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

PETITION FOR REHEARING EN BANC

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Dated: July 29, 2014

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CERTIFICATE OF INTERESTED PERSONS

Fisher, et al. v. University of Texas at Austin, et al., No. 09-50822

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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Appellees

1. The University of Texas at Austin
2. Pedro Reyes, Executive Vice Chancellor for Academic Affairs
3. William Powers, Jr., President of the University of Texas at Austin
4. Board of Regents of the University of Texas System
5. R. Steven Hicks, Member of the Board of Regents
6. Wm. Eugene Powell, Member of the Board of Regents

7. Ernest Aliseda, Member of the Board of Regents

8. Alex M. Cranberg, Member of the Board of Regents

9. Wallace L. Hall, Jr., Member of the Board of Regents

10. Robert L. Stillwell, Member of the Board of Regents

11. Brenda Pejovich, Member of the Board of Regents

12. Paul Foster, Member of the Board of Regents

13. Jeffery D. Hildebrand, Member of the Board of Regents

14. Kedra Ishop, Vice Provost and Director of Undergraduate Admissions

15. Francisco G. Cigarroa, M.D., Chancellor of the University of Texas System

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FED. R. APP. 35(b)(1) STATEMENT

This is a case of exceptional importance. Indeed, it would be difficult to find a case more worthy of rehearing en banc. Selecting those students who will benefit from the limited places available at state universities has enormous consequences for their futures and the perceived fairness of governmental action. Courts must bear the responsibility of strictly scrutinizing any admissions program that uses racial preferences. "Prospective students, the courts, and the public" have every right to "demand that the State and its . . . schools prove their process is fair and constitutional in every phase of implementation." *Grutter v. Bollinger*, 539 U.S. 306, 394 (Kennedy, J., dissenting). The importance of these issues to Texas parents and students alone justifies en banc review.

But this is not just any challenge to the use of race in university admissions. This case has been remanded to implement a pathmarking ruling setting forth the constitutional standard by which the use of race in admissions should be judged going forward. The Supreme Court looked to this court to apply that standard for the first time. Courts and universities throughout the nation are watching to see how the court fulfills that duty. Hence, "this case may determine the admissions policies of institutions of higher learning throughout the Fifth Circuit, or beyond, for many years." *Fisher v. Univ. of Texas at Austin*, 644 F.3d 301, 307 (5th Cir. 2011). (Jones, J., dissenting from denial of rehearing en banc).

The panel's failure to follow the Supreme Court's mandate thus heightens the importance of granting rehearing en banc. The Court instructed the panel to: (1) apply strict scrutiny without deference; (2) faithfully enforce the strict-scrutiny principles applicable in other settings; and (3) evaluate whether the University of Texas ("UT") can prevail based on the existing record. The panel instead allowed UT to propose a rationale on appeal, conducted its own factfinding to support that rationale, and then deferred to UT's assertion that pursuit of it was necessary and narrowly tailored. In short, en banc review is necessary because the panel "fail[ed] to give *Fisher* its proper weight." Slip Op. 68 (Garza, J., dissenting).

Rehearing en banc also is warranted because, as Judge Garza explained, the opinion conflicts with Supreme Court precedent. UT failed to set forth its critical-mass goal with clarity and now relies on a post-hoc "qualitative" goal. But that is not the goal *Grutter* endorsed; it is based on stereotypical assumptions about the diversity contribution made by minorities from non-integrated communities, finds no record support, and is at odds with how UT's "holistic" system actually functions. Racial preferences may only be used as a last resort. Given the trivial impact of racial preferences, it was not necessary for UT to reintroduce this disfavored tool. There is no justification for "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.).

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STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

Whether the University of Texas at Austin ("UT") has demonstrated that its use of race in undergraduate admissions decisions is necessary to enroll a critical mass of minority students and narrowly tailored to that end.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Abigail Fisher, a white female applicant for undergraduate admission to UT, was denied admission in 2008. UT admitted 88% of that freshman class pursuant to the State's race-neutral Top Ten Percent Law; the remainder was admitted through a "holistic" review process that included preferential consideration of race. Ms. Fisher challenged UT's use of race in admissions as a violation of the Equal Protection Clause. After bifurcating liability and remedies phases, the district court granted summary judgment to UT on liability. *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009). A panel of this Court affirmed with Judges King and Garza specially concurring. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011). The Court denied rehearing en banc 9-7 with then-Chief Judge Jones writing in dissent for five judges. *Fisher v. Univ. of Texas at Austin*, 644 F.3d 301 (5th Cir. 2011).

