No. 14-981

In the Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner has asked the Court to decide the following question:

> "Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013)."

Pet. i.

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INTRODUCTION

The narrow, fact-specific question remaining in this case is whether the Fifth Circuit properly followed this Court's instructions in *Fisher v. University of Texas at Austin*, in determining whether the University of Texas at Austin (UT) "has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." 133 S. Ct. 2411, 2421 (2013).

Presumably this Court would not have remanded the case for the Fifth Circuit to undertake that inquiry if it believed (as petitioner apparently does) that the answer was preordained. And despite the caricature that petitioner attacks, the Fifth Circuit's actual opinion establishes that the court conscientiously followed this Court's instructions in *Fisher*. Not every Judge agreed with the fact-specific result that the court reached below. In Judge Garza's view, UT had not, "[o]n this record," presented "'sufficient evidence'" to show that its admissions plan is narrowly tailored. Pet. App. 90a (dissenting) (citation omitted). But petitioner does not allege a conflict of authority with the decision of any other circuit, and she has identified no conflict of authority with any decision of this Court. She is just asking this Court to engage as a Super Court of Appeals to review the Fifth Circuit's application of *Fisher* to the record in this case. Such a request ordinarily would not warrant certiorari.

Petitioner also argues that the Fifth Circuit erred by accepting UT's interest in "'qualitative' diversity." Pet. 19. If that sounds familiar, it is because petitioner made the same attack on UT's diversity interest in

2012. Pet. S. Ct. Reply Br. 12-14.[1] Instead of adopting petitioner's position, the Court reiterated that a "central point" of Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), was that the diversity that matters *is* qualitative—not quantitative—in nature. *Fisher*, 133 S. Ct. at 2418. Moreover, the Court asked the Fifth Circuit to reconsider only whether UT's plan was narrowly tailored—*i.e.*, how it "works in practice" (*id.* at 2421)—not UT's "goal of diversity," the first prong of strict scrutiny (*id.* at 2419-20). In any event, even if this argument is not barred by the Court's prior decision, petitioner has failed to show that the Fifth Circuit erred in accepting UT's diversity interest.

As is evident from their desire to "[e]liminat[e] racial preferences in education altogether" (Pet. 30), the real problem for petitioner and her amici is this Court's decisions in *Bakke* and *Grutter v. Bollinger*, 539 U.S. 306 (2003). Those decisions establish that universities *may* consider race—when narrowly tailored to their compelling interest in student body diversity. And as this Court has already held, those decisions must be accepted "as given" in this case, because petitioner has forfeited any argument that those decisions should be overruled. *See* 133 S. Ct. at 2417; *id.* at 2422 (Scalia, J., concurring). So all that remains is the application of existing precedent to the record in this case, as *Fisher* directs. Whatever promise this case once held for those opposed to the

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[1] The citations herein to the parties' Supreme Court merits briefs, joint appendix (JA), and supplemental joint appendix (Supp. JA) are to the filings in No. 11-345.

consideration of race in college admissions, it has lost its luster. The petition should be denied.

STATEMENT OF THE CASE

A. Student Body Diversity At UT

Like all the Nation's top universities, UT has determined that a diverse student body has invaluable educational benefits for its students and is indispensable to its efforts to train the future leaders of its State and the country. UT S. Ct. Br. 5-6.

The record is replete with evidence that UT has repeatedly tried to boost minority enrollment through race-neutral means, including the consideration of socioeconomic and related factors in a holistic review that excluded race. JA 399a-402a. But UT has concluded, based on years of experience in considering such factors, including during the period after the Fifth Circuit imposed a categorical ban on the use of race in admissions (*Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996)), that socioeconomic factors are not a complete, or adequate, substitute for considering race as well in seeking to promote diversity. JA 112a-13a. That judgment is shared by all (or virtually all) of the Nation's selective universities. *See Fisher* Amicus Br. for Amherst and 36 Additional Private Colleges and Universities 10-11, 21-24.

Between *Hopwood* and *Grutter*, UT tried numerous race-neutral ways of achieving a diverse student body, in addition to the holistic review of individualized factors other than race. For example, UT increased its annual recruitment budget, opened regional admissions offices in areas with a highly concentrated minority population, developed race-neutral scholarship programs to attract highly qualified students from lower socioeconomic backgrounds,

created promotional materials and campaigns recruiting minority applicants, and conducted studies on other race-neutral means of improving diversity on campus. Pet. App. 25a-29a; JA 398a-402a.

In all these efforts, UT has had to combat the lingering perception—rooted in a painful history of *de jure* segregation and longstanding discrimination against African-Americans and Hispanics—that "[UT] is largely closed to nonwhite applicants and does not provide a welcoming supportive environment to underrepresented minority students." Supp. JA 14a; *see Fisher* Amicus Br. for Family of Heman Sweatt *et al.* 23-25. Petitioner ignores that history. Even with these efforts, UT experienced an immediate and serious decline in enrollment of underrepresented minorities in the aftermath of *Hopwood*'s prohibition on the consideration of race in holistic review. In just two years, African-American enrollment dropped by 40%, and Hispanic enrollment dropped by 5% (despite the rapidly increasing number of Hispanics in the admissions pool). UT S. Ct. Br. 7-8; Pet. App. 165a.

