard “in the first instance” based on “this record.” *Fisher*, 133 S. Ct. at 2421.

Contrary to UT’s suggestion, there is no ambiguity in the Supreme Court’s instruction. When the Supreme Court gives the court of appeals discretion to decide an issue itself or remand to the district court, it says so. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 230 (2005). Conversely, when the Supreme Court uses the kind of mandatory language it employed in this case, *viz.*, that a remanded issue is

“for” or “to” be decided by the courts of appeals “in the first instance,” appellate courts recognize that they must decide it themselves. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), *decided on remand* by 20 F.3d 789 (7th Cir. 1994). UT purports to find ambiguity in the Supreme Court’s observation that “fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis.” *Fisher*, 133 S. Ct. at 2421. But UT shuts its eyes to the Supreme Court’s instruction that this fairness be achieved by having the “Court of Appeals”—not the district court—conduct that inquiry “in the first instance.” *Id.*; *see also id.* at 2434 (Ginsberg, J., dissenting).

UT’s argument that a remand is warranted because unspecified further factual development might be needed before the cross-motions for summary judgment are adjudicated is likewise foreclosed by the Supreme Court’s mandate. The opinion makes clear that the question being remanded is “[w]hether *this record*—and not simple ... assurances of good intention—is sufficient” to sustain UT’s admissions program against constitutional challenge. *Id.* at 2421 (emphasis added) (citation omitted). UT has not even tried to explain how this Court could permit further discovery in light of this language. The Supreme Court has made its direction clear. That is the end of the matter.

And even if the Court had discretion to remand before resolving whether UT's program is constitutional, remand would serve no purpose save delay. First, there is no justification for further factual development. It has always been UT's position that whether its admissions program can survive strict scrutiny should be resolved on cross-motions for summary judgment. *See, e.g.*, Mem. in Supp. of Defs' Cross-Mot. for Summ. J. and in Opp. to Pl's Mot. for Partial Summ. J. at 1-2 (W.D. Tex. Feb. 23, 2009) (Doc. 96-1) ("UT Mem.") ("After extensive discovery, the parties agree[d] on the material facts of this case, and that summary judgment is proper" because "this case presents no genuine issue of material fact."); Defs' Reply Mem. In Supp. of Cross-Mot. for Summ. J. at 1 (W.D. Tex. Apr. 13, 2009) (Doc. 102) ("To begin with, the parties agree that there is no genuine issue of material fact and that summary judgment is appropriate."); Am. Tr. of All Pending Matters Before the Hon. Sam Sparks at 41:9-10 (W.D. Tex. June 12, 2009) (Doc. 118) ("The facts of this case are undisputed. Everybody agrees on that.") (Mr. Ho); Brief of Appellees at 8, 15, 34, 49 n.6 (Mar. 8, 2010) (referring to the "undisputed summary judgment record").

Having consistently maintained that the facts are "undisputed" and that summary judgment is proper, UT is barred from any belated attempt to create a disputed issue of fact on remand. *See In re SeaQuest Diving, LP*, 579 F.3d 411, 425-26 (5th Cir. 2009) (finding that an argument for "remand ... because genuine

issues of material fact exist” was “waived” because a party had “stipulated that there were no genuine issues of material fact”); *Shrink Mo. Gov’t PAC v. Maupin*, 71 F.3d 1422, 1423 (8th Cir. 1995); *Sullivan v. Lemoncello*, 36 F.3d 676, 678 (7th Cir. 1994). Moreover, Ms. Fisher’s reliance on strict scrutiny was hardly a secret, as there was “extensive discovery” in this case, UT Mem. at 1, and UT has nothing to discover from Ms. Fisher. Allowing UT to reverse course thus would be especially inappropriate given the “full and fair opportunity” it had to present “all the evidence available to [it] at the time” regarding the rationale for and operation of its use of racial preferences in admission. *Washington v. Finlay*, 664 F.2d 913, 925-26 (4th Cir. 1981).

Put simply, UT “is in no position at this stage of these lengthy proceedings to return to the trial court in order to litigate the [] same matters that it could and should have litigated initially.” *EEOC v. Westinghouse Elec. Corp.*, 925 F.2d 619, 631 (3d Cir. 1991). “A remand should not be ordered when ‘two bites of the apple’ would be given to a litigant who, under circumstances such as those at bar, has neglected to produce evidence to support a desired finding and has, therefore, failed to carry its requisite burden as to a particular issue.” *Id.*; *see also Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 282 (5th Cir. 1999). This is surely why the Supreme Court directed that this Court “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.” *Fisher*, 133 S. Ct. at 2421 (emphasis added).

Regardless, there are no further facts to develop. Indeed, despite multiple opportunities to do so, UT can find no argument otherwise. All UT can muster is a vague suggestion that it “is evaluating” whether “further fact finding is needed or warranted” Appellees’ Reply Concerning Further Proceedings on Remand at 5 (July 29, 2013) (“Appellees’ Reply”). But such a vague desire to search for unspecified evidence provides “no compelling reason to subject the parties and the courts to further delays and expense by remanding the case for application of the proper legal standard to the undisputed facts.” *In re Holloway*, 955 F.2d 1008, 1015 (5th Cir. 1992). “A party ‘cannot evade summary judgment simply by arguing that additional discovery is needed,’ and may not ‘simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.’” *Adams v. Travelers Indem. Co.*, 465 F.3d 156, 162 (5th Cir. 2006) (Higginbotham, J.). Because UT has not specified any “additional facts that await development,” there is no reason for the Court to “postpone the inevitable and remand to the district court.” *Ozee v. Am. Council on Gift Annuities, Inc.*, 143 F.3d 937, 940 (5th Cir. 1998).

The only possible reason for a remand would be for the district court to decide the legal question now before this Court. But no matter what the district

court decided, this Court would review the ruling *de novo*. See *BGHA, LLC v. City of Universal City, Tex.*, 340 F.3d 295, 297 (5th Cir. 2003) (“We review the grant of summary judgment *de novo*, applying the same standards as the district court.”). A remand would waste time, money, as well as judicial resources, and it would disserve the public interest. Ms. Fisher, the people of Texas, their elected representatives, and universities throughout the nation all have an interest in having this case, which has been pending since 2008, resolved as expeditiously as possible. This Court must and should address the merits.

Finally, the Court has asked whether “any remand to the district court [should] be accompanied by instruction from this court?” Supplemental Briefing Directive at 1. The answer is “Yes.” *After* applying the correct legal standard, this Court should reverse the district court’s grant of summary judgment to UT and enter judgment for Appellant as to liability. See *infra* at 17-50. The Court should *then* remand with instructions to proceed to the remedies phase in accordance with the district court’s bifurcation order, see *infra* at 13-14, and this Court’s established practice, see, e.g., *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 447 (5th Cir. 1991); *Panasonic Co., Div. of Matsushita Elec. Corp. of Am. v. Zinn*, 903 F.2d 1039, 1043 (5th Cir. 1990).