The Supreme Court granted certiorari and vacated the panel's decision. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013). It rejected the Panel's premise "that good faith would forgive an impermissible consideration of race."

Id. at 2421. Because "the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny," the Court held that "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 omitted). In seeking to prove "with clarity" that racial preferences are necessary and narrowly tailored, UT "receives no deference." *Id*. at 2418-20. The court must "verify that it is 'necessary' for the university to use race to achieve the educational benefits of diversity" and that the use of race is "specifically and narrowly framed to accomplish that purpose." *Id*. at 2414, 2420. The case was remanded for the panel to "assess whether [UT] has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity" based on "this record[.]" *Id*. at 2421.

A panel majority again sustained summary judgment for UT. Slip Op. ("Op.") 10-41. The majority held that UT's claimed need to reintroduce racial preferences was *not* based on a failure to otherwise enroll sufficient numbers of minorities. Op. 30. Rather, racial preferences were "a necessary complement to the Top Ten Percent Plan" which "leaves a gap in an admissions process seeking to create the multi-dimensional diversity that *Bakke* envisions." Op. 29-30. This "gap" was a purported failure to enroll "minorities with unique talents and higher test scores" not found in the "pool" of admittees "measured solely by class rank in

largely segregated schools." Op. 36-37. The majority speculated that these "unique talents" are "demonstrated qualities of leadership and sense of self" that are characteristic of students attending integrated "high performing schools" but lacking in "Top Ten admittees" who are mostly from "majority-minority" schools. Op. 29. Thus, whether or not the Top Ten Percent Plan "produces sufficient numbers of minorities for critical mass," using race in holistic admissions is a "necessary and ameliorating complement" in pursuit of diversity. Op. 40.

Judge Garza dissented. Op. 44-69. In his view, the panel again "defer[red] impermissibly to [UT's] claims" and, absent deference, UT could not prevail. Op. 44. First, UT did not define critical mass with "clarity" and could "not explain how admitting a very small number of minority applicants under the race-conscious admissions plan is necessary to advancing its diversity goal." Op. 51-55. Second, any claimed "qualitative" interest was "too imprecise to permit the requisite strict scrutiny analysis." Op. 56. UT could not demonstrate any cognizable qualitative necessity because it "does not evaluate the diversity present" among the automatic admittees "before deploying racial classifications to fill the remaining seats." Op. 57. Judge Garza refused to defer to an "assumption" based on "no evidence" that Top-Ten minorities "are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." Op. 58. Third, UT's "classroom diversity" interest was abandoned and,

in any event, failed narrow tailoring. Op. 60-62. Fourth, periodic review and processing similarities to the program upheld in *Grutter v. Bollinger*, 539 U.S. 306 (2003), could not save UT's system. Op. 62-65. Last, Judge Garza found criticism of the Top Ten Percent Law "misplaced," explaining that the law "matters only insofar as it causes the University to admit a large number of minority students separate and apart from the holistic review process." Op. 67-68.

REHEARING EN BANC SHOULD BE GRANTED

I. The Case's Importance And The Panel's Failure To Obey The Supreme Court's Mandate Necessitate Rehearing En Banc.

This case raises a question of exceptional importance. How a university using race in admissions can carry its burden of demonstrating that this disfavored classification is necessary to achieve educational diversity interest and narrowly tailored to that end is of intense interest to courts and universities throughout the nation. *Fisher*, 644 F.3d at 307 (Jones, J.). In vacating this Court's prior decision, the Supreme Court instructed this Court to adjudicate this issue on the existing record and without deference. This Court should grant en banc review to prove that lower courts are able and willing to conduct the "strict scrutiny" the Supreme Court requires as a precondition to *any* use of race. "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 this modest, limited way." *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

Yet as Judge Garza's thoughtful dissent makes clear, the panel opinion defers to UT's litigation-spawned hypothesis that using race is necessary to enhance educational experience by increasing enrollment of minorities from integrated, high-performing secondary schools. But UT never relied on this interest—as opposed to its now abandoned reliance on demographic parity and classroom diversity—when reintroducing racial preferences. Moreover, no evidence—as opposed to the majority's supposition—establishes that secondary schools attended by minorities admitted holistically differ materially from those attended by minorities admitted through the Top Ten Percent Law or that students admitted holistically make a more meaningful educational contribution than those automatically admitted. And, the majority somehow credits this invented and unsubstantiated theory even though UT uses socio-economic factors as part of its holistic review to the *detriment* of the very minority applicants from high-performing schools that it now claims to champion. It is this type of judicial adventurism that led the Supreme Court to warn that racial preferences may be sustained, if at all, only after "close analysis to the evidence of how the process works *in practice*." *Fisher*, 133 S. Ct. at 2421 (emphasis added).

