No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are faculty members at Howard University School of Law and attorneys in the Law School's Civil Rights Clinic. While Howard is often referred to as one of the nation's premier historically black universities, for nearly 150 years the University's mission has actually been to provide a premier education to all regardless of race. Our history of integrated education has taught us that the practice of diversity is never a simple matter of just saying no to race or using one of its supposedly more palatable proxies such as socio-economic status. If achieving diversity was such an easy thing, surely by now most higher education institutions would have figured out how to do it through race-blind measures instead of inviting upon their heads the sort of constitutional challenges that seem to recur with remarkable frequency no matter how clearly this Court, as it did in *Grutter v. Bollinger*, 539 U.S. 306 (2003), removes constitutional doubt from the issue. For a modern college and university, achieving the sort of student body diversity that will provide thoughtful leadership in our technocratic, multicultural and democratic society requires incalculably complex judgments. Therefore, when, as is the case for the University of Texas at Austin ("UT Austin"), an institution takes race into account as part of a good faith effort at achieving diversity, for the sake of academic

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

autonomy and out of respect for its expertise, its decision deserves judicial deference.

We submit this brief in support of respondents in order to respectfully urge this Honorable Court to uphold the decision of the United States Court of Appeals for the Fifth Circuit, affirm its own holding in *Grutter* and find that UT Austin acted within its constitutionally protected zone of academic autonomy when it reintroduced race as one factor in its admission decisions in order to seek the educational benefits flowing from diversity.

SUMMARY OF ARGUMENT

Universities "occupy a special niche in our constitutional tradition." *Grutter*, 539 U.S. at 329. This special niche is rooted in the First Amendment which provides that, within constitutional limits, a university is free to determine on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). In the context of student body selection, the respect for academic autonomy has manifested itself in the Court's deference to a university's good faith determination that a compelling state interest in student body diversity exists and that race can be one of the factors considered in pursuit of such.

The Court's deference is neither without good reason nor without constitutional limits. A diverse class not only benefits classroom discussion but also provides the opportunity for cross-cultural understanding in social settings. Additionally, the maintenance of a diverse student body communicates to the general public the university's willingness to engage diverse viewpoints – a necessary part of a vibrant

academic environment. At the same time, in requiring that a university's efforts at diversity be narrowly tailored, the Court has held that any program must respect the rights of each student by considering race as part of a holistic assessment of all the diverse characteristics of each applicant. Moreover, while a university need not have chosen the least restrictive means to achieve the benefits of diversity, it must have considered alternatives. That the Court struck this balance, in *Grutter*, did not constitute an abandonment of strict scrutiny but simply another manifestation of the well-founded principle that context matters. *See Grutter*, 539 U.S. at 331-32; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005); *Johnson v. California*, 543 U.S. 499, 515 (2005) *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995); *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960).

UT Austin tried and failed to achieve diversity in its classrooms using purely race-blind alternatives. Since 1997, UT Austin's main admission policy has been the "Top-Ten Percent Plan" (Plan), pursuant to which a Texas high school student who graduates in the top ten percent of his or her class is admitted to the University. After two separate studies found that, in spite of the plan, UT Austin would not be diverse without employing race as a factor in admissions, UT Austin created a supplement to the Plan, pursuant to which race is used as one of multiple considerations to holistically evaluate students not admitted as a Ten-Percenter. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 224-225 (2011).

The race-neutral Plan remains UT Austin's primary admissions policy; meanwhile, the holistic review program remains extremely narrow in scope. Nonetheless, the program continues to produce the benefits the University envisioned: a more diverse, racially as well as otherwise, student body. This has resulted from both the diverse students admitted via the challenged program and students of all races and backgrounds drawn to the University because of the perception and reality of the campus as an open academic environment.

ARGUMENT

I. INSTITUTIONAL ACADEMIC AUTONOMY IS CONSTITUTIONALLY-PROTECTED AND MUST BE TAKEN INTO ACCOUNT WHEN ASSESSING THE CONSTITUTIONALITY OF A COLLEGE OR UNIVERSITY RACE-BASED ADMISSIONS POLICY

A. Academic Autonomy, Including the Freedom to Determine Who May Study at a University, Is a Special Concern of the First Amendment

> *But the most important aspect of freedom of speech is freedom to learn . . . All education is a continuing dialogue – questions and answers that pursue every problem to the horizon. That is the essence of academic freedom . . .* [2]

As a result of the "expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter* 539 U.S at 329; *see*

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[2] William O. Douglas, VALUES OF FREE SPEECH IN AN ALMANAC OF LIBERTY 363 (Doubleday & Co., Inc. Garden City, NY 1954).

also Regents of Univ. of Calif. v. Bakke 438 U.S. 265, 312-13 (1978) (opinion of Powell, J.) ((“[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”). Academic freedom, as a constitutional concern, “stems from “[t]he essentiality of freedom in the community of American Universities” which this Court has concluded “is almost self-evident.” *Sweezy*, 354 U.S. at 250; *see also Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) (“[o]ur Nation is deeply committed to safeguarding academic freedom, which is… a special concern of the First Amendment”).