The Texas Legislature responded by enacting the Top 10% law (1997 Tex. Gen. Laws 155 (H.B. 588)), which, beginning in 1998, guaranteed admission to UT to any Texas high school graduate ranked in the top 10% of his or her class. Tex. Educ. Code § 51.803. The unfortunate reality is that, due to residential patterns, public high schools remain segregated in much of Texas. *See* Pet. App. 32a-33a; *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting). By automatically admitting the top 10% of students from minority schools, the plan boosts the numbers of African-American and Hispanic admittees. This numerical increase, however, comes at a cost to educational

objectives and diversity in the full sense because the Top 10% law bases admissions decisions on one factor—class rank. Roughly 60 to 80% of the students who enrolled in the years at issue were admitted under the Top 10% law. Supp. JA 159a; Pet. App. 22a.

Even with the Top 10% law and UT's facially race-neutral initiatives in full swing, UT minority enrollment remained stagnant or worsened in the years following *Hopwood*. JA 122a. With race excluded from the mix, UT's holistic admissions process became largely "an all-white enterprise." Pet. App. 24a. Only 140 African-American students were enrolled through holistic review in 1997, in a class of 7085. JA 127a. This number continued to drop precipitously in subsequent years—to 130 in 1998, 105 in 2001, and a mere 73 African-American holistic enrollees in 2003. *Id.* Hispanic holistic enrollment likewise suffered—dropping from 534 in 1997 (7.5% of the class) to 210 in 2003 (3.2% of the class). *Id.*

Overall minority enrollment—including Top 10% enrollees—was only negligibly better. In 1997, African-American enrollment dropped to 2.7% of the freshman class—a 40% drop as compared to 1995—and Hispanic enrollment was 12.6%. *Id.* at 352a; Pet. App. 165a. Those trends continued in subsequent years despite the rapidly increasing minority population in the admissions pool. In 2002, still only 3.4% of the freshman class was African-American and 14.3% Hispanic. JA 127a. In 2004, 4.5% of the entering class was African-American, and 16.9% was Hispanic. *Id.* Even the dissent below acknowledged that UT had not reached a "critical mass" of underrepresented minorities in 2004. Pet. App. 70a-71a.

B. Admissions Plan At Issue

After this Court decided *Grutter*, UT launched a year-long re-evaluation of its admissions policies. JA 431a-32a. UT held retreats and discussions with administrators, faculty, constitutional law experts, and students. *Id.* It evaluated student body diversity at UT and the possibility of considering race in full-file review of applicants not eligible under the Top 10% law. *Id.* at 431a. UT also studied the makeup of its classrooms as one measure of student body diversity. *Id.* at 395a. Its study showed that 90% of undergraduate classes enrolled zero or one African-American student and 43% enrolled zero or one Hispanic student. *Id.* at 396a; Supp. JA 147a; Pet. App. 50a. These results mirrored the relatively stagnant minority enrollment rates that UT had experienced for years. *See, e.g.*, JA 127a; *supra* at 5.

In 2004, UT issued a proposal to allow for the consideration of race in the holistic review of the portion of the class not automatically admitted under the Top 10% law. JA 397a; Supp. JA 23a-32a. The proposal stated that UT seeks to achieve the very interest that this Court found compelling in *Grutter* and *Bakke*: qualitative diversity that consists of "'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" Supp. JA 3a (citations omitted). The proposal stressed that the consideration of race in full-file review would be individualized, *id.* at 26a-29a; an applicant's race would be only one of many factors considered and would not be assigned any individual weight, *id.* at 29a; and "[n]o specific goal will be established in terms of the numbers of students with specific characteristics who are admitted," *id.*

Under the new policy, which took effect in 2005, UT reviews applicants who do not qualify under the Top 10% law by awarding two composite scores: an Academic Index (AI) and a Personal Achievement Index (PAI). An applicant's PAI score is based on two essays and a Personal Achievement Score (PAS). JA 374a-75a. The PAS score, in turn, is based on a holistic consideration of six equally-weighted factors, one of which is special circumstances. *Id.* at 379a. The "special circumstances" factor is broken down into seven potential attributes, including race. *Id.* at 380a. An applicant's race is one of seven factors that may be considered within one of six PAS categories, the score of which comprises one third of the PAI—which in turn is one of two numerical values that places a student on the admissions grid—making race "only a factor of factors." Pet. App. 45a; *see* UT S. Ct. Br. 12-13.

UT does not assign any "point[s]" or "automatic" advantages based on race. JA 381a-82a. UT's full-file review looks at each applicant as a whole person—thus offsetting the one-dimensional aspect of the Top 10% law—and considers the applicant's race only as one factor among many used to "examine the student in 'their totality,' 'everything that they represent, everything that they've done, everything that they can possibly bring to the table.'" *Id.* at 129a.

The admissions officers who undertake the holistic review of individual files are aware of an applicant's race (for those who self-identify their race on their application, as nearly all applicants do). But these reviewers do not make individual admit or deny decisions. Rather, they undertake the holistic review that is used to calculate the PAS and PAI scores. Once all files in the holistic pool are individually scored, they

are plotted on a matrix for the corresponding major or school. Each cell on the matrix includes all applicants with a particular AI/PAI index. No applicant is identified by race on the cell grid and each cell must be either admitted or rejected in its entirety—regardless of the cell's racial make-up. UT S. Ct. Br. 12-13.