If the Court were nevertheless to remand the case before adjudicating the cross-motions for summary judgment,¹ it should instruct the district court to immediately adjudicate those motions based on the existing record and to issue its decision on constitutional liability within 45 days of the remand. The Supreme Court's mandate indisputably requires the cross-motions to be resolved based on "this record." *Fisher*, 133 S. Ct. at 2421.

II. THERE ARE NO ISSUES OF STANDING.

This Court has asked "[a]re there remaining questions of standing?" Supplemental Briefing Directive at 2. While UT now belatedly argues that Ms. Fisher lacks standing because she "would not have been admitted to UT's fall 2008 class ... no matter what her race," and therefore she was not injured by UT's race-based admissions policy, Appellees' Statement Concerning Further Proceedings on Remand at 5-6 (July 23, 2013) ("Appellees' Statement"), the answer is "No." UT's standing argument is foreclosed and, in any event, meritless.

First, the argument is foreclosed under the mandate rule. *See* Appellant's Proposed Schedule at 2-3; Appellant's Reply at 2-6. "The mandate rule compels

¹ If the Court remands before adjudicating liability, Ms. Fisher will seek a stay in order to seek emergency relief from the en banc court and/or the Supreme Court on the grounds that such an order violates the Supreme Court's mandate. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *see also, e.g., Gen. Atomic Co. v. Felter*, 436 U.S. 493, 497-98 (1978); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978); *Bucolo v. Adkins*, 424 U.S. 641, 643-44 (1976); *Deen v. Hickman*, 358 U.S. 57 (1958).

compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.” *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004). In adjudicating the merits of this dispute, the Supreme Court *necessarily* found that Ms. Fisher has standing. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 95 (1998). Moreover, as the oral argument transcript shows, the Supreme Court was well acquainted with UT’s argument and aware of its obligation to independently determine Article III jurisdiction before proceeding to the merits. *See Oral Arg. Tr.* 3:22-4:3; 4:9-14 (Oct. 12, 2012). As Justice Ginsburg explained, the Court must “raise it on its own” *Id.* 3:23-24. Accordingly, questions of standing are beyond the scope of this remand proceeding.

UT’s reference to “drive by” jurisdictional rulings confuses the precedential effect of the Supreme Court’s decision to reach the merits here without expressly discussing standing with its effect on the case at bar. Appellees’ Reply at 6. To be sure, the Supreme Court “does not consider itself bound by decisions on questions of jurisdiction made *sub silentio* in previous cases, when a subsequent case finally brings the jurisdictional issue to the Court.” *LaShawn A. v. Barry*, 87 F.3d 1390, 1395 n.6 (D.C. Cir. 1996) (citations omitted). But that rule applies only to “the *stare decisis* effect of decisions in *other* cases, not the effect of earlier decisions ... in the *same* case.” *Id.* Because the Supreme Court necessarily determined that Ms.

Fisher has standing in *this* case, it is law of the case and the mandate rule prohibits the lower courts from revisiting the issue. *See id.*

In addition, this Court has already correctly held that Ms. Fisher has standing, *see Fisher*, 631 F.3d at 217, and nothing has occurred since then to undermine that conclusion. *See* Appellant's Proposed Schedule at 8. The only change is in UT's position, as it previously took the position that Ms. Fisher *does* have standing. *See* Brief of Appellees at 29 ("Plaintiffs here have standing to challenge ... past UT admissions decisions."). UT has offered no reason for the Court to revisit this issue. Thus, to the extent that Ms. Fisher's ability to secure admission through an application process untainted by racial preferences actually implicates Article III standing, the issue is settled.

In truth, however, what UT frames as a standing issue is not one at all. All Ms. Fisher must show to establish Article III standing is unequal treatment in the admissions process on the basis of her race. *See Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.") (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-30 (1995)); *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more

difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”). UT concedes, as it must, that Ms. Fisher has met that burden. *See Fisher*, 631 F.3d at 230 (concluding that race “is undisputedly a meaningful factor that can make a difference in the evaluation of a student’s application”) (citation and quotations omitted). No more is required to establish Ms. Fisher’s Article III standing.

Contrary to UT’s assertion, then, whether Ms. Fisher would have been admitted through a race-neutral admissions system goes only to her ability to secure compensatory damages for rejection-related injuries—not her Article III standing. *See Regents of the University of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (“[E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing.... The question of Bakke’s admission *vel non* is merely one of relief.”). In other words, UT wrongly conflates a dispute over a potential aspect of Ms. Fisher’s damages claim with whether she has appropriately invoked this Court’s jurisdiction. *See, e.g., Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). Ms.

Fisher clearly has standing. Her entitlement to compensatory damages will be resolved on remand once liability has been established in accordance with the bifurcation order that governs the proceedings in this case. *See* Scheduling Order at 2 (W.D. Tex. July 10, 2008) (Doc. 60).

In fact, whether UT's admissions program is constitutional *must* be resolved before reaching questions of relief irrespective of the bifurcation order. “[W]hen governmental decisions touch upon an individual’s race or ethnic background, [she] is entitled to a judicial determination that the burden [she] is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.” *Grutter*, 539 U.S. at 323 (citations and quotations omitted). Ms. Fisher is no less entitled to a judicial determination as to whether she was allowed to “compete for admission on an equal basis” before litigating damages than a plaintiff seeking prospective relief for unequal treatment is entitled to the same determination before litigating whether an injunction is appropriate. *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003). The Supreme Court has made clear that the remedial cart does not come before the constitutional horse.

Moreover, allowing a university that employs racial preferences to avoid constitutional review by attempting to knock out applicants on “admission-*vel-non*” grounds at the outset of the case would require the termination of racial preferences altogether. Lower courts cannot permit universities, such as UT, to

hide behind subjective, hidden, and cloudy “holistic” admissions decisions while simultaneously forcing students to prove “but for” causation before proceeding to the merits. A university’s ability to pursue diversity through racial preferences is permissible “only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny.” *Fisher*, 133 S. Ct. 2418. “If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in [a] modest, limited way.” *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting); *see also Croson*, 488 U.S. at 518-20 (Kennedy, J., concurring). Manipulation of standing to evade strict scrutiny will not save racial preferences from judicial invalidation. It will only help convince the Supreme Court that the costs of attempting judicial oversight far exceed the benefits of racial preferences in admissions.

But even if Ms. Fisher’s admissibility were relevant at this stage, there is no “uncontradicted record,” Appellees’ Statement at 5, showing that a race-neutral system would have denied her admission. To the contrary, UT previously claimed that it could not determine whether it would have admitted Ms. Fisher unless it rescored its entire 2008 admissions process because all applicants subject to AI/PAI competitive selection were affected by race. Opp. to Mot. for Prelim. Inj. at 12 (W.D. Tex. May 5, 2008) (Doc. 42) (arguing that “no simple formula exists

for determining whether or not” an applicant would be admitted; instead, the “entire admissions process [must] be re-enacted”). Conveniently, it was only after the Supreme Court granted review that UT claimed to have solved the admissions puzzle. The Court should see UT’s newly minted standing argument as the evasive tactic it is.