The First Amendment protects universities as they

> provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’

Sweezy, 354 U.S. at 263 (citing Academic Freedom Committees of the University of Cape Town and University of Witswatersrand, Johannesburg, *The Open Universities in South Africa* 11-12 (1957 reprinted in 1974).)[3] Thus, “academic freedom thrives not only on

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[3] In 1957, members of the faculties of “the Universities of Cape Town and Witwatersrand declared their opposition to” apartheid’s attempt to exclude African, Asian and Coloured students from universities the National Party government reserved for white students. As those who reissued the report in 1974 noted, “much of the 1957 study was devoted to an exposition of [the] aspect of [academic] freedom [that involved who should be admitted to study] and its importance to South African society.” *The Open Universities in South Africa* at p. 1

the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985); *see also Bakke,* 438 U.S. at 312 (opinion of Powell, J.) ("[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."). As one of the foremost scholars of academic freedom aptly puts it:

> [T]he university is the preeminent institution in our society where knowledge and understanding are pursued with detachment or disinterestedness . . . Disinterested scholarship and research are both goods in themselves and benefits to society as a whole. . . . The disinterested search for knowledge fosters a manner of discourse that, at its best, is careful, critical, and ambitious. Again, the method of discourse is both a good in itself and a benefit to society. [S]cholarly discourse creates the most favorable environment in which thinkers may formulate ideas that stand apart from popular opinion or fashionable error. . . . The university aspires to instill in those entering adulthood a capacity for mature and independent judgment. The elements of this liberal education, which are constantly revised and challenged, inform the student of the knowledge valued from the past, convey the methodological rudiments of critical thought, and foster the capacity for independent and measured thinking.

J. Peter Byrne, *Academic Freedom: "A Special Concern of the First Amendment"*, 99 Yale L. Rev. 251, 333-35 (1989); *see also* Paul Horwitz, *Universities as*

First Amendment Institutions: Some Easy Answers and Hard Questions, 54 U.C.L.A. L. Rev. 1497, 1501 (2007) (advancing an institutional analysis of the First Amendment under which colleges and universities deserve judicial deference when engaged in academic decision-making).

Furthermore, practical "considerations of profound importance counsel restrained judicial review of the substance of academic decisions." *Ewing*, 474 U.S. at 225. Among these considerations are the "lack of standards" by which to judge the institution's choice, as well as "a reluctance to trench on the prerogatives of state and local educational institutions and [the judiciary's] responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'" *Ewing*, 474 U.S. at 226 (citing *Keyishian*, 385 U.S. at 603;) *see also Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2997 (2010) (Stevens, J. concurring) ("Public universities serve a distinctive role in a modern democratic society.")

Accordingly, judicial deference to academic institutions is based on two principles. First is the understanding that "a liberal education is good in itself, both pleasant and virtuous, and a necessity for providing competent leadership in a complex, technocratic, and democratic society." Byrne, *Academic Freedom*, 99 Yale L. Rev. at 335. Second is the recognition that courts are ill-suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions." *Ewing*, 474 U.S. at 226; *see also* Horwitz, 54 U.C.L.A. L. Rev. at 1501 (citing *Ewing* and *Horowitz* for the proposition that deference is

owed "to the 'genuinely academic decisions' of university officials.")

Historically, constitutional respect for academic freedom has meant that this Court will neither second-guess nor overturn academic judgments made in good faith. *See e.g., Ewing*, 474 U.S. at 225 ((deferring substantially to an academic decision to dismiss a student where the university reasonably exercised professional judgment); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) (stressing "the importance of avoiding second-guessing of legitimate academic judgments"); *Sweezy*, 354 U.S. at 263 (reversing a university's contempt conviction for refusing to answer questions posed by the Attorney General regarding the content of the professor's lectures and his knowledge of communism); *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. at 96, n. 6 (Powell, J., concurring) (noting that "[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation."); *Martinez*, 130 S. Ct. at 2997-98 (Stevens, J., concurring) (sustaining the constitutionality of a law school's universal application of an organizational non-discrimination policy to all officially registered groups when challenged by campus religious organizations who sought to exclude homosexual members as a violation of First and Fourteenth Amendment rights).

Hence, when a court reviews a genuinely academic decision, it may not override it "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Ewing,* 474 U.S. at 225.

B. Academic Freedom is Also Grounded in a Longstanding Judicial Tradition of Deference to Expert Decisions Made in Good Faith

Academic freedom is also grounded in a longstanding judicial tradition of respecting the good faith decisions of properly charged experts. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In *Chevron*, this Court noted that, when faced with a challenge to an administrative agency's construction of a statute within its authorized jurisdiction and in the absence of an unambiguous answer on the part of Congress as to the precise question at issue, reviewing courts should generally defer to the agency's own reasonable interpretation. 467 U.S. at 842-44. Specifically, judicial deference is warranted when (1) the issue being challenged is highly technical and complex; (2) judges lack expertise in the field in question; (3) the governmental actor did not act negligently in carrying out its official duties; and (4) the governmental actor performed its duties in a detailed and reasonable fashion. *Id*. at 865.