There can be no question, then, that the majority fails to follow the "mandate rule." *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004). First, the Supreme Court instructed that, in proving that racial preferences are necessary and narrowly

tailored, "the University receives no deference." *Fisher*, 133 S. Ct. at 2420. Yet the majority just replaced "defer" in the vacated opinion with "persuades" in this one. Op. 29, 30, 33, 36, 39, 40, 41. The opinions are otherwise indistinguishable in their mode of inquiry; at every turn, the majority accepted UT's circular legal arguments, post-hoc rationalizations, and unsupported factual assertions. Op. 44-69 (Garza, J.). The majority's claim that it is not deferring to the University's narrow-tailoring arguments does not suffice. The "court's actual analysis must demonstrate that 'no deference' has been afforded." Op. 52 (Garza, J.) (quoting *Fisher*, 133 S. Ct. at 2420). The majority opinion, therefore, "is squarely at odds with the central lesson of *Fisher*." Op. 44 (Garza, J.).

Second, the panel was instructed to seek "additional guidance . . . in the Court's broader equal protection jurisprudence which applies in this context." *Fisher*, 133 S. Ct. at 2418. Not only are these decisions "entirely absent" from the opinion, Op. 53 (Garza, J.), the majority contravened them. The "'justification'" for departing from equality "'must be genuine, not hypothesized or invented post hoc in response to litigation.'" Op. 61 (Garza, J.) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Yet the majority allowed UT to abandon the reasons it gave when it reintroduced racial preferences and replace them with a supposedly "qualitative" critical-mass interest invented on appeal. It is clear why UT, facing strict scrutiny, abandoned its genuine reasons. *Fisher*, 644 F.3d at 303-

08 (Jones, J.); *Fisher*, 631 F.3d at 259-63 (Garza, J.). That the handwriting was on the wall, however, neither licensed UT to rely on a post-hoc rationale nor empowered the majority to countenance that tactic.

Similarly, the majority ignored the bedrock equal-protection rule that where race has only a "minimal impact" on advancing a compelling interest, it "casts doubt on the necessity of using racial classifications" and demonstrates that race-neutral alternatives would have worked about as well. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 734 (2007); *id.* at 790 (Kennedy, J., concurring); *Fisher*, 644 F.3d at 307 (Jones, J.). Without even mentioning *Parents Involved*, the majority held that "fault[ing] UT Austin's holistic use of race for its *de minimis* contribution to diversity . . . turns narrow tailoring upside down." Op. 33. But there is no *de minimis* exception available to UT; "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts." *Fisher*, 133 S. Ct. at 2421. At base, there is simply no way to "explain *how* this small group contributes to [UT's] 'critical mass' objective." Op. 55 (Garza, J.).

Third, the Supreme Court instructed the panel to conduct strict scrutiny based on the evidence in "this record." *Fisher*, 133 S. Ct. at 2421; Op. 58 n.15 (Garza, J.). The majority, however, "venture[d] far beyond the summary judgment record," *id*., to reverse-engineer a factual basis for UT's invented "qualitative"

rationale, *see, e.g.*, Op. 18 n.70, 19 n.73, 24-25 nn.97-98, 26-28 nn.101, 103-120, 32 nn.123-26. Resting the judgment on non-record evidence was a flagrant violation of the mandate.

In supplying its own evidence to justify UT's actions, the majority also violated basic rules of appellate procedure. In "an appeal of a summary judgment, [the] review is confined to an examination of materials before the lower court at the time the ruling was made; subsequent materials are irrelevant." *Martin's Herend Imps., Inc. v. Diamond & Gem Trading U.S. of Am. Co.*, 195 F.3d 765, 774 (5th Cir. 1999); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1071 n.1 (5th Cir. 1994) (en banc). UT had every opportunity to develop the record. Mem. in Supp. Of Defs.' Cross-Mot. for Summ. J. at 1-2 (Doc. 96-1) ("After extensive discovery, the parties agree on the material facts of this case, and that summary judgment is proper."). The appeal should have been decided based only upon the uncontested facts. *CLS v. Martinez*, 130 S. Ct. 2971, 2982-84 (2010).