In any event, UT’s gambit is pointless. Ms. Fisher was a highly competitive applicant to UT in the 2008 admissions year. Her grade point average placed her in the top 12% of her high school class and her SAT score was higher than the average SAT scores of the African-American and Hispanic students who enrolled in the 2008 freshman class. *See* Answer at 12 (Doc. 87); Second Amended Compl. at 22 (Doc. 61-3); Implementation & Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin at 13-14 (Oct. 29, 2009), *available at* <http://www.utexas.edu/student/admissions/research/HB588-Report12.pdf>. And, as the district court acknowledged, UT admitted 64 “underrepresented minority” students with Academic Index scores lower than Ms. Fisher’s. *See Fisher v. University of Texas*, 556 F. Supp. 2d 603, 607-08 (W.D. Tex. 2008). Accordingly, while her admission under a race-neutral admissions system is an issue that might or might not be litigated in the damages phase, the available evidence cannot establish that Ms. Fisher would have been rejected under a race-neutral admissions process.

III. UT CANNOT MEET THE HEAVY BURDEN OF JUSTIFYING ITS SYSTEM OF RACIAL PREFERENCES UNDER THE REQUISITE TRADITIONAL STRICT-SCRUTINY ANALYSIS.

From the beginning, Ms. Fisher has argued that UT's admissions system must be subject to traditional strict scrutiny. Seven Justices of the Supreme Court agreed. UT cannot survive strict scrutiny for many reasons. First, UT has reached critical mass by any pre-existing measure; and if it claims it has not, UT has failed to prove with clarity why that is so or when it will reach that goal. Second, the prior race-neutral system over which UT layered racial preferences worked about as well to promote diversity at a tolerable administrative expense; and if it did not, there are complementary race-neutral measures that would have been equally effective as preferences in increasing racial diversity. Third, UT's use of race was not narrowly tailored to meet any interest UT has asserted as compelling. Fourth, UT's arbitrary manipulation of racial categories (especially its discrimination against Asian-Americans) further confirms that its use of racial preferences is not narrowly tailored.

A. The Supreme Court Requires UT To Satisfy Traditional Strict Scrutiny Without The Aid Of Judicial Deference.

The Court has asked "how ought it apply strict scrutiny as directed by the Supreme Court on the record now before it?" Supplemental Briefing Directive at 1. The answer is without the deference that pervaded the Court's prior opinion. That opinion merely "scrutiniz[ed] the University's decisionmaking process to

ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires.” *Fisher*, 631 F.3d at 231. To that end, the Court “presume[d] the University acted in good faith” and forced Ms. Fisher to “rebut” that “presumption.” *Id.* at 231-32. As a consequence, the Court rejected Ms. Fisher’s argument that “*Grutter* deferred only to the university’s judgment that diversity would have educational benefits, not to the assessment of whether the university has attained critical mass of a racial group or whether race-conscious efforts are necessary to achieve that end” and held that “the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University’s constitutionally protected, presumably expert academic judgment.” *Id.* at 232.

The Supreme Court thoroughly disagreed. It held that this Court’s “expressions of the controlling standard [were] at odds with *Grutter*’s command that ‘all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny *Grutter* did not hold that good faith would forgive an impermissible consideration of race.”” *Fisher*, 133 S. Ct. at 2421 (quoting *Adarand*, 515 U.S. at 227). “Strict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.” *Id.* “The higher education dynamic does not change the narrow

tailoring analysis of strict scrutiny applicable in other contexts.” *Id.* In short, this Court “confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications and affirming the grant of summary judgment on that basis.” *Id.*

The Supreme Court walked through all the steps a reviewing court must take to determine if “any admissions program using racial categories or classifications” is “narrowly tailored to further compelling government interests.” *Id.* at 2419. First, “judicial review must begin from the position that any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.” *Id.* (citations and quotation omitted). “‘Because, racial characteristics so seldom provide a relevant basis for disparate treatment,’ *Croson Co.*, 488 U.S. at 505, ‘the Equal Protection Clause demands that racial classifications ... be subjected to the most rigid scrutiny,’ *Loving v. Virginia*, 388 U.S. 1, 11 (1967).” *Id.* at 2418-19.

Second, the Supreme Court stressed that although decisions involving the use of racial preferences in higher education “most specifically address the central issue in this case, additional guidance may be found in the Court’s broader equal protection jurisprudence which applies in this context.” *Id.* Disagreeing with this Court, *see Fisher*, 631 F.3d at 232-34, the Supreme Court thus made clear that all the teachings of *Croson*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986),

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), among many other decisions, applied here, *see also Fisher*, 644 F.3d at 306 (Jones, J.) (“With due respect to the panel, *Fisher* fails to apply the avowed continuity in principle of the Court’s decisions.”).

Third, “[s]trict scrutiny requires the university to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of that purpose.” 133 S. Ct. at 2418 (citations and quotation omitted). With respect to demonstrating with clarity the precise nature of the university’s goal, “it is the government that bears the burden to prove that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.” *Id.* at 2419 (citations and quotations omitted). The *only* academic judgment to which a court may defer is “that a diverse student body would serve its educational goals.” *Id.* Even then, deference is not unlimited; “[a] university is not permitted to define diversity as some specified percentage of a particular group merely because of its race or ethnic origin That would amount to outright racial balancing, which is patently unconstitutional.” *Id.* (citation and quotations omitted).

With respect to demonstrating with clarity that racial preferences are necessary to meet its goal, “the University receives no deference.” *Id.* at 2420.

“[T]he reviewing court [must] verify that it is necessary for a university to use race to achieve the educational benefits of diversity.” *Id.* (citation and quotations omitted). In other words, “*Grutter* made clear that it is for the courts, not for university administrators, to ensure that the means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” *Id.* (citations omitted). It remains at all times “the University’s obligation to demonstrate, and the Judiciary’s obligation to determine, that admissions processes” invoking racial preferences are constitutionally necessary to achieve critical mass. *Id.*

Evaluating whether racial preferences are necessary, in turn, “involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.” *Id.* While “narrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative, strict scrutiny does require courts to examine with care, and not defer to, a university’s serious, good faith consideration of workable race-neutral alternatives.” *Id.* (citations and quotations omitted). Moreover, “[c]onsideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.” *Id.* “If ‘a nonracial approach ... could promote the substantial interest about as well and at a tolerable administrative expense,’

then the university may not consider race.” *Id.* (quoting *Wygant*, 476 U.S. at 280 n.6) (other citation omitted). In other words, “strict scrutiny imposes on the university the ultimate burden of demonstrating, *before turning* to racial classifications, that available, workable race-neutral alternatives do not suffice.” *Id.* (emphasis added).

B. UT Fails Strict Scrutiny For Several Independent Reasons.

1. UT has failed to demonstrate with clarity that its use of race is necessary to achieve critical mass.

The Court has asked whether UT “[h]as ... achieved ‘critical mass’?” Supplemental Briefing Directive at 2. The answer is “yes,” which means that UT’s use of race is unconstitutional. But even if the answer were unclear, UT’s use of race is unconstitutional because UT will have failed to demonstrate “with clarity” that it is short of critical mass. Given the substantial number of minority students admitted through UT’s pre-2004 race neutral admissions system, UT effectively achieved critical mass no later than 2003, the last year it employed its race neutral admissions plan, and certainly would have achieved critical mass without the use of racial preferences by 2007, the year before Ms. Fisher applied for admission. For this reason alone, UT’s decision to continue using racial preferences in Ms. Fisher’s admissions cycle fails under strict scrutiny and is therefore unconstitutional.