While the consideration of race is limited and contextualized under UT's policy, it is undisputed that "race is a meaningful factor and can make the difference in the evaluation of a student's application." Pet. App. 309a; JA 130a, 169a. And both African-American and Hispanic enrollment increased after UT adopted its race-conscious policy in 2005. By 2007, African-American holistic enrollment had doubled from 2004 levels, climbing from 3.6% of the holistic class in 2004 to 6.8% in 2007. *See* Supp. JA 157a. Hispanic holistic enrollment increased from 11.6% to 16.9% for the same period. *Id.* Those numbers include only enrollees from Texas high schools, and do not account for out-of-state, minority holistic admittees. *Id.*

C. Petitioner's Application For Admission

Petitioner, a Texas resident, applied for admission to UT's 2008 freshman class in Business Administration or Liberal Arts. Because petitioner did not graduate in the top 10% of her high school class, she was eligible for admission only under holistic review. Pet. App. 3a-4a. Based on her grades and SAT score, petitioner's AI score was 3.1 (out of 6). *Id.* at 6a. But, given the lack of space beyond Top 10% admits in 2008, no applicants on the admissions grid for the fall 2008 Business or Liberal Arts freshman class were admitted unless their AI score exceeded 3.5. JA 415-16. Even if she had earned "a 'perfect' PAI score of 6" (which she did not), she would not have been

admitted. *Id.*; Pet. App. 6a-7a; UT CA5 Supp. Br. 11-13; UT S. Ct. Br. 15-17. Petitioner's application to UT was denied, and petitioner enrolled at Louisiana State University, where she graduated in 2012.

D. Procedural History

Petitioner (and one other person who has dropped out of this case) filed suit against UT and University officials under 42 U.S.C. § 1983, alleging, *inter alia*, a denial of equal protection. JA 38a. She did not allege any class claims. Her complaint sought a declaratory judgment and injunctive relief requiring UT to reconsider her application using race-neutral criteria, and "[m]onetary damages" in the amount of application fees and all associated expenses—a total of roughly $100. *Id.* at 79a. The complaint did not request nominal damages. *See id.* at 78a-79a.

The district court granted summary judgment to UT, holding that UT's consideration of race was valid under this Court's decision in *Grutter*. Pet. App. 315a-16a. The Fifth Circuit affirmed, finding that "'it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*.'" *Id.* at 151a. The Fifth Circuit denied rehearing by a 9-7 vote. *Id.* at 319a-20a.

This Court reversed. The Court accepted *Grutter* and *Bakke* "as given" and reaffirmed that the interest in the educational benefits of diversity is compelling. *Fisher*, 133 S. Ct. at 2417. After hearing the same basic arguments renewed by petitioner here attacking diversity in the qualitative sense, the Court further reaffirmed that the interest found compelling in *Bakke* and *Grutter* is not in ensuring any "specified percentage" of students from a particular ethnic group, but "'diversity that … encompasses a far broader array

of qualifications and characteristics of which racial and ethnic origin is but a single though important element,'" *id.* at 2417-18 (quoting *Bakke*, 438 U.S. at 315 (Powell, J.)). The Court concluded, however, that the Fifth Circuit gave undue deference to UT in its analysis of the narrow-tailoring prong of strict scrutiny. *Id.* at 2421. Accordingly, the Court remanded with instructions 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.*

Following additional briefing and oral argument, the Fifth Circuit held that UT had demonstrated that its policy is constitutional under the "exacting scrutiny" emphasized by this Court. Pet. App. 2a-3a. After stressing that UT was not entitled to deference on narrow tailoring and that "exacting scrutiny" was required (*e.g.*, *id.* at 3a, 17a-19a, 20a, 22a), the court found that UT's limited consideration of race was "necessary" (*id.* at 54a) and narrowly tailored to UT's compelling interest in achieving student body diversity (*id.* at 41a). Judge Garza dissented. *Id.* at 57a.

The Fifth Circuit denied rehearing, this time by a 10-5 vote. *Id.* at 95a. This petition followed.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S CHALLENGE TO THE FIFTH CIRCUIT'S FACT-SPECIFIC APPLICATION OF *FISHER* DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner's central argument is that the Fifth Circuit misapplied, or just "ignor[ed]," this Court's instructions in *Fisher*. Pet. 1; *see id.* at 14-19. That split-less and fact-bound issue does not merit this

Court's review, *see* S. Ct. Rule 10(a), and in any event is refuted by the Fifth Circuit's decision.

A. This Court's Instructions In *Fisher*

In *Fisher*, this Court accepted *Bakke* and *Grutter* "as given," reaffirmed that "the educational benefits that flow from a diverse student body" is a "compelling interest that could justify the consideration of race," and remanded for reconsideration of whether UT's admissions policy "'is narrowly tailored to obtain the educational benefits of diversity.'" 133 S. Ct. at 2417, 2421 (citation omitted). That narrow-tailoring inquiry comes, the Court further explained, "[o]nce the University has established that its goal of diversity is consistent with strict scrutiny." *Id.* at 2419.

The Court also explained that narrow tailoring tests whether the challenged "admissions process meets strict scrutiny in its *implementation*." *Id.* at 2419-20 (emphasis added); *see id.* at 2421 (court must give "close analysis to the evidence of how the process works in practice"). "'To be narrowly tailored,'" the Court reiterated, "'a race-conscious admissions program cannot use a quota system,'" *id.* at 2418 (quoting *Grutter*, 539 U.S. at 334); it must ensure that "'each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application,'" *id.* (quoting *Grutter*, 539 U.S. at 337); and it may survive only if "no workable race-neutral alternatives would produce the educational benefits of diversity," *id.* at 2420.

The Court further stressed that, while "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes," a university is not entitled to deference on these matters, and the reviewing court must ensure that the

university has met its burden in establishing that its policy is narrowly tailored. *Id.* at 2420-21.