Here, of course, UT could cite no record evidence in support of its newly concocted rationale because it did not rely on "qualitative" diversity when it instituted the policy. Op. 58, 68 n.25 (Garza, J.). Thus, the majority engaged in its own factfinding, attempting to substantiate UT's post-hoc argument that minorities admitted through the Top Ten Percent Law are deficient in a way that makes the use of race in holistic admissions necessary. But "[f]actfinding is the basic

responsibility of the district courts, rather than appellate courts." *Maine v. Taylor*, 411 U.S. 131, 144-45 (1986). It is bad enough when a litigant is allowed to develop facts on appeal. It is remarkably inappropriate where, as here, the appellate court premises its ruling on facts of its own creation.

All told, the majority's all-too-apparent antipathy to automatic admissions and its enthusiasm for UT's holistic process led it to label the latter a "necessary complement" to the legislatively mandated Top Ten Percent Law. But neither the merit of that law nor UT's choice (apart from its use of race) as to how it would admit the remainder of the class was at issue. The panel thus had no constitutional basis for determining whether UT's holistic process was necessary or whether the Top Ten Percent Law was wise. What the panel was instructed to evaluate, and which it again resolved by deference, was whether UT had proven that its use of race within that holistic review was educationally necessary and narrowly tailored. By abdicating that responsibility, the majority "in effect gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires." *Fisher*, 644 F.3d at 303 (Jones, J.). En banc review is necessary to ensure respect for the mandate and fundamental principles of appellate procedure.

II. Conflict With Supreme Court Precedent Also Necessitates Rehearing En Banc.

Absent deference, UT's use of race cannot survive strict scrutiny under governing Supreme Court precedent. Because "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," it was UT's "burden to prove that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate." *Fisher*, 133 S. Ct. at 2419 (citations omitted). UT proved neither. UT has abandoned any interest in State demographics, Op. 30, or classroom diversity as a critical-mass goal, Op. 60 (Garza, J.). At this juncture, then, UT's "attempted articulations of 'critical mass' . . . are subjective, circular, or tautological." Op. 53 (Garza, J.). That should end the matter. UT cannot "meet its narrow tailoring burden" if its educational diversity "objective is unknown, unmeasurable, or unclear." *Id*. at 52-53.

The majority finds clarity in UT's post-hoc assertion of a qualitative "critical mass" interest. Op. 29. A qualitative definition of critical mass, of course, would eschew *any* role for enrollment figures in the calculus. The majority at times agrees, proclaiming that UT's goal "is not a further search for numbers[.]" *Id*. But it then reverses course, claiming race was reintroduced because "minority representation . . . remained largely stagnant . . . rather than moving towards a critical mass of minority students," Op. 23, and that "there was a cautious, creeping

numerical increase in minority representation" as a result of "race-conscious holistic review," Op. 32. The majority ends up tied in knots, claiming "[n]umbers are not controlling but they are relevant," Op. 36, without explaining why they matter to a goal with "no fixed upper bound" or "minimum threshold" of minority representation, Op. 34. As Judge Garza found, this rationale is anything but clear. Importantly, the Supreme Court does not demand "clarity" for clarity's sake. *Fisher*, 133 S. Ct. at 2418. It "ensures 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." *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989).

This case epitomizes the concern. UT's invented qualitative critical-mass goal is noxious. It assumes minorities admitted via the Top Ten Percent Law—as a group—"are inherently limited in their ability to contribute to the University's vision of a diverse student body" merely because many come from "majority-minority communities." Op. 58-59 (Garza, J.). This rank stereotyping is the "very ill that the Equal Protection Clause seeks to banish." Op. 58. Just as "[i]t cannot be entertained as a serious proposition that all individuals of the same race think alike," *Schuette v. BAMN*, 134 S. Ct. 1623, 1634 (2014), it cannot be assumed that individuals of the same race have identical personal attributes, experiences, and skills because they come from non-white communities. UT may think it can judge

the content of an applicant's character based solely on her race and where she attended high school. But the Constitution does not allow the State to "substitute racial stereotype for evidence, and racial prejudice for reason." *Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013) (Sotomayor, J., respecting denial of certiorari). It is UT, not Appellant, that "views minorities as a group, abjuring the focus upon individuals—each person's unique potential." Op. 40.