In *Grutter*, the Court found that it was justifiable for the University of Michigan Law School to use race in admissions to boost minority enrollment from a pre-existing 4% to a 14% level at which richer exchanges and improved intercultural understanding would be achieved. 539 U.S. at 320. By contrast, the record here establishes that UT's pre-*Grutter* admissions system was generating substantial and increasing levels of Hispanic and African-American enrollment. In 2004, African-American (4.5%) and Hispanic (16.9%) students were 21.4% of the incoming freshman class, a level where an extraordinary and well-documented evidentiary showing would be required to disprove the obvious conclusion that the educational benefits of diversity were being attained. *See* Pl's Statement of Facts in Supp. of Mot. for Partial Summ. J. at 13 (W.D. Tex. Jan. 23, 2009) (Doc. 94-2 at 13) ("Pl's Statement of Facts").

By the time Ms. Fisher applied, however, minority enrollment levels were even higher, thus eliminating any possible need to use race during her admissions cycle. The year prior, the combined percentage of Hispanic and African-American enrollees had risen to 25.5%, with racial preferences having only a negligible effect on minority enrollment. *See id.* at 17-18. Including Asian-American students, UT's minority enrollment was well over 40% before Petitioner applied to UT. *See id.* Because of the Top 10% law, UT was one of the most diverse public universities in the nation both when it restored race to its admissions system in

2004 and more so when it denied admission to Ms. Fisher in 2008. Moreover, the trend line was showing steady increases in the enrollment of African-American and Hispanic students.² Because the Top 10% law has made (and continues to make) a far greater contribution to racial diversity than UT's racial preferences ever could, the record does not permit a finding that UT's pre-existing system failed to produce a critical mass. No Supreme Court decision authorizes "gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African-American or Hispanic." *Fisher*, 644 F.3d at 307 (Jones, J.).

UT's public statements confirm that the university knew that it had already achieved educational critical mass no later than 2003. In 2000, while proclaiming the success of the Top 10% law, UT reported that its race-neutral program had restored minority enrollment levels "to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies." PI's Statement of Facts at 10. UT also announced that its program was enrolling

² As recently as 2010, UT officials credited "changes in the demographics of Texas" for its success in enrolling a majority-minority freshman class. *See* Class of First-Time Freshmen Not a White Majority This Fall Semester at the University of Texas at Austin (Sept. 14, 2010), available at www.utexas.edu/news/2010/09/14/student_enrollment2010/. UT's President recently announced that "[f]ifty-two percent of our [2010] freshmen are minority students, including 23 percent who are Hispanic, reflecting the changing demographics of the state." 2010-2011 Impact Report at 6, available at www.utexas.edu/diversity/pdf/DDCE_ImpactReport.pdf. Provost Leslie also noted the success, applauding the fact that "[t]he university's student population is beginning to truly reflect the demographics of the state of Texas." *Id.* at 4.

minority students that performed better than ever before, and applauded the Top 10% law for “helping to create a more representative student body and enroll students who perform well academically.” *Id.* In 2003, UT proudly announced that it had “effectively compensated for the loss of affirmative action.” *Id.* at 11. Because UT would certainly have achieved critical mass in 2008 without using racial preferences, it cannot show a necessity to use racial preferences to achieve the educational benefits of diversity.

Importantly, Ms. Fisher does not bear the burden of proving whether UT is at critical mass or when it might get there. It is UT that that must “demonstrate *with clarity* ... ‘that its use of [a racial] classification is necessary ... to the accomplishment of its purpose.’” *Fisher*, 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 305 (opinion of Powell, J.)). And because the full weight of the Court’s equal-protection jurisprudence applies here, *see supra* at 19-20, UT must not only clearly explain why it concluded that it was not at critical mass, but must have a “strong basis in evidence” to justify its inability to otherwise achieve the academic benefits it sought, *Wygant*, 476 U.S. at 277; *Croson*, 488 U.S. at 500. “[S]trict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving a close analysis to the evidence of how the process works in practice.” *Fisher*, 133 S. Ct. at 2421.

UT has not met its burden of explaining with clarity why it has not yet achieved critical mass or provided any evidentiary basis—let alone a “strong” one—for its untenable conclusion that minority enrollment levels would fall short, absent racial preference, of the numbers needed to meet UT’s educational goals. Every justification UT has offered is reverse-engineered and taints any evidence the university later gathered to support its decision to reintroduce racial preferences as pretextual. UT did not carefully study whether it was necessary to layer racial preferences on top of the Top 10% law to achieve critical mass. As the record shows, UT announced its intention to reintroduce race into admissions before it gathered any non-demographic factual evidence or conducted any study of the issue; UT announced its decision on the very same day that the Supreme Court issued *Grutter*. See Pl’s Statement of Facts at 11-12. For this reason alone, UT is incapable of providing a clear and supportable academic basis for its hasty, demographic-based decision to restore race as a component of its undergraduate admissions program. To the contrary, UT’s reflexive appetite for racial balancing makes it impossible to dispel the concern that its decision was “the product of unthinking stereotypes or a form of racial politics.” *Crosby*, 488 U.S. at 510.

But even if UT could rely on its later-conducted studies, the university still cannot meet its heavy burden. Neither these studies nor UT’s briefing in this litigation has ever provided clarity as to why UT believes its prior race neutral

admissions system fell short of critical mass. For example, UT has claimed that it needs to use racial preferences because its student body is not reflective of state demographics. But this Court concluded that UT was not actually pursuing a demographic goal. *See Fisher*, 631 F.3d at 235 (“UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas.”). Rather, in the Court’s view, UT merely gave “limited attention to this data when considering whether its current student body included a critical mass of underrepresented groups.” *Id.* at 237. By the Court’s own reasoning, then, a desire to achieve a student body population that reflects Texas’s racial demographics cannot even remotely supply the clear educational purpose needed to sustain UT’s reintroduction of racial preferences.

At times, UT also has pointed to a lack of classroom diversity as a critical-mass shortfall. *See id.* at 226, 241. In one of its studies, UT claimed that it “still has not reached a critical mass at the classroom level.” *Id.* at 244 (citations and quotations omitted). But UT abandoned this interest before the Supreme Court. UT conceded that critical mass must be measured against the enrolled freshman class, *see* Brief of Respondents at 25, 39 (Aug. 6, 2012) (“Resp. Br.”), stating that “[t]he university has never asserted a compelling interest in any specific diversity in every single classroom. It has simply looked to classroom diversity as one dimension of student body diversity.” Oral Arg. Tr. 34:20-23. The most UT

would say is that classroom diversity is some sort of “red flag,” Resp. Br. 43, whatever that means. This “we’re seeking classroom diversity but we’re really not” doublespeak is precisely the kind of impenetrable rhetoric that the Supreme Court warned this Court against accepting as a substitute for a clearly articulated basis for racial admissions preferences. But that is all UT has to offer.