B. The Fifth Circuit Faithfully Followed This Court's Instructions In *Fisher*

Far from "ignor[ing]" this Court (Pet. 1), the Fifth Circuit faithfully carried out this Court's instructions.

1. Petitioner's lead contention is that the Fifth Circuit improperly deferred to UT and failed "to hold UT to the demanding burden" articulated by this Court. Pet. 1; *see id.* at 14-16. But the court could not have been more clear in recognizing—from the very outset of its decision and then throughout—that *Fisher* required it to "give a more exacting scrutiny to UT Austin's efforts to achieve diversity," Pet. App. 3a, and that UT was *not* entitled to deference on the narrow tailoring inquiry, *see, e.g.*, *id.* at 17a-19a (emphasizing that university bears the burden of establishing that its policy meets strict scrutiny (citing *Fisher*, 133 S. Ct. at 2419-21)); *id.* at 20a (Supreme Court's "charge" is to review record "without deference"); *id.* at 22a ("Affording no deference, we look for narrow tailoring in UT Austin's use of this individualized race-conscious holistic review…."). The court's careful, intensive, and extended analysis of the record refutes petitioner's claim that the Fifth Circuit's application of strict scrutiny amounted to a "*pro forma* exercise." Pet. 2.

Petitioner assumes strict scrutiny is the kiss of death. But as this Court reminded in *Fisher*, just as "[s]trict scrutiny must not be strict in theory but feeble in fact," it cannot be "'strict in theory, but fatal in fact.'" *Fisher*, 133 S. Ct. at 2421 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)). The Fifth Circuit appropriately navigated these guideposts, while applying the "exacting scrutiny"

demanded by this Court. Pet. App. 3a. The court scrutinized every challenged aspect of UT's plan, and ultimately was "persuaded by [UT] from this record of its necessary use of race in a holistic process and the want of workable alternatives that would not require even greater use of race." *Id.* at 54a.

2. That conclusion is underscored by the Fifth Circuit's unassailable findings that UT had demonstrated that its policy is narrowly tailored in each of the key facets emphasized by *Fisher*.

a. After "[c]lose scrutiny of the data in this record," the Fifth Circuit properly found that UT's policy does not operate as a "racial quota." Pet. App. 22a. As the court explained, UT does not consider race as a search "for numbers but a search for students of unique talents and backgrounds who can enrich the diversity of the student body in distinct ways." *Id.* at 40a; *see id.* at 44a (data does not show a "quota").

In reality, it is petitioner—not the Fifth Circuit—who ignores this Court's mandate. Petitioner tries to fault UT's policy for *not* setting "'concrete targets'" under its plan, and instead considering the "'qualitative'" benefits of diversity in enriching the student body. Pet. 19-20 (citation omitted); *see id.* at 31 (arguing that "avoiding express quotas or defined point awards" creates a problem under narrow tailoring). But racial quotas are impermissible. The Fifth Circuit correctly recognized that it is petitioner, not UT, who is arguing for quotas, Pet. App. 45a ("Fisher points to the numbers and nothing more…."), and aptly admonished that "a head count by skin color or surname … is not the diversity envisioned by *Bakke* and a measure it rejected," *id.* Judge Garza likewise

chastised petitioner for "ask[ing] [the court] to ratify racial quotas." *Id.* at 71a n.11 (dissenting).

b. The Fifth Circuit's conclusion that UT has demonstrated that its plan puts the "focus upon individuals" (*id.* at 40a) is also unassailable. *See id.* at 84a (under UT's plan, "race is only a sub-factor within a holistic, *individualized* review process" (Garza, J., dissenting) (emphasis added)). While, in one breath, petitioner maintains that the plan's impact on numerical diversity is too "'tiny'" to be constitutional, Pet. 28 (citation omitted), in the next she argues that "race, and race alone, is determinative" and that "'each applicant' is not being 'evaluated as an individual,'" *id.* at 31 (quoting *Fisher*, 133 S. Ct. at 2418). The Fifth Circuit properly rejected that position.

The last time this case was before the Court, petitioner did not seriously contest that UT's plan considers race only in an individualized way. Because it does. As discussed, no numerical value is assigned to any applicant's race, and any applicant—of any race—can benefit from UT's contextualized consideration of race. JA 129a-30a. Race is considered with other factors only during an individualized holistic review to "examine the student in 'their totality'" (*id.* at 129a). The actual admissions decisions are made after the PAS and PAI scores are assigned, by drawing a line on the AI/PAI matrix identifying which "cells" of students should be admitted. At that point, applicants are not identified by race at all—as Judge Garza put it, race is "invisible." Pet. App. 80a n.21 (dissenting).

Pointing to the fact that race is listed on the "cover" of the application along with other background information (as is true for the common application used by most schools) and that UT seeks students of

different races from different backgrounds, petitioner argues that "race, and race alone, is determinative." Pet. 31. But that argument is contradicted by the record. Even if UT *wanted* race to be determinative (and, as it has explained throughout this case, it does not), race cannot be under its plan. As discussed, race is "only a factor of factors" (Pet. App. 45a) in holistic review; the consideration of race only bears upon the calculation of an applicant's PAI score; and the final admissions decision is race-blind. That explains why petitioner for most of this case has taken the paradoxical position that UT's consideration of race is too *modest* to be constitutional. *See infra* at 18-19.

c. The Fifth Circuit also heeded this Court's mandate in finding that UT gave "'serious, good faith consideration [to] workable race-neutral alternatives.'" Pet. App. 29a (quoting *Grutter*, 539 U.S. at 339). After exhaustively reviewing UT's actions, *see id.* at 20a-29a, the court concluded: "Put simply, this record shows that UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program—in addition to an automatic admissions plan not required under *Grutter* that admits over 80% of the student body with no facial use of race at all." *Id.* at 29a. That finding is unassailable. Indeed, even Judge Garza acknowledged that "the University's many efforts to achieve a diverse campus learning environment without resorting to racial classifications are commendable." *Id.* at 86a (dissenting).