To be sure, the Court has applied the *Chevron* standard in the specific context of determining whether a federal agency, acting under congressional statute, has exceeded the bounds of its authority. However, underlying *Chevron* deference is a deeper concern that there are instances when the judiciary is ill equipped to render judgment and that in such instances courts are well served to defer to expert decisions made in good faith and with care.

In fact, the *Chevron* doctrine did not originate in, nor has it been exclusively reserved for, the expert judgments of federal administrative actors. *See Edwards' Lessee v. Darby*, 25 U.S. 206 (1827). Rather, "federal courts routinely defer to all sorts of bodies: administrative agencies, prison officials, expert witnesses, military officials, state administrators, and the like." Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 Hastings Const. L. Q. 557, 563 (2004). In *Darby*, one of the earlier cases of judicial deference, the Court was asked to nullify a land tract survey made by delegated commissioners of the state of North Carolina. The Court, recognizing a substantial level of deference to be given to the commissioners' decisions, explained that the "construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Id*. at 210. The Court agreed with the claimant in that the commissioners were not granted the express authority to survey as they did, but nonetheless held that they retained an implied authority flowing from the statute that covered the scope of their action. *Id*. at 209. The Court further indicated that deference was warranted because the state legislature enacted an additional statute, subsequent to the challenged action, expressly permitting the state actor to act as he did. *Id*. at 210. The Court concluded, "[i]t was a public act, done by a public authorized agent of the government, and afterwards recognized [sic] by the government itself. None but the government itself ought, therefore, to be permitted to call it in question." *Id*. at 211.

The deference provided in *Darby* foreshadowed what was to come in *Chevron*. The Court has repeatedly made clear that courts should not be in the business of substituting their own judgments for those of experts rendered in good faith when sensible minds can reasonably differ about the wisdom of those expert decisions. *See, e.g*. *Lawton v. Steele*, 152 U.S. 133, 140 (1894) (holding state actors operating under state statute not liable for damage caused to plaintiffs' property stemming from a reasonable interpretation of their statutory authority); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (explaining that decisions as to the restriction of inmate speech are "peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment"); *Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126-30 (1977) (noting that judiciary is ill-equipped to properly handle the complex problems of prison administration, and thus courts must defer to the informed discretion of prison officials regarding the reasonableness of restrictions on inmate freedom).

The point is not that a university, by virtue of its academic freedom and the expertise of its faculty and administrators, is owed absolute deference with respect to its admissions decisions. Rather, admissions decisions not only implicate First Amendment concerns, but also present complex expert subjective judgments about the role of a university and its relationship with the student body and the larger community. Therefore, when, as here, a university takes account of race as one in a series of factors to determine the makeup of a student body consistent

with the university's mission, academic freedom and expertise ought to provide the analytical framework within which the Court determines whether the use of race indeed passes strict scrutiny.

C. A University's Choice of Standards Governing the Selection of its Student Body Merits the Deference Accorded Other Academic Decisions

None of this is to say that a university has *carte blanche* in claiming judicial deference for its educational prerogatives. Rather, the institution must demonstrate that it is speaking as to a matter on which it has specialized knowledge. *See Ewing*, 474 U.S. at 225. Moreover, in invoking its academic expertise, the university must be supported by an empirical record instead of mere *post-hoc* rationalizations. *See United States v. Virginia*, 518 U.S. 515, 535-36 (1996) ("Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities[.]").

Applying this constraint, this Court has properly recognized that the composition of a student body whose diversity enriches the academic experience of all students is "at the heart" of a university's mission, and therefore, is worthy of deference. *Bakke*, 438 U.S. at 312 ("The freedom of a university to make its own judgments as to education includes the selection of its student body."); *Id.* at 313; *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 792 (2007) ("The issue in *Gratz* arose . . . in the context of college admissions where . . . precedent supported the proposition that First Amendment interests give universities particular latitude in

defining diversity." (opinion of Kennedy, J., concurring)).

The Court in *Grutter* explained: "numerous studies show that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." 539 U.S. at 333. Likewise, Justice Powell in *Bakke* approvingly cited Princeton University's president as to the benefits of a "robust exchange of ideas" in a diverse environment. 438 U.S. at 312 n. 48. Contrary to the amicus brief of "Former Federal Civil Rights Officials", the expression of diverse views does not result from the stereotyping by professors of students, but rather, the self-initiated expression and interaction of students. Nor can it be satisfied by asking students to surf the internet, as they suggest. Rather:

> [The] learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. . . . 'People do not learn very much when they are surrounded only by the likes of themselves.' . . . For many . . . the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student gov-

> ernment can be subtle and yet powerful sources of improved understanding and personal growth.