Third, UT asserted for the first time before the Supreme Court that its failure to achieve critical mass is a qualitative—not quantitative—problem because its real concern is a lack of “diversity within racial groups.” Resp. Br. at 33. But UT raised this argument for the first time at the Supreme Court. Naturally, then, there is nothing in the record demonstrating that UT relied on this interest when it reintroduced race in 2004 or retained it in 2007, or any evidence whatsoever supporting UT’s argument it needed to reintroduce racial preferences to achieve this novel form of “critical mass.”

In any event, the argument is meritless. Apparently in UT’s view, minority students admitted under the Top 10% law are not as “broadly diverse” or “academically excellent” as those admitted through the AI/PAI process. Resp. Br. at 33. UT sees racial preferences as a way to enroll more minority students who matriculate from “an integrated high school,” are not the “first in their families to attend college,” and are from more affluent “socioeconomic backgrounds” because, unlike minority students admitted under the Top 10% law, they “dispel

stereotypical assumptions” instead of “reinforc[ing]” them. *Id.* at 33-34. While UT asserted that it does not prefer affluent minority students to those who secured admission by excelling despite life’s disadvantages, its preference for the “African American or Hispanic child of successful professionals in Dallas” makes things clear. *Id.* at 34. UT does not believe it failed to enroll a critical mass of minority students—it failed to enroll enough of the minorities it prefers.

If this is truly UT’s reason for reintroducing racial preferences, then its goal may be clear—but it is clearly unconstitutional. UT’s goal would not be reaching the critical mass concept endorsed by Supreme Court; it would unconstitutionally discriminate between minority students on the basis of wealth and cultural background. *See Grutter*, 539 U.S. at 374-75 (Thomas, J., concurring in part and dissenting in part). And, perversely, it would diminish the possibility of cultural understanding by admitting minorities with a background similar to those of a majority of Caucasian students. *Grutter* endorsed racial preferences as a means of ensuring that student body comes from “the greatest possible variety of backgrounds.” 539 U.S. at 330. Diversity is not as an excuse for discrimination against disadvantaged minorities.

Thus, “intra-racial” diversity cannot justify abandoning the constitutional imperative of race neutrality. Once UT enrolls a critical mass of underrepresented minority students, it is no longer *necessary*, and thus no longer permissible, to

discriminate among applicants on the basis of race. UT may wish to enroll minority students different from the disadvantaged students to whom the door of opportunity is opened at UT by the Top 10% law and other race neutral admissions criteria. But financial qualification is a matter left to the people of Texas and their elected representatives. It is not a constitutional reason for ignoring the presence of a critical mass of underrepresented minorities in determining the need for racial admissions preferences.

Moreover, UT would need to explain with clarity (and support with strong evidence) when this goal of enrolling a “critical mass” of privileged minorities would be satisfied. For example, UT would need to articulate what mix of rich and poor minorities produces the “critical mass” it desires. It would need to explain whether poor minorities that are fortunate enough to secure access to elite high schools (but do not finish in the Top 10% of their class) secure the benefit of this racial preference or if they are left behind because their family background might reinforce a stereotype. Or perhaps the economically disadvantaged minority attending the elite high school would secure the “intra-racial” diversity preference after all if, as Solicitor General Verrilli suggested, he is an “African American fencer” or the “Hispanic who has ... mastered classical Greek.” Oral Argument Tr. 61:8-10. In sum, UT would need to clearly define what makes an applicant the “right” kind of minority so that the reviewing court could determine if there is

deficit of advantaged minorities on the university campus. But there is a sound reason why the Supreme Court has never endorsed this qualitative brand of critical mass. The whole enterprise is noxious.

Fourth, UT cannot rely on a phantom “periodic” review to salvage its failure to identify a stopping point for its use of racial preferences. Even though such review is essential to keeping racial preferences “limited in time,” *Grutter*, 539 U.S. at 342, UT never produced the periodic five-year review that it promised. More than three years late, UT tried to dodge the issue in the Supreme Court by claiming that UT has not “finalized its five-year review” because its conclusions “must be based on a careful review of the decision in this case.” Resp. Br. at 12 n.4. But the outcome of this case cannot change the campus environment or the empirical results of UT’s system of racial preferences. If anything, the converse is more likely to be true. UT was required to conduct this five-year review to ensure that its use of race is “a temporary matter, a measure taken in the service of the goal of equality itself.” *Grutter*, 539 U.S. at 342 (quoting *Croson*, 488 U.S. at 510). Empty promises are not an acceptable substitute.

In the end, UT has never articulated “with clarity” why it needs racial preferences to achieve critical mass because it recognizes there is no constitutional basis for its decision. UT cannot admit that it seeks to enroll a freshman class mirroring Texas’s demographics because that would be “outright racial balancing,

which is patently unconstitutional.” *Fisher*, 133 S. Ct. at 2419 (citations omitted); *Fisher*, 631 F.3d at 238 (explaining that “a university must eschew demographic targets”). UT had to abandon classroom diversity because it realized that the Fourteenth Amendment does not allow “this level of granularity to justify dividing students along racial lines,” *id.* at 254 (Garza, J.), and because the concept “opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be ‘underrepresented,’” *Fisher*, 644 F.3d at 307 (Jones, J.). And just as UT has abandoned demographics and classroom diversity as the measuring stick for critical mass, it ultimately must abandon allegiance to the “intra-racial diversity” trial balloon it sent up in the Supreme Court because it relies on the proposition that race (and only race), rather than experience and environment arising from race, is determinative of character—a disheartening message to the Texas high school students who continue to believe that UT values the contribution they make to the campus environment as individuals.

In its prior appearance before this Court, UT was able to avoid confronting these problems because the Court’s “good-faith” deference made it unnecessary to provide clear answers. *See, e.g., Fisher*, 631 F.3d at 245. But, and in response to the Court’s question, UT is no longer entitled to “any deference in its decision that ‘critical mass’ has not been achieved[.]” Supplemental Briefing Directive at 2. As the Supreme Court made clear, deference extends to the “educational judgment

that ... diversity is essential to its educational mission” but no further. *Fisher*, 133 S. Ct. at 2419. UT now bears the heavy burden of proving that its reintroduction of racial preferences was in pursuit of a clearly-defined, constitutionally permissible, and otherwise unattainable critical mass goal, and that it had a strong evidentiary basis for that determination. UT cannot make this showing.

2. Race-neutral alternatives have worked and would work about as well as racial preferences.

The Court has asked “[w]hat workable alternatives to the use of race were available to the University that were not being deployed?” Supplemental Briefing Directive at 2. Although there are workable alternatives that UT never considered and was required to pursue, *see infra* at 36-39, that has never been the central issue in this case. The key issue is whether the pre-2004 “non racial” approach that UT abandoned “promote[d] the substantial interest about as well and at a tolerable administrative expense” because, if it did, “then the university may not consider race.” *Fisher*, 133 S. Ct. at 2420. Strict scrutiny “forbids the use even of narrowly drawn racial classifications except as a last resort.” *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment). Thus, when racial classifications have only a “minimal impact” in advancing the compelling interest, it “casts doubt on the necessity of using such classifications” in the first place and demonstrates that race-neutral alternatives would have worked about as

well. *Parents Involved*, 551 U.S. at 734; *see also id.* at 790 (Kennedy, J., concurring).