The Fifth Circuit also correctly found that "UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent plan workable by patching holes that a mechanical

admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission—as described by *Bakke* and *Grutter*." *Id.* at 46a-47a. Despite its benefits, the Top 10% law comes with an undeniably serious cost to diversity: it "mechanical[ly]" considers only one factor—class rank. *Id.* at 20a-21a; *see id.* at 32a, 39a, 45a. Given that the Top 10% law "mechanical[ly]" "admit[s] students based on the sole metric of high school class rank," even Judge Garza had to acknowledge that "*some form* of holistic review is advisable to supplement the admissions process." *Id.* at 87a (dissenting). Indeed.

As the Fifth Circuit explained, UT's holistic plan "mitigate[s] in an important way the effects of th[is] single dimension process" (*id.* at 39a) and thereby advances UT's interest in seeking to achieve student body diversity in the full sense recognized by this Court—*i.e.*, by assembling students with a "'broad[] array of qualifications and characteristics'" among all racial groups (*id.* at 15a (quoting *Fisher*, 133 S. Ct. 2418 (quoting *Bakke*, 438 U.S. at 315)). As the Fifth Circuit found, the record amply supports UT's judgment—shared by countless other schools across the country—that holistic review enriches student body diversity in the broadest sense. *See id.* at 39a-40a. That is why this Court has recognized that percentage plans are not a complete, workable alternative to holistic review. *Grutter*, 539 U.S. at 339. In other words, looking to only a *single* factor (class rank) does not remotely promote UT's compelling interest in diversity "'about as well'" as UT's holistic policy that considers numerous factors as well as race. *Fisher*, 133 S. Ct. at 2420 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).

The Fifth Circuit also properly concluded, after scouring the record, that UT's "holistic use of race plays a necessary role in enabling it to achieve diversity." Pet. App. 48a. As the court recognized, not only does UT's holistic consideration of race enhance diversity in the broad sense recognized by this Court as well as offset the drawbacks of looking to only a single factor (class rank), but the "hard data" shows that before UT adopted the plan at issue, "minority representation … remained largely stagnant, within a narrow oscillating band, rather than moving towards a critical mass of minority students." *Id.* at 30a. Even Judge Garza "agree[d] with the majority's rejection of Fisher's arguments that the University had achieved 'critical mass' in 2004," before the university adopted the plan at issue. *Id.* at 71a n.11 (dissenting).

Conversely, minority enrollment increased after adoption of the plan. The percentage of African American enrollees rose in 2005, 2006, 2007, and 2008—and doubled from 2002 to 2008. *Id.* at 44a; Supp. JA 156a. Hispanic enrollment increased as well. Pet. App. 44a. As the Fifth Circuit recognized, the holistic consideration of race also offset the declining odds of admission that African American and Hispanic applicants had experienced in the ultra-competitive holistic pool during this period. *Id.* at 21a-25a, 48a. In other words, even though it is modest, individualized, and nuanced, UT's consideration of race nevertheless is a "*meaningful* factor" (*id.* at 309a n.14 (emphasis added)) that "can make the difference in the evaluation of a student's application" (*id.*). *See* JA 130a.

Petitioner does not dispute these figures. And she has never disputed that, despite these incremental gains, minority representation at UT remained

alarmingly low for African Americans in particular. Instead, she tries to mask this problem by lumping together individuals of different minority groups. *See* Pet. 4-7. But here again, her argument betrays the equal protection principles she purports to champion: her argument depends on the "limited notion of diversity" that this Court denounced in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 723 (2007), and fails to account for the differences among people of the same race, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 434 (2006). As the Fifth Circuit observed, petitioner's argument "views minorities as a group, abjuring the focus upon individuals." Pet. App. 52a.

The Fifth Circuit also properly rejected the argument that UT's policy is unconstitutional because it did not have a more *dramatic* impact on racial diversity. Pet. App. 19a-20a, 43a-45a. As the court put it, that is an "upside down" conception of narrow tailoring—a sentiment that Judge Garza shared. *Id.* at 20a, 44a; *see id.* at 72a (dissenting) ("agree[ing] that a race-conscious admissions plan need not have a 'dramatic or lopsided impact' on minority enrollment numbers to survive strict scrutiny"). Instead of dooming UT's plan, the "modest numbers" attacked by petitioner "only validate the targeted role of UT Austin's use of *Grutter*." *Id.* at 44a. Moreover, as the Fifth Circuit recognized, it is undeniable that UT's holistic admissions policy increases the diversity that could not possibly be achieved by looking solely to a "single dimension"—class rank. *Id.* at 32a.