Id.; *see also id*. at 314 ("An otherwise qualified medical student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school . . . outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."). Accordingly, the consideration of race not only benefits minorities, but all students. As important as these interests are with regards to legal education, there is even "greater force to these views at the undergraduate level . . . " *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

Finally, the Court recognized that a diverse student body is important for the message it sends to the public regarding the institution's legitimacy:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions[.]

Grutter, 539 U.S. at 332-33 (internal citations and quotation marks omitted) (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

II. THE COURT'S DECISIONS AFFORDING COLLEGES AND UNIVERSITIES DEFERENCE REFLECT AN APPROPRIATE LEVEL OF CONCERN FOR THE CONSTITUTIONAL RIGHTS OF STUDENTS.

While the Court has deferred to colleges and universities both as to expert standards in composing student bodies and as to academic policy that diversity constitutes a compelling interest, the Court has also required that colleges and universities demonstrate that race-conscious admissions programs are narrowly tailored to satisfy strict scrutiny. *Grutter*, 539 U.S. at 335-43. Contrary to petitioner's and opposing *amici's* allegations, the Court's refusal to require that a university exhaust every conceivable alternative or impose a "strong basis in evidence standard" – applied only in the employment context – does not transform its review into rational basis, but simply demonstrates a reasonable degree of respect for the unique academic and expert context within which these institutions operate.

The Court has long maintained that all "governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Grutter*, 539 U.S. at 330 (quoting *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995) (internal quotation marks, citation and emphasis omitted)). In practice, this has meant that all racial classifications imposed by the government are analyzed under strict scrutiny such that the state must demonstrate that the challenged program is narrowly tailored to meet a compelling government interest. *Adarand,* 515 U.S. at 227. This is no less true for race-conscious admissions policies at colleges

and universities. In fact, despite the traditional deference to academic autonomy, when necessary this Court has not hesitated to find challenged programs unconstitutional where institutions have failed to respect the rights of students. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down the University of Michigan's admission program because it employed race as a determining factor); *Bakke*, 438 U.S. 265 (holding unconstitutional the University of California-Davis' medical school admission program because it used a quota system).

That said, "such rights are not absolute," *Bakke*, 438 U.S. at 320 (opinion of Powell, J.), but must sometimes bend to the educational interests of academic institutions. *Grutter*, 539 U.S. 306. As this Court has explained:

> Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . . [W]henever 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. But that observation says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. . . . Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the government[] . . . for the use of race in that particular context.

Id. at 331-32; *Johnson v. California*, 543 U.S. 499, 515 (2005) (same).

Put simply, the Court's deference to academic autonomy provides an analytical context for, but not an exception to, strict scrutiny. *Grutter*, 539 U.S. at 326; *Gratz*, 539 U.S. at 275 (2003). In short, "context matters." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006) (noting that context matters when assessing the impact of governmental narcotic prohibitions on the free exercise rights of a church); *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (stating that context matters when reviewing restrictions on the religious practices of incarcerated persons.). *See also* Horwitz, 54 U.C.L.A. at 14 (noting that this context is challenged by the First Amendment's attempt to maintain the doctrinal integrity of content-neutrality). This is neither unique to *Grutter* nor a particularly novel constitutional principle. *See Adarand*, 515 U.S. at 228 (stating that strict scrutiny must take "relevant differences into account) (internal quotation marks omitted)); *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) ("In dealing with claims under broad provisions of the Constitution . . . it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts[.]")

Contrary to petitioner's and opposing *amici*'s claims, strict scrutiny is a substantive constitutional principle not a rhetorical shibboleth. It cannot possibly be applied in the exact same way in every possible context. The use of race in federal government contracts[4] differs from the use of race in state and local contracts,[5] which differs from race-conscious

[4] *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995).

[5] *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

public employment policies,[6] which differ from race-conscious pupil assignments in public primary and secondary schools,[7] which differ from the use of race as one factor in higher education admission decisions.[8] Every one of these instances is subject to strict scrutiny, but strict scrutiny is applied differently in each because each has a unique context.

Taking the unique academic context into account, this Court has plainly held that the attainment of a diverse student class is a compelling interest sufficient to satisfy strict scrutiny. *Grutter*, 539 U.S. at 325. As such, and contrary to petitioner's and opposing *amici*'s attempted analytical sleight-of-hand, a university is not constitutionally required to exhaust every conceivable alternative or demonstrate a "strong basis in evidence standard" because the Court has always applied these standards in the specific context of employment. Rather, once an academic institution has established that the program serves a compelling interest, the institution need only show that the program is narrowly tailored to meet that interest. *Shaw v. Hunt,* 517 U.S. 908 (1996). While petitioner characterizes the court's inquiry in the academic context as nothing short of perfunctory, this is far from the case. Rather, as the Court set out in *Grutter*, the reviewing court must engage in several inquiries before it can conclude that the university has satisfied the standard.

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[6] *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267 (1986).