That is precisely the case here. In 2008, after classifying 29,501 applicants by race, UT enrolled 216 African-American and Hispanic students through use of the race-affected AI/PAI analysis. *See Fisher*, 631 F.3d at 260-61 (Garza, J.). Even assuming that race was a decisive factor for each student admitted outside the operation of the Top 10% law, UT's use of race still could only have added, at most, 58 African-American and 158 Hispanic students to an in-state class of 6,322. *Id.* at 261 (Garza, J.). On a campus as large as UT's, with significant student-body diversity already in place, it strains credulity to conclude that the addition of students representing "0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman class" made a constitutionally meaningful impact on student body diversity. *See id.* (Garza, J.).

In fact, race was not decisive for many of the 216 "underrepresented" minority students. Some of the students were admitted based solely on their high AI scores, and others would have been admitted irrespective of race. *Id.* at 227. As a comparison, in 2004, when race was not a factor in admissions, 15.2% of non-Top 10% Texas enrollees were African American or Hispanic; in 2008, 17.9% of all enrollees were African American or Hispanic. *Lavergne Aff.* at 125 (W.D. Tex. Feb. 23, 2009) (Doc. 96-10) ("Lavergne Aff."). It stands to reason, then, that at

least the same percentage of “underrepresented” minority students would have been admitted in 2008 as were admitted in 2004 on a race-neutral basis. If so, race could only have determined the admission of the 2.7% difference between the two years—or 33 additional students. *See id.* Classifying every applicant by race in order to add only 33 students, representing 0.52% of an enrolled in-state class of 6,322, where the class already has a nearly 40% minority enrollment rate, is the type of gratuitous racial engineering that narrow tailoring forbids. *See Fisher*, 644 F.3d at 307 (Jones, J.) (“[T]he Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment.”).

Ultimately, these admissions statistics demonstrate that UT’s decision to classify each of the tens of thousands of applicants by race has “had an infinitesimal impact on critical mass in the student body as a whole.” *Fisher*, 631 F.3d at 263 (Garza, J.). This “infinitesimal impact” demonstrates that the continued use of UT’s pre-2005 race-neutral admissions system would have worked “about as well,” *Wygant*, 476 U.S. at 280 n.6, and, therefore, UT “could have achieved [its] stated ends through [nonracial] means,” *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring). Accordingly, UT’s use of race is not narrowly tailored. *See Fisher*, 133 S. Ct. at 2420.

UT previously avoided having summary judgment granted against it on this ground only because of this Court’s mistaken invocation of deference. *See Fisher*,

631 F.3d at 220-21. But UT can no longer depend on judicial deference to save it. Nor can UT be heard to complain that the people of Texas, through their elected representatives, have foisted upon it a method of selection, *i.e.*, the Top 10% law, that university administrators (and even some jurists) see as an inappropriate approach to undergraduate admissions. Like it or not, UT is required by state law to administer a race-neutral means of selection “comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texas freshman.” *Id.* at 240. The question is not whether a “*Grutter*-style admissions system standing alone is constitutional.” *Id.* at 243. The question instead is whether UT can prove through independent evidence that the negligible gains produced by “overlay[ing] such a plan with the Top Ten Percent Law” meets the test of constitutional necessity. *Id.* It cannot. “The additional diversity contribution of the University’s race-conscious admissions program is tiny, and far from ‘indispensable.’” *Fisher*, 644 F.3d at 307 (Jones, J.).

But even if this Court were to assume that UT has a compelling interest in pursuing this infinitesimal increase in minority enrollment, there are available race neutral means of achieving the same result. First, of the 2,800 African-American and Hispanic students admitted under the Top 10% law in 2008, 1,331 chose not to enroll at UT. Pl’s Statement of Facts at 17-18. UT could have intensified its outreach efforts to this already-admitted group without undue expense in order to

increase African-American and Hispanic enrollment. Given that UT's yield rate for these students lagged behind the corresponding rate for their white and Asian-American counterparts, Pl's Statement of Facts at 17-18; Lavergne Aff. at 124-26, this would have been a logical place for UT Austin to focus its race-neutral efforts. And in light of the negligible effect that UT's racial preferences had on minority enrollment, even a slightly increased yield rate among African-American and Hispanic admits would have matched or exceeded the effect of UT's racial preferences.

Second, African-American and Hispanic students are admitted to UT at much higher rates under the Top 10% law than through UT's race-based system of "full file" review. Pl's Statement of Facts at 17-18; Lavergne Aff. at 124-26. The Top 10% law is currently capped at 75% of UT's entering freshman class. *See* Tex. Educ. Code § 51.803(a-1). Thus, allowing the Top 10% law to achieve its full potential would increase minority enrollment at least as much or more than the use of racial classifications in admissions decisions. *See supra* at 24.

Third, UT could have boosted African-American and Hispanic enrollment at no additional expense and through any number of minor adjustments to its PAI calculus. For example, UT could have given more weight to the many race-neutral factors in the personal achievement score that compensate for environmental disadvantages frequently encountered by minority applicants. Or it could have

adjusted the relative weight it places on applicants' personal achievement scores as compared with their essay scores. An applicant's PAI is calculated by adding four-sevenths (4/7) of his or her personal achievement score to three-sevenths (3/7) of his or her average essay score. Defs' Statement of Facts at 8-9 (W.D. Tex. Feb. 23, 2009) (Doc. 96-2) ("Defs' Statement of Facts"). If the personal achievement score were given relatively more weight and the essay score relatively less weight, then the factors in the personal achievement score that somewhat correlate to race would tend to increase the number of minority admits on their own. Again, given the miniscule effect that UT's racial preferences actually have on minority enrollment, even minor adjustments to the PAI calculus could easily match the effect of racial preferences.

Indeed, by intensifying its focus on socioeconomic and related factors that are already part of UT's race-neutral admissions system, the university could secure all the diversity gains achieved through racial preferences, advance other valuable interests, and avoid the constitutional and societal costs that racial discrimination imposes. See Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access & Diversity*, 7 Harv. L. & Pol'y Rev. 367, 367-68 (2013) (describing "the results of a study from the University of Colorado that demonstrates that class-based affirmative action efforts are not only valuable for increasing socioeconomic diversity but may also help schools maintain racial

diversity”); Bill Keller, *Affirmative Reaction*, New York Times, June 9, 2013 (“As it happens, a well-designed program of socioeconomic preference also increases minority enrollment. Racial preferences don’t help all that much in promoting class diversity, because selective colleges heavily favor minorities from middle-class and affluent families; but class-based preferences favor minorities, because blacks and Hispanics are more heavily represented among the poor.”),

Of course, UT is not required to pursue racial diversity. But if it chooses to, strict scrutiny demands that it demonstrate that each of these race neutral means of admission would not have worked about as well “*before* turning to racial classifications” *Fisher*, 133 S. Ct. at 2420 (emphasis added). UT was required to seriously pursue these alternatives before resorting to racial preferences. “Consideration by the university is ... necessary, but it is not sufficient to satisfy strict scrutiny[.]” *Id.* UT’s failure to do so renders its program unconstitutional. And, even if only abstract consideration were required, UT still cannot meet its burden. The record is devoid of any evidence that UT considered any options and rejected them as ineffective in producing the marginal increase in minority enrollment that it claims to have a compelling interest in pursuing.