Intra-racial diversity also is not the "compelling" interest *Grutter* endorsed. Under *Grutter*, "critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." 539 U.S. at 319. To be sure, directly or indirectly setting aside a fixed number of minority seats is a forbidden means of tailoring. *Id.* at 335. But tailoring cannot proceed absent some "relationship between numbers and achieving the benefits to be derived from a diverse student body[.]" *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978) (Powell, J.). Race preferences must be limited to curing a proven deficit of educational diversity. Here, "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.), the wholesale injection of race into the evaluation of each and every applicant for admission cannot be narrowly tailored.

Regardless, no evidence substantiates the panel's novel qualitative diversity theory; UT offers none, *supra* p.8, and the majority's own factfinding compiled

only aggregate data, Op. 58-59 (Garza, J.). Nothing in the *record* shows "qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law" or "that any minority students admitted under holistic review come from majority-white schools." Op. 57, 59 n.17 (Garza, J.). UT does not even design its system to check. It neither "evaluate[s] the diversity present in [the Top Ten Percent] group before deploying racial classifications to fill the remaining seats," *id.*, nor tailors holistic review to admit minorities from "integrated" communities. Furthermore, UT "offers no method for this court to determine when, if ever, its goal (which remains undefined) for qualitative diversity will ever be reached." Op. 60 (Garza, J.).

Instead of confronting UT's failure to offer record support for its invented theory, the majority undertook its own factfinding mission. The results show why this task is appropriately the domain of district courts. The majority claims UT's holistic review process helps admit "minorities with the experience of attending an integrated school with better educational resources." Op. 35. But that process does precisely *the opposite*, as UT grants an express preference to socio-economically *disadvantaged* minorities likely to be educated in segregated communities (and prefers other characteristics also reliably favoring them). Doc. 96-10, at 120. UT cannot claim to use race to assist a cohort of applicants it actively disadvantages in the holistic admissions process.

Similarly, the majority claims that using race as a factor in holistic review "giv[es] high-scoring minority students a better chance of gaining admission to UT Austin's competitive academic departments" than does the Top Ten Percent Law. Op. 37. But record evidence proves that, from 2005 to 2007, "underrepresented" minority students admitted via the Top Ten Percent Law were accepted into UT's most competitive programs at substantially higher rates than those admitted via holistic review. Doc. 94-28 at 16-25; Doc. 94-27 at 17-21; Doc. 96-10 at 134. In fact, *not one* African-American admitted through the holistic process was accepted into the highly-competitive Business, Communications, or Nursing programs from 2005 to 2007. *Id.* At the same time, nearly half of all African-Americans admitted through the holistic process were "cascaded" into Liberal Arts. *Id.* It thus is UT's race-infused holistic review process—not the Top Ten Percent Law—that has "clustering tendencies." Op. 37.

As a result, the majority fulminates against the Top Ten Percent Law, which it sees as unduly restricting the *right kind* of majority and minority admissions. Understanding that it could not "ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texan freshmen," *Fisher*, 631 F.3d at 240, the majority attacks it instead, Op. 15-16, 19, 23-30, 34-35, 37-40. But the attack is misplaced, as "the validity or the wisdom of the Top Ten Percent Law" is not at issue. *Fisher*, 631 F.3d at 247 (King, J.); Op.

67 (Garza, J.). The law is unquestionably valid. *Schuette*, 134 S. Ct. at 1638. And it was not the majority's place to question the wisdom of the Top Ten Percent Law or strangely suggest UT has a "different election" to make if it is dissatisfied. Op. 16. UT is "mandated by the law to admit any graduate in the top ten percent of his or her high school class." Op. 65 n.23 (Garza, J.).

The majority's desire to pit the Top Ten Percent Law against holism is misdirection. The issue is not whether UT may use holistic admissions to fill the rest of the class but whether reintroducing *race* as a factor within that *preexisting* holistic process was constitutionally necessary. A successful challenge here will not force UT to abandon holism. It will force UT to acknowledge that its use of race in 2008 was unjustifiable because the proven effectiveness of the Top Ten Percent Law coupled with race-neutral holistic admissions made use of "race as a factor in the holistic review process" unnecessary. Op. 68 (Garza, J.). Race mattered for at most "216 African-American and Hispanic students in an entering class of 6,322," Op. 55 (Garza, J.), but likely only a few dozen, *Fisher*, 631 F.3d at 262 (Garza, J.). Either way, UT is not using race as a "last resort to achieve a compelling interest." *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring).

CONCLUSION

The Court should grant rehearing en banc and reverse the district court.

Respectfully submitted,

Dated: July 29, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2014, 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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