[7] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

[8] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

A. The Program May Not Set Aside Seats for Minority Applicants.

"To be narrowly tailored, a race-conscious admissions program cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 539 U.S. at 334 (quoting *Bakke,* 438 U.S. at 315 (opinion of Powell, J.)). All seats must be open to all students; a university may not set aside a certain number of seats for students of a particular race or ethnicity. *See Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system"). That said, a university may aspire to create an incoming class with a group of students sufficiently large – a critical mass – to adequately represent a diverse viewpoint. *Grutter*, 539 U.S. at 335-36; *see Bakke*, 438 U.S. at 323 (opinion of Powell, J.) ("[Ten] or [Twenty] black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States."). As long as it does not require that a class include a particular number of minority students, the occasional consultation of data regarding the makeup of students accepted will not render the program unconstitutional. *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323 (opinion of Powell, J.)) ("'Some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota.").

B. The Program Must Consider Each Application on an Individual Basis.

The institution must consider each application on an individual basis. *Grutter*, 539 U.S. at 334; *id.* at 392-93 (opinion of Kennedy, J., dissenting) ("There is

no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure . . . that each applicant receives individual consideration and that race does not become a predominant factor[.]"); *see also Parents Involved*, 551 U.S. at 788-89 (opinion of Kennedy, J., concurring) ("If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."). In doing so, the institution must value not only the racial diversity the individual's enrollment would provide, but any diverse aspect of the applicant's experience. *See Gratz*, 539 U.S. at 271-72 (rejecting a program where the "only consideration that accompanies this distribution of points [was] a factual review of an application to determine whether an individual is a member of one of these minority groups."). The program must be "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)).

C. Race May not be Used Mechanically to Admit or Deny a Student, but May Be Considered a Plus, Along With Other Favorable Aspects of the Application.

While the university may take note of an individual's race or ethnic background, it may not assign a mechanical, predetermined diversity bonus based on race. *See Grutter*, 539 U.S. at 337 (distinguishing a race-conscious admissions program that automatically awards twenty points based on race from a plan that considered race but "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity"). Likewise, it may not deem the race of an individual a basis for automatic admission or rejection. *Id*. (upholding the program as "there [was] no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable."). Instead, the university may consider an individual's race or ethnicity a plus to be considered along with the other favorable aspects of the application. *Id*.; *Parents Involved*, 551 U.S. at 798 (opinion of Kennedy, J., concurring) ("Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered."); *Bakke*, 438 U.S. at 317 (opinion of Powell, J.) ("The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with an Italian-American [applicant] if the latter exhibit[s] qualities more likely to promote beneficial educational pluralism."). Other favorable aspects could include "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability

to communicate with the poor, or other qualifications deemed important." *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

D. A University May Only Adopt a Race-Conscious Program After Considering Race-Neutral Alternatives and Then Must Periodically Review the Program's Necessity.

While a properly designed program may pass constitutional muster, a university may not adopt such without seriously considering race-neutral alternatives that will achieve the diversity the university seeks. *See City of Richmond v. J.A. Croson*, 488 U.S. 469, 507 (1989). (invalidating a set-aside plan not narrowly tailored where "there [did] not appear to have been any consideration of the use of race-neutral means"); *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 280, n.6 (1986) (explaining that narrow tailoring "requires consideration" of "lawful alternative and less restrictive means"). However, in deference to the institution's expertise as to its educational priorities and the potential impact alternatives may have, the Court has recognized that "narrow[] tailoring does not require exhaustion of every conceivable race-neutral alternative," in particular those that would require it to sacrifice its educational mission. *Grutter*, 539 U.S. at 339. For example, in *Grutter*, the district court argued that the University of Michigan Law School could have simply lowered its standards with regards to the GPA and LSAT scores of students admitted. *Id*. at 340. The Court recognized that this would require the University to sacrifice the academic quality of students, which would impact the level of classroom discourse. *Id*. Recognizing the impact this would have on the uni-

versity's educational mission, the Court explicitly rejected the notion that "narrow tailoring requires an institution to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.*; *see Wygant*, 476 U.S. at 280 (explaining that alternatives must serve the interest "about as well"); *Croson,* 488 U.S. at 509-10 (plurality opinion) (rejecting the program because the city had a "whole array of race-neutral" alternatives which "would have [had] little detrimental effect on the city's interests"). Finally, though not necessary, a court may examine if the challenged program had more than merely a minimal impact on the enrollment of minorities at the institution.[9] *Parents Involved*, 551 U.S. at 734-35.