Furthermore, there can be no dispute that the Top 10% law and these other race neutral means can be implemented at a “tolerable administrative expense.” *Fisher*, 133 S. Ct. at 2420 (quoting *Wygant*, 476 U.S. at 280 n.6). The Top 10%

law, which admits students “based solely on class rank,” Defs’ Statement of Facts at 15, is already a mandatory aspect of UT’s admissions system and thus does not increase the burden on admissions officials. Making adjustment to other aspects of the way in which applications are scored through race neutral means is equally administrable. Weighting scores differently is not burdensome. In any event, UT’s prior satisfaction with race neutral admissions (at least until the afternoon *Grutter* was announced) confirms that all of these race neutral means are feasible alternatives.

In contrast, using racial classifications to achieve these minimal gains comes at an extraordinarily high cost. It “demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.” *Parents Involved*, 551 U.S. at 746 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). Racial classifications “carry a danger of stigmatic harm” and may “promote notions of racial inferiority.” *Crosby*, 488 U.S. at 493. UT’s use of race in undergraduate admissions thus “exact[s] a cost disproportionate to its benefit.” *Fisher*, 631 F.3d at 262 (Garza, J.). Moreover, to enroll a few additional “underrepresented” minority students each year, UT places an unwarranted badge of inferiority on the thousands of Hispanic and African-American applicants who are admitted to UT each year based solely on merit and achievement. UT cannot satisfy its “burden of proving [its] marginal changes ... outweigh the cost of

subjecting hundreds of students to disparate treatment based solely upon the color of their skin.” *Parents Involved*, 551 U.S. at 734-35.

UT’s use of race in admissions also does not further its academic mission. African-Americans and Hispanics admitted under the race-neutral Top 10% law perform *better* than those admitted through race-based admissions. *See* PI’s Statement of Facts at 10. Indeed, because African-Americans and Hispanics admitted outside the Top 10% law “are, on average, far less prepared than their white and Asian classmates,” many of these students “who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable.” *Fisher*, 133 S. Ct. at 2431 (Thomas, J., concurring). Faced with this poor performance, these students often “abandon their initial aspirations to become scientists and engineers” and instead “drift towards less competitive majors.” *Id.* at 2432. Although cloaked in good intentions, “the University’s racial tinkering harms the very people it claims to be helping.” *Id.*

3. UT’s claimed interest in demographic representation, classroom diversity, and intra-racial diversity could never be implemented in a narrowly tailored way.

Even if any of UT’s vaguely articulated critical mass goals were assumed to meet the requirements of strict scrutiny, which they do not, UT still is not pursuing them in a narrowly tailored way. The Court must “carefully examine” UT’s use of race to ensure a precise “fit” between its critical mass goal and the means chosen to

achieve it. *Grutter*, 539 U.S. at 327, 333. There is no such “fit” between UT’s asserted goals and the means it has used to pursue them.

First, the goal of demographic parity could not possibly be implemented in a narrowly tailored way. Pursuing such a goal would necessarily involve setting different enrollment targets for each minority group (presumably commensurate with their respective pro rata shares of the state population) and thus inevitably lead to discrimination between and among the various minority groups, including those minority groups already receiving an admissions preference. Among the problems with pitting one minority group against another is that “preferring black to Hispanic applicants, for instance, does nothing to further the interest” in student-body diversity. *Id.* at 375 (Thomas, J., concurring in part and dissenting in part). Pursuit of demographic parity would allow the very discrimination that *Grutter* forbids.

Moreover, UT concedes, as this Court previously recognized, that “[t]he numbers of minorities admitted under holistic review do not remotely mirror racial demographics.” Resp. Br. 29. This shows either that UT is only giving lip service to demographic balancing for the sake of public posturing or is pursuing that illegitimate goal ineffectually. Either way, UT is not pursuing that goal through means capable of achieving it. The rapid increase in Texas’s minority population guarantees that it would take decades of massive preference for UT to align the

student body to state demographics, making narrow tailoring a practical impossibility. A critical mass goal that can never be met through constitutional means is not narrowly tailored.

Second, UT's use of racial preference is not narrowly tailored to solve any purported problem with classroom diversity. UT's definition of classroom diversity—a classroom with at least two African-American, two Hispanic and two Asian-American students, *see* Lavergne Aff. at 36-37; *Fisher*, 631 F.3d at 225—is virtually guaranteed never to be satisfied. Attainment is literally impossible in classes of five, and UT disclaims satisfaction in the 63% of classes with two or more Hispanic students. *See Fisher*, 631 F.3d at 225. Moreover, the results of UT's study indicate that “classroom diversity” is more lacking for Asian Americans than for Hispanics. Walker Aff. at 33 (Doc. 96-13). But UT's use of race in admissions discriminates against Asian Americans and, if anything, exacerbates the classroom diversity problem. *See id.*; Pl's Statement of Facts at 14. Such a system is not narrowly tailored to resolve any alleged classroom diversity deficiency. Realistically, UT has created a bogus classroom diversity metric that will function as an endless justification for using racial preference in admissions. *See Fisher*, 644 F.3d at 307 (Jones, J.).

For the same reason, UT's pursuit of classroom diversity lacks a meaningful termination point. “[R]eliance on race at the departmental and classroom levels ...

will, in practice, allow for race-based preferences in seeming perpetuity.” *Fisher*, 631 F.3d at 254 (Garza, J.). As Judge Jones queried, “Will the University accept this ‘goal’ as carte blanche to add minorities until a ‘critical mass’ chooses nuclear physics as a major?” *Fisher*, 644 F.3d at 307. “If this is so, a university’s asserted interest in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom.” *Fisher*, 631 F.3d at 254 (Garza, J.).

In any event, UT’s classroom diversity concern is a problem of its own making. As UT knows, minorities “cluster[] in certain programs” for reasons unrelated to aggregate undergraduate admissions. *Fisher*, 631 F.3d at 240. An applicant who is admitted to UT is not guaranteed admission to his or her preferred academic program (e.g., Schools of Business, Engineering, Nursing, etc.). Defs’ Statement of Facts at 5. Because some academic programs demand higher test scores and grades than others, *see id.* at 7-8, many students (and the predominant number of underrepresented minorities admitted outside the Top 10% law) will not be admitted to their first choice of programs and enter UT as undeclared majors in the College of Liberal Arts, *see id.* at 7-8, 17-20; *see also Fisher*, 133 S. Ct. at 2432 (Thomas, J.) (noting that “students may well drift towards less competitive majors because the mismatch caused by racial discrimination in admissions makes

it difficult for them to compete in more rigorous majors”). Once these students enroll in school or a major, moreover, UT exercises almost no control over the classes they select.