Focusing on numbers alone, petitioner argues that, in 2008, holistic review resulted in the addition of "only

33 African-American and Hispanic students" compared to 2004. Pet. 7. But that figure—an extrapolation—fails to account for the fact that, in 2008, UT experienced an unprecedented surge in Top 10% admissions—to over 80% of the incoming class—which crowded out holistic admitees of all backgrounds. Supp. JA 157a. Petitioner's extrapolation also ignores Texas resident admits who chose not to enroll at UT and non-resident admits who did enroll at UT. Even using petitioner's flawed methodology, 126 and 173 underrepresented minorities were admitted in 2006 and 2007, respectively, through holistic review. *Fisher* U.S. Br. 33-34. And accounting for the entire holistic pool and adjusting for the unique circumstances of the 2008 admissions cycle, holistic review would have admitted about 200 underrepresented minorities in 2008. *See* UT CA5 Supp. Br. 38; JA 170a.

In the end, the fact that petitioner cannot seem to make her mind up on whether, in her view, UT's consideration of race is too *little*, or too *much*, is itself a sure sign that UT's policy threads the needle.[2]

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[2] Amicus CATO Institute argues (at 8-12) that the "holds" practice described in the recently released Kroll Report (Kroll, *University of Texas at Austin – Investigation of Admissions Practices and Allegations of Undue Influence, Summary of Key Findings* (Feb. 6, 2015), *available at* http://www.utsystem.edu/sites/utsfiles/documents/outside-reports/investigation-admissions-practices-and-allegations-undue-influence/investigation-admissions-practices-kroll-2015-02.pdf) casts doubt on the constitutionality of UT's holistic review policy. That is incorrect. The Kroll Report examines the placement of "holds" on applicants by the UT president's office or college deans following recommendations from a "friend of the university" or

3. Petitioner's argument that the Fifth Circuit did not ground its decision in the record, or engaged in "appellate factfinding," is baseless as well. Pet. 17-18. The court meticulously examined the record and found that UT's policy was necessary, individualized, and narrowly tailored. As the Fifth Circuit explained, "[c]lose scrutiny of the data *in this record*" convinced the court that UT had demonstrated that diversity had suffered or remained stagnant before the enactment of UT's policy (Pet. App. 22a-23a, 29a-30a (emphasis added)); the Top 10% law crowded out available spaces and thereby increased competition for holistic review

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"person of interest" (such as a state legislator), to ensure that the president or dean was notified before a negative admissions decision was sent. Kroll Report at 27-28. The report does not support amicus's argument.

The "holds" practice addressed in the Kroll Report operated outside the holistic admissions practice that is challenged in this case. The report concluded that the holistic readers of files were not aware of "holds," and that hold candidates were admitted "only after the admitted class was already determined." *Id.* at 41, 44; *see id.* at 28. In addition, amicus overstates the possible consideration of race or ethnicity in this separate "holds" process. The report concluded only that there was a "*suggest[ion]* that ethnic, racial, and state geographical diversity *may* have been *an* important consideration" for some of the presidential exceptions it studied. *Id.* at 62 (emphases added). Finally, amicus is wrong that UT "withheld" (at 8) the "holds" policy from the courts. Although reportedly "long-standing" (Kroll Report at 12), the "holds" practice was never the subject of this suit, or the target of any discovery request. In addition, while the Kroll Report is new, this investigation has been publicly pending for nearly two years. *Id.* at 2. UT is reviewing the Kroll Report and considering the practice of these presidential exceptions.

spaces and the underrepresentation of minority students in the holistic admit pool (*id.* at 22a-23a); UT tried numerous race-neutral tools before adding race as a factor in holistic review (*id.* at 25a-30a); holistic review with race as a factor attracted better qualified and more well-rounded students (*id.* at 23a-25a); and the consideration of race in holistic review had a meaningful impact on diversity (*id.* at 43a-47a).

The opinion also notes—mainly in footnotes—that the trends established by the record are supported by data for subsequent years as well, citing data publicly available on UT's website and other academic sources. *Id.* at 31a-33a. That information does not detract from the court's painstaking scrutiny of the facts *in the record*, or from its record-grounded conclusion that UT's policy was narrowly tailored in 2008—the year that matters in analyzing petitioner's backward-looking claim. If anything, the court's reference to such information just underscores how seriously it took its responsibility to scrutinize UT's policy. Likewise, the court's reference to the practical realities of the Top 10% law provide no basis for second-guessing the Fifth Circuit. These realities are not new (*see Fisher*, 133 S. Ct. at 2433 (Ginsburg, J. dissenting)), and petitioner has never denied that, due to residential patterns, Texas's public school system is segregated.

It is too late for petitioner—who opposed a remand to the district court below to allow for further fact finding, Pet. App. 10a-11a—to try to create factual disputes precluding summary judgment for UT. But to the extent that petitioner attempts to argue that the facts on which the Fifth Circuit decided this case are disputed, a genuine factual dispute could only warrant a trial like the one in *Grutter*, not summary judgment

for petitioner. *Fisher*, 133 S. Ct. at 2421. Petitioner is not entitled to summary judgment on this record.

C. The Fifth Circuit Did Not Err In Considering Student Body Diversity In The "Qualitative" Sense

Perhaps recognizing that her fact-bound challenge to the Fifth Circuit's application of *Fisher*'s narrow-tailoring instructions has little traction, petitioner also argues that the Fifth Circuit erred by recognizing "a novel 'qualitative' diversity interest." Pet. 19. This argument is really just an attempt to relitigate arguments that petitioner made to this Court in 2012 about the nature of the diversity interest that should matter. *See* Pet. S. Ct. Reply Br. 12-14. This Court did not accept those arguments then, and there is no reason to revisit them here. Moreover, these arguments go to the first part of the strict scrutiny analysis—the university's "goal of diversity," *Fisher*, 133 S. Ct. at 2419-20; not the narrow-tailoring question on which this Court remanded. In any event, petitioner's argument is based on a fundamental misunderstanding of both the diversity interest that this Court recognized as compelling in *Bakke*, *Grutter*, and *Fisher*, and UT's position in this case.