Even if an institution has considered alternative approaches and properly designed the challenged program, a university must ensure that the program "remain[s] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Bakke*, 438 U.S. at 307-08. Nor may such programs continue

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[9] The Court in *Parents Involved* highlighted the fact that the plans challenged by the plaintiffs in that case had only a minimal impact on the composition of the school district and therefore further undermined the alleged necessity of the program. 551 U.S. at 734-35. While the court cited *Grutter* for the proposition, this was not a point of emphasis in the Court's decision. The portion of the decision *Parents Involved* cited in support was the discussion of the basis for the district court's decision. *Grutter*, 539 U.S. at 320. Furthermore, as *Parents Involved* involved a secondary school, which is not due the same deference as UT Austin, it is questionable whether the court should look to the impact of the plan and if so, how much of an impact it should require.

on ad infinitum. "Race-conscious admissions policies must be limited in time." *Grutter*, 539 U.S. at 341. This requirement can be satisfied by safeguards such as a sunset provision carved into the policy or "periodic reviews to determine whether such policies are still necessary" to meet the university's educational objectives. *Id*. at 342. In the case of the latter, the Court should respect that the school would "like nothing better than to find a race-neutral admissions formula and will terminate its race-conscious admissions program as soon as practicable." *Id*. at 343. Regardless, the court speculated that within twenty five years such programs would no longer be needed.

E. These Limitations Sufficiently Protect the Rights of Academic Institutions and Students.

While petitioner characterizes these limitations as trivial, they have adequately protected students for nearly thirty-five years in preventing the dangers about which opposing *amici* sound the alarm. For example, *amicus* Asian American Legal Foundation alleges that the consideration of race in admissions program invites the use of stereotypes by admission officers. This argument misunderstands the type of program the Court approved in *Grutter*. Because an admissions officer must consider the application of each student on a holistic basis, a university may ensure that it has a class which not only is racially diverse, but that the students of each race represent an array of backgrounds and perspectives. In fact, that the universities are able to admit a "critical mass" of students of a particular race works to ensure that an admission officer is not forced to pick a handful of students, under a stereotype-based

assumption, that they represent the views of all persons of that race.

Likewise, *amicus* California Association of Scholars, echoing Justice Thomas' dissent in *Grutter*, suggests that the consideration of race lays the seed for racial segregation. *See Grutter*, 539 U.S. at 365-66 (opinion of Thomas, J., dissenting). Justice Thomas wondered whether deference to the University of Michigan's decision to value diversity meant courts would have to defer to Historically Black Universities' potential choice to exclude all white applicants. *Id*. The hypothetical exaggerates the degree of deference due colleges and universities. The flaw in *amicus* California Association of Scholars analysis is the failure to recognize student body diversity rather than student body homogeneity is the interest deemed compelling in *Grutter*. 531 U.S. at 313. Even assuming that racial homogeneity constitutes a compelling interest, the program would have to be narrowly tailored to meet this interest. While a Historically Black University could consider the race of an applicant as part of the individualized review of each applicant, it could not foster a concerted effort to eliminate the number of white students on campus. This would in essence institute a quota system, which the court long ago rejected. *Bakke*, 438 U.S. at 314

Finally, the Court has explicitly rejected the argument advanced by opposing *amici* that the individualized consideration it has allowed is merely a form of sophistry:

> A court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the

> absence of a showing to the contrary in the manner permitted by our cases.

Grutter, 539 U.S. at 318-19.

III. THE CIRCUIT COURTS' DECISION IN *FISHER* PROPERLY REFLECTS A RESPECT FOR THE DEFERENCE DUE INSTITUTIONS OF HIGHER EDUCATION AND THE CONSTITUTIONAL RIGHTS OF STUDENTS.

UT Austin has long understood the importance of student body diversity to its educational mission. This belief is not merely founded on its own academic judgment, but has been reaffirmed by several studies confirming that diversity provides students a wider range of perspectives as to the material they study in their classes and better prepares them for the world they will encounter upon graduation. Consistent with *Bakke* and *Grutter*, UT Austin crafted a program narrowly tailored to meet this compelling interest; thus, at once, keeping faith with its academic prerogatives, as well as respecting the constitutional rights of its students. Like the program in *Grutter*, UT Autin's program does not prioritize race, but instead considers race as one diverse factor to be credited alongside several other race-neutral characteristics of each applicant. Furthermore, that UT Austin adopted a race conscious policy only after employing several other race neutral alternatives, only makes evident the fact that the challenged program satisfies strict scrutiny.

A. The University of Texas Has Long Understood, for Good Reason, that Student Body Diversity Is Central to its Educational Mission.

Any review of UT Austin's program must begin with a presumption, "absent a showing to the contrary," that a university acted in good faith, when enacting a race-conscious admissions policy. *Grutter*, 539 U.S. at 308. But, while crucial, this presumption need not be the sole basis for judicial deference. Rather, like *Grutter*, UT Austin's "claim is further bolstered by numerous expert studies and reports showing that . . . diversity promotes learning outcomes and better prepares students for an increasingly diverse work force[,]" 539 U.S. at 308, as well as the University's demonstrated historical commitment to achieving a diverse student body. *Fisher*, 645 F. Supp. 2d at 610 ("To argue UT has failed to give serious, good faith consideration . . . is to ignore the facts of this case").