Thus, if UT were seriously interested in fitting its racial interventionism to its purported classroom diversity problem, which it is not, the university would need either to: (1) institute a fixed curriculum to ensure that each classroom mirrored the racial makeup of the overall class; (2) force certain schools or majors to lower their academic standards; (3) require some students to enroll (or prevent others from enrolling) in specific schools or majors based strictly on race; or (4) make race so dominant in admissions that it floods the system with enough minority students to overwhelm the problem. UT has not expressed any interest in the first or second option and the other two would be patently unconstitutional. There are no “means” available to UT that can be narrowly tailored to the “end” of classroom diversity even if UT were pursuing it.

Third, UT’s “intra-racial diversity” objective (to the extent it really has one) is not being pursued through narrowly tailored means. As an initial matter, the interest is at war with UT’s stated interest in demographic proportionality. UT has claimed, and this Court has incorrectly agreed, that attention to demographics is legitimate because the university must teach its students “to lead a multicultural workforce and to communicate policy to a diverse electorate.” *Fisher*, 631 F.3d at

225-26 (citations and quotations omitted). The Court added that looking to demographics in seeking students outside the Top 10% of their class allowed UT to admit students whose “relative success in the face of harmful and widespread stereotypes evidences a degree of drive, determination, and merit not captured by test scores alone.” *Id.* at 238. UT’s newly found interest in enrolling minority students from privileged backgrounds over minority students from less fortunate circumstances thus discriminates against the very students that attention to state demographics was supposed to assist.

Such a preference also is not narrowly tailored because UT’s race neutral system already took account of wealth and privilege through consideration of the “[s]ocio-economic status of family” and the “[s]ocio-economic status of school attended.” *Lavergne Aff.* at 120. By reversing or eliminating these factors, UT would have an available race-neutral means of implementing its preference for privileged applicants. An admissions preference for family wealth or graduation from an elite high school would much more closely “fit” UT’s desire to enroll affluent minorities. Thus, if UT’s existing use of socioeconomic factors is to assist underprivileged applicants it could eliminate them as a criteria for admission and achieve the same result. It could also eliminate other admissions factors that tend to favor disadvantaged applicants at the expense of wealthy ones. In short, UT can

easily accommodate its desire to promote affluence among the university's minority population through race neutral means.

The problem for UT, of course, is that engineering its admissions system to promote affluence instead of race could never justify UT's stated preference for the hypothetical "African American or Hispanic child of successful professionals in Dallas" over Abigail Fisher. Both come from integrated schools, would not be the first in their family to attend college, come from similar communities, and have indistinguishable academic credentials. UT claims an interest in allowing "students to better understand persons of different races" from "the greatest possible variety of backgrounds," *Grutter*, 539 U.S. at 330, but does not mean it. UT wants students from the same background as Abigail Fisher. It just wants them to be of a different race. As Justice Kennedy put it: "So what you're saying is that what counts is race above all?" Oral Arg. Tr. 45:3-4.

4. UT's use of race is not narrowly tailored given its arbitrary manipulation of racial categories.

Finally, UT's arbitrary and imprecise racial classifications are inconsistent with narrow tailoring. Among other concerns the Supreme Court had with the system of racial preferences used by the Seattle and Louisville school systems, it "specifically faulted" racial-preference regimes "employing 'only a limited notion of diversity' that lumped together very different racial groups." *Fisher*, 631 F.3d at 245 (quoting *Parents Involved*, 551 U.S. at 703). This "binary conception of

race” was not “sensitive to important distinctions within these broad groups” and ran “headlong into the central teaching of *Grutter* and other precedents which instruct that a university must give serious and flexible consideration to all aspects of diversity.” *Id.* (citations and quotations omitted).

UT’s use of racial preferences is similarly flawed as it is only slightly less crude than the binary system the Supreme Court found so distasteful in *Parents Involved*. Even the process of creating each minority “group” category and then determining which one a particular applicant belongs to for purposes of granting an admission preference to some minorities but not others is itself problematic. *Fisher*, 644 F.3d at 303-04 (Jones, J.) (“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.”). Yet instead of showing that it performs this task with the sensitivity it demands, UT made the remarkable admission before the Supreme Court that it does not even have a means of verifying whether a student falls into one particular racial category or another. *See* Oral Arg. Tr. 32:14-34:5. In fact, UT acknowledged that it would be perfectly appropriate for an applicant who is only one-eighth Hispanic to self-identify as Hispanic on the application form and obtain the benefits of a racial preference in the admissions process. *See id.* 33:9-33:15. There is simply nothing narrowly tailored about UT’s use of race.

Worse still, UT has declared *all* “Asian” students overrepresented and *all* Hispanic students underrepresented because of their percentage of population within Texas. *See* Pl’s Statement of Facts at 14. But “[t]o call these groups a ‘community’ is a misnomer; all will acknowledge that social and cultural differences among them are significant.” *Fisher*, 644 F.3d at 304 (Jones, J.). To meet its narrow tailoring obligation (even in pursuit of its own misguided critical mass goal), UT would need to show at a bare minimum that students from “East Asia, South Asia, and the Middle East” are all demographically overrepresented and that “Texas Hispanics” from Mexico, “Central America, Latin America and Cuba” are all demographically underrepresented. *Id.* Otherwise, UT would be guilty of “lump[ing] together very different racial groups” in a way this Court claimed would be objectionable under strict scrutiny.

Regardless, UT’s use of racial preferences is overinclusive even if it can legitimately “lump” all Asian and Hispanic applicants into two binary categories given that only the latter is deemed underrepresented despite equivalent enrollment numbers between the two racial groups. The very 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.” *Grutter*, 539 U.S. at 333. It is a stretch to argue that Hispanic students at UT are underrepresented or feel “isolated or like

spokespersons for their race,” *id.* at 319, when UT has been recognized as one of the nation’s “top producers of undergraduates for Hispanics” by *Diverse Issues in Higher Education* magazine, Pl’s Statement of Facts at 2, and one of the nation’s “Best Schools for Hispanics” by *Hispanic Business* magazine, *id.* Given the educational success of its Hispanic students, UT’s use of race clearly is purely representational and thus over-inclusive.

CONCLUSION

The Court should hold UT’s use of racial preferences unconstitutional and remand the case to the district court to enter an order granting Ms. Fisher’s motion for summary judgment on liability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2013, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of the Court via the ECF system and transmitted to counsel registered to receive electronic service. I also caused a true and correct copy 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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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, Fifth Circuit Rule 32.2, and the Order from this Court dated September 12, 2013, because this Brief contains 11,984 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 32.2.

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No. 09-50822 Abigail Fisher, et al v. State of TX, et al
USDC No. 1:08-CV-263

The following pertains to your supplemental appellant's brief electronically filed on October 4, 2013.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

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