The concept of "'qualitative' diversity" is not "novel" (Pet. 19). It is the essence of the diversity interest recognized as compelling by this Court in *Bakke* and *Grutter*—and in *Fisher* again. As the Fifth Circuit recognized, the diversity interest recognized by this Court is not an interest in *quantitative* diversity, in which a "'specified percentage of the student body'" is made up of particular races. Pet. App. 15a (quoting *Fisher*, 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 315)). Instead, the "'diversity that furthers a

compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" *Id.* (quoting same). In other words, the diversity that matters in this context is *qualitative.* The compelling interest in diversity that the Fifth Circuit recognized comes directly from *Bakke*, *Grutter*, and *Fisher*. Pet. App. 13a-16a, 41a-42a, 44a-46a, 50a.

Likewise, there is nothing "post hoc" (Pet. 16) about this rationale. UT's 2004 proposal recognized the benefits of diversity in the qualitative—rather than numerical—sense, including the benefits of promoting "'cross-racial understanding.'" Supp. JA 1a (quoting *Grutter*, 539 U.S. at 330); *see id.* at 23a (UT's policy undertakes "an individualized, holistic review of each applicant, taking into consideration the many ways in which the academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University"); *see also* UT S. Ct. Br. 13-14, 23-25, 33-34.

One aspect of the diversity that this Court recognized as compelling in *Bakke* and *Grutter* is a diversity of "qualifications and characteristics" of applicants within the *same* race. The Harvard plan that Justice Powell commended in *Bakke* illustrates—and endorses—this facet of diversity by using an example of black applicants with different backgrounds. *Bakke*, 438 U.S. at 324. In *Gratz v. Bollinger*, the Court specifically relied on and quoted this example from the Harvard plan in describing the kind of diversity that is constitutionally compelling. 539 U.S. 244, 272-73 (2003). This is not surprising. Ensuring a diversity of backgrounds within—as well as among—racial groups is one of the best ways to help

breakdown racial stereotypes and promote cross-racial understanding, and it underscores that the consideration of race truly is individualized and not based on stereotypes. The point is not to favor applicants with any particular background, but to promote diversity by admitting individuals—of *all* races—from *different* backgrounds.

Instead of trying to answer *Bakke* and the Harvard plan, petitioner attacks a straw man by arguing that UT's plan simply seeks "to enroll more affluent minorities." Pet. 26 n.8; *see id.* at 21-22, 25. That is absurd. UT seeks in numerous ways to recruit students—of all races—from disadvantaged socioeconomic backgrounds. *See* Pet. App. 26a-27a; JA 112a-13a, 147a-48a. UT does not consider race to admit "more affluent minorities." It considers race, along with numerous other individualized factors, to admit students who are more likely, because of their background, qualifications, and experiences, to enrich the educational experience for all students at UT. And admissions data establishes that underrepresented minorities admitted through holistic review in the years at issue were, on average, more likely than their Top 10% counterparts to have more varied socioeconomic backgrounds and higher SAT scores. *See* Supp. JA 163a-64a; UT S. Ct. Br. 33-34.

Recognizing that diversity is a qualitative concept does not mean that efforts to advance diversity—and achieve a "critical mass" of student body diversity, *Grutter*, 539 U.S. at 329—are unmeasurable. As UT has explained, it has looked to several data points in gauging whether it has achieved its interest in student body diversity, including hard data on minority admissions, enrollment, racial isolation in classrooms at

UT, and reports of racial hostility on campus at UT, as well as direct feedback from students and faculty. UT S. Ct. Br. 41; UT CA5 Supp. Br. 45-46. Even Judge Garza, who criticized the "critical mass" concept, agreed that UT had *not* reached a "'critical mass' in 2004." Pet. App. 71a n.11 (dissenting). So even he recognized that the existence of a "critical mass" is measurable without adopting numerical targets.[3]

For similar reasons, petitioner's "termination point" argument is without merit. Pet. 20. As the Fifth Circuit recognized, UT's policy explicitly calls for periodic reviews—the key feature stressed in *Grutter*, 539 U.S. at 342—and UT has reviewed its policy on an annual basis. *See* UT CA5 Supp. Br. 48-49. And here again, petitioner's argument suffers from the flaw that it measures and "defin[es] diversity only by numbers." Pet. App. 50a. In any event, this case is a particularly ill-suited vehicle in which to consider "termination point" arguments because all that remains is petitioner's backward-looking claim that she was improperly denied admission *in 2008*—a claim that looks even smaller in view of the Fifth Circuit's

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[3] As she has throughout this case (*see* Pet. S. Ct. Br. 28-29, 40-41), petitioner again mischaracterizes UT's position on the diversity interest it seeks to advance. *See* Pet. 9, 11, 16. UT has never had an interest in achieving a particular demographic or racial target, as petitioner previously conceded. JA 131a. And while UT does look to classroom diversity as "*one* window" into whether its students are realizing the educational benefits of diversity, *id.* at 266a (emphasis added), UT has never relied on classroom diversity as the *discrete* interest petitioner has attacked. *See* UT S. Ct. Br. 39; UT CA5 Supp. Br. 46.

unanimous conclusion that UT lacked a critical mass of underrepresented minorities in 2004.