In their merits brief to the Court, respondents amply demonstrate UT Austin's commitment to the principle that student body diversity is an important and necessary component of its educational mission. Respondents Br. at 3-6. Respondents also fully recount in their brief the long, careful and considered process UT Austin undertook to arrive at its current policy. *Id*. at 6-15. As such, we see neither reason nor need to repeat that history here.

Still, in the context of academic autonomy, several key points, thoroughly documented in respondents' brief, bear emphasis. After the United States Court of Appeals for the Fifth Circuit held in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), that a university's consideration of race when selecting its student body

was unconstitutional, UT Austin recognized that in order to produce an academic environment conducive to learning, it needed to institute alternative policies to admit students whose merit was not reflected in only their GPA and standardized test scores. *Id.* at 7. UT Austin, rather than abandoning its commitment to diversity, immediately began considering a variety of policies to meet this priority. Among the alternative policies UT Austin adopted was consideration of factors constantly touted as proxies for race, including the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household. *Id*. However, none of these alternative factors – many of which are now being advocated by petitioner and opposing *amici* – prevented the percentage of African-Americans and Hispanics attending the University from dropping significantly. *Id*. at 7-8. Additionally, the Texas Board of Regents adopted the "Top Ten Percent Plan," pursuant to which any senior who graduates in the top ten percent of his or her class at the time of applying is guaranteed admission to any Texas public university, including UT Austin. *Id*. at 8-9. The Program remains the single most significant admission policy at UT Austin. Nonetheless, UT recognized that it could still not sufficiently provide all of its students the necessary educational experience. Accordingly, in the wake of *Grutter* and faced with empirical evidence the Ten-Percent Plan still did not produce a diverse student body, the University of Texas Board of Regents authorized each school in the UT system to research whether race and ethnicity should be part of an individualized review of each applicant. *Id*. at 9-10. In crafting its holistic plan, UT Austin did not rely simply on its academic

judgment, but instead undertook a series of studies that conclusively showed insignificant diversity in most classrooms, including, for example, a finding that "in 2002, 90 percent of classes with 5 to 24 students had one or zero African-American students and 43 percent had one or zero Hispanic students. *Id.* at 10. Nonetheless, UT Austin recognized that day may come where the program may no longer be necessary. The plan requires that every five years the University review the admissions process specifically to determine whether consideration of race is necessary to the admission and enrollment of a diverse student body and whether race-neutral alternatives exist that would achieve the same results. *Id*. at 11-12.

Accordingly, UT Austin is not engaged in post-hoc rationalizations to justify an otherwise unconstitutional policy. Nor is the University asking the Court to simply presume that it legitimately believes that diversity is necessary to its educational mission. Rather, the record demonstrates that the program is necessary for UT Austin to create an environment it genuinely, and for good reason, believes is essential to a well-rounded educational experience.

B. Understanding the Importance of Student Body Diversity, the University of Texas Has Crafted a Program Narrowly Tailored to Meet This Compelling Interest.

The University, in reliance on this Court's decisions in *Grutter* and *Bakke*, has crafted a narrowly tailored program that sufficiently protects the constitutional rights of applicants, while meeting its historic commitment to diversity.

Like the program the Court approved in *Grutter*, the program, rather than using race as a determining factor, merely considers race alongside all other diverse aspects of an applicant's background. Again, since respondents in their brief have comprehensively laid out the components and workings of its program, we will refrain from reproducing all of its details here. *See* Respondents Br. at 12-15. That said, the complex structure of UT Austin's policy bears summarizing here in order to demonstrate the expert care the institution has taken to avoid using race in the mechanical fashion this Court rejected in *Bakke* and in *Gratz*.

Before their candidacies are evaluated, all applicants are divided into one of three categories: Texas residents, non-Texas residents and international students. Texas residents are then further divided into applicants eligible for admission via the Top Ten Percent Program and remaining candidates. Once an applicant is identified as ineligible for the Top Ten Percent Program, the Admissions committee calculates his or her Academic Index (AI), as well as their Personal Achievement Index (PAI). Each student's AI is based on a combination of four factors: (1) high school class rank; (2) completion of UT's required high school curriculum; (3) the extent to which the applicant exceeded the required curriculum; and, (4) SAT (verbal and math) or ACT scores. Some applicants score high enough for admission based solely on their AI. Likewise, others score so low that they are all but denied admission. Race plays no role in the consideration of either of these group's applications. The University then uses the PAI to assess the applications whose AI is neither so low or high as to fall into one of the aforementioned groups. The PAI is based on two essays and a Personal Achievement

Score (PAS). The essays are scored on a scale of 1 to 6, with race being wholly absent as a factor. The PAS also ranges from 1 to 6 and takes account of the following six factors, leadership potential, extracurricular activities, and awards, work experience, community service, and special circumstances. In turn, the special circumstances category includes seven separate attributes, with race being only one. The special circumstances elements are not considered individually or given a numerical value and then added together. Instead, each characteristic is simply considered in light of the individual's overall experience.