II. THIS CASE SUFFERS FROM GRAVE, IF NOT FATAL, VEHICLE DEFECTS

The peculiar way in which petitioner chose to frame her case, along with events that have unfolded since this action was brought, combine to make this case an unseemly vehicle to reopen the divisive issue of the proper, and properly limited, consideration of race in college admissions. These flaws have become increasingly glaring with time, and are more evident today than when the Court last considered this case.

Unlike the plaintiffs in *Bakke*, *Grutter*, and *Gratz*, petitioner did not bring a class claim. She filed this action solely on behalf of herself and one other person who has since dropped out of the case. Her amended complaint sought forward-looking relief requiring UT to reconsider the denial of her application for admission to the 2008 class and a declaration that the policy is unconstitutional, as well as "[m]onetary damages in the form of refund of application fees and all associated expenses incurred by Plaintiffs in connection with applying for admission to UT." JA 78a-79a. But the moment petitioner received her diploma from Louisiana State University—after this Court had granted certiorari in February 2012—her forward-looking request for relief became moot, and the case irrevocably changed. *Cf. DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) (per curiam).

Because she made no class claim, after her graduation petitioner had only one remaining claim that conceivably could keep this case alive: her request for "damages" in the amount of the roughly $100 in application fees she paid when she applied for

admission to UT in 2007. JA 79a. This is a problem. As this Court has held, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). And here, the $100 in "damages" that petitioner seeks could not remedy the injury she claims (a denial of equal protection based on the consideration of race). Petitioner would have paid those fees even if she had been admitted to UT—*i.e.*, even if she had not suffered the injury of which she complains. Petitioner has tried to dodge this obvious redressability defect (*see* Pet. App. 9a n.26), but has never answered it.[4]

There is also a serious question as to whether petitioner is an appropriate plaintiff at all to challenge UT's policy. As discussed, the record establishes that, with her AI score of 3.1, petitioner would not have been admitted to the Fall 2008 class no matter what her race, given the strong competition that year. *See infra* at 8-9; Pet. App. 4a; *see id.* at 6a-7a & n.17. As the Fifth Circuit recognized, this fact creates a serious question about whether petitioner has standing, or could establish that she was injured by the policy even if a violation were proved. Pet. App. 6a-10a; *see also* UT CA5 Supp. Br. 6-13; *Texas v. Lesage*, 528 U.S. 18 (1999) (per curiam); Adam D. Chandler, *How (Not) To Bring An Affirmative-Action Challenge*, 122 Yale L.J.

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[4] Nominal damages is not an answer, because petitioner never sought them (and thus has waived such damages). JA 79a; *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 58-60, 71 (1997); *see also Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (holding that possible damages do not avoid mootness where plaintiffs never sought them).

Online 85, 99-100 (2012). But the more salient point is that, regardless of whether this anomaly requires the dismissal of this case, it makes this case an undesirable vehicle for national consideration of a divisive issue. Indeed, it would be inconsistent with principles of constitutional avoidance to resolve such a divisive issue in the context of a case where the plaintiff could not establish a right to recovery even if she proved a constitutional flaw in the admissions policy.

And there is yet another defect that should give pause even to those members of this Court who do not agree with *Bakke* or *Grutter*. As this Court correctly recognized the last time around, petitioner has failed to ask this Court to overrule *Bakke* or *Grutter*, taking the reconsideration of those cases off the table here. *See Fisher*, 133 S. Ct. at 2419; *id.* at 2422 (Scalia, J., concurring). That argument has been forfeited. But in any event, as the question presented makes clear, petitioner again does not raise that issue. This Court's decision in *Fisher* underscores just how much is off the table in this case. And the case has only shrunk since the last time it was before this Court, given that all that remains is whether the Fifth Circuit's record-intensive application of *Fisher* was correct.

Petitioner's own attorneys must appreciate these shortcomings. Members of petitioner's legal team recently filed lawsuits challenging the admissions practices at Harvard University and the University of North Carolina. Unlike the complaint in this case, the new complaints were filed on behalf of current *and prospective* applicants to those schools. They seek *future-looking* relief rather than backward-looking damages in the amount of a $100 deposit. And they explicitly call for overruling *Bakke* and *Grutter*. *See*

Compl. ¶ 427, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, et al.*, No. 1:14-cv-14176 (D. Mass.); Compl. ¶ 196, *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, No. 1:14-cv-00954 (M.D.N.C.). The new wave of litigation, in other words, just underscores that this case is not fit for further review.

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Petitioner lastly tries to grab this Court's attention by claiming that denying certiorari would sanction the no-holds-barred consideration of race at universities across the country. Pet. 29-33. But no university is going to look at this litigation and conclude that any court has given "a green light for racial preferences in admissions decisions." *Id.* at 2; *see id.* at 32 (same). This Court stressed that any plan considering race must meet the "demanding burden of strict scrutiny articulated in *Grutter* and [*Bakke*]." *Fisher*, 133 S. Ct. at 2415. And the Fifth Circuit went out of its way to emphasize that race-conscious admissions plans are subject to "exacting scrutiny," Pet. App. 13a; *see supra* at 10, and rigorously scrutinized UT's policy. Moreover, the Fifth Circuit grounded its decision on the particular policy at issue—which the court aptly described as a "unique creature" given its interplay with the one-of-a-kind, Top 10% law. *Id.* at 51a. As the Fifth Circuit itself stressed, the court's decision therefore "offers no template for others." *Id.* at 52a. That is what petitioner's own attorneys will argue if *Fisher* is cited in the cases they have filed against Harvard and the University of North Carolina.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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