But that does not represent the end of the individualized process. When applying, all applicants indicate their first and second choice of programs or majors. Once an applicant's AI and PAI scores have been computed, the data, without any indication of name or race, is placed on a graph with an x-axis, as well as a y-axis, including the scores of all applicants who have indicated an interest in that particular program. Then, a representative of each school or major draws a line on the graph, in a "stair step" design; all applicants to the left of the line are admitted. Those students denied admission to their first choice program are then placed on a second matrix, representing their second choice, where the same process is undertaken. Those non-Top Ten Percent students admitted to neither their first or second choices are given a final chance to be admitted as general Liberal Arts Majors under the process described above. If they fail a final time, they are left to seek admission through a separate summer studies program or to transfer to UT Austin after attending another University of Texas college or university.

In light of that summary, a fair reading of UT Austin's program makes two things abundantly clear. First, this is an institution doing its absolute best to admit the bulk of its entering class with race playing absolutely no role in the process either because most applicants automatically qualify under the Top-Ten Percent plan or, if not, they score high enough on their AI – which does not include race as a factor – to be admitted. Second, even when it does open the door to consider race, this is an institution doing its utmost to make certain that race is so diluted in the mix of factors that it defies common sense to claim that an applicant is admitted *because* they are African-American or Hispanic, or not admitted *because* they are Caucasian. In short, this is an institution that has put its resources and expertise on the line in order to abide by the constitutional command that, even for the sake of a compelling interest, race should be used in a narrowly tailored fashion.

Not only that, but the reality is that UT Austin has gone well beyond *Grutter* in attempting several race neutral policies before adopting the policy challenged here: it instituted special scholarship programs, expanded its outreach efforts to high schools in underrepresented areas of the state, increased recruitment efforts at low income schools throughout the state, and, most significantly, adopted the Top Ten Percent Plan, through which seventy-five percent of all admitted African-American students and seventy-six percent of all admitted Hispanic students are accepted. Nonetheless, these efforts failed to produce a sufficiently diverse student body.[10]

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[10] In 1997, the year after *Hopwood* was decided, only 2.7 percent of the University's undergraduate population was African, and only 15.6 percent were Hispanic. While the percentage

Ironically, petitioner and her *amici* concede the limited scope of UT Austin's race-conscious policy but appear to object to it precisely because it is so limited. It is not at all clear how the very narrow tailoring of a program could possibly be the basis for finding it unconstitutional. During the 2008 cycle, approximately ninety percent of the University's students were admitted through the race neutral Top Ten Percent Program. During the same cycle, a mere 1,216 slots were made available to students not admitted under the Ten Percent Plan. Were the Court to accept petitioner's argument that to be narrowly tailored a plan would have to increase a university's minority enrollment by 30 percent, akin to *Grutter*, the vast majority of the 1,216 slots would have to be allocated to minorities – an impossibility under the Constitution's requirement that the program be narrowly tailored to meet a compelling governmental interest. Realistically, the only way to achieve the impact petitioner alleges is necessary would be to expand the program to cover a greater percentage of students admitted under the program – a position they logically cannot advance if they believe the program, in its narrowest and most necessary sense is not required to fulfill the University's objectives.

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of African-Americans and Hispanics peaked in 2004, with 4.5 percent and 16.9 percent, respectively, the percentage of students were insufficient to meet the University's objectives. As noted above, minorities regularly reported feeling isolated in their classes; while a substantial number of smaller classes had virtually little or no minority representation

In the final analysis, petitioner does not challenge UT Austin's program because it fails to pursue a compelling state interest; the Court's decision in *Grutter* settled that question. Nor does petitioner challenge the program because it is insufficiently narrowly tailored; it is difficult to imagine a race-conscious program that uses race as narrowly as UT Austin's does. The truth is petitioner challenges the program because in her and opposing *amici*'s view race can never be a valid constitutional consideration under any circumstance. Petitioner and her *amici* are entitled to that opinion, but it is not a position this Court has ever adopted. Nor is it a position this Court should now accept. Race in America is a difficult subject, loaded as it is with a record of "rope, fire, torture, castration, infanticide, rape, death and humiliation."[11] Many would agree that for historical reasons and in light of present day evidence, "the color line" remains in the twenty-first century what W.E.B. Dubois identified as the problem of the twentieth century.[12] But the meaning we ascribe to race need not be so indelibly fixed in slavery and apartheid that the only corrective is to avoid any thought of race at any and all cost. Our past notwithstanding, we remain free to choose how to think about race. In that way and in the end, it seems particularly apt that at UT Austin, an institution dedicated to providing the best American higher education has to offer, race should be a factor in building a diverse student body. In considering race in that fashion, UT Austin is doing nothing less than

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[11] James Baldwin, *The Fire Next Time*, collected in *The Price of The Ticket* 376 (St. Martin's Press 1985).

[12] W.E.B. Dubois, *The Soul of Black Folks* 41 (Bedford Books 1903).

teaching this generation of students the freedom to think and talk anew about race.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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