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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Grutter v. Bollinger*, 539 U.S. 306 (2003), so radically departed from this Court's longstanding equal protection jurisprudence that it should be overruled.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF has litigated for the equality of all persons, regardless of race, and for the application of strict scrutiny to all governmental racial classifications. For example, MSLF attorneys represented the plaintiffs in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); and *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). MSLF has also

[1] The parties have consented to the filing of this amicus curiae brief by filing blanket consents with this Court. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

actively participated as amicus curiae in a number of similar cases challenging racial classifications, most recently in *Ricci v. Stefano*, 557 U.S. 557 (2009).

MSLF can bring a unique perspective to bear in this case by examining the nature and requirements of strict scrutiny to demonstrate that *Grutter*, on which the Fifth Circuit relied, abandoned the concept of strict scrutiny developed by the longstanding precedent of this Court and should be overruled. Therefore, the Fifth Circuit's decision upholding the racially discriminatory admissions policies of the University of Texas should be reversed.

STATEMENT OF THE CASE

MSLF adopts Petitioner's thorough Statement of the Case.

SUMMARY OF ARGUMENT

This case involves the level of judicial scrutiny a court should apply when reviewing a university's racially discriminatory admissions policy, an issue of extraordinary and fundamental importance to the Nation: "Racial classifications of any sort pose the risk of lasting harm to our society," which "may balkanize us into competing racial factions [and] carry us further from the goal of a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Here, the Fifth Circuit, relying on *Grutter*, approved the racially discriminatory admissions practices of the University of Texas at Austin ("UT" or the "University"). But *Grutter* itself abandoned this Court's longstanding equal protection precedent, and held that achieving the supposed educational benefits that flow from diversity in a law school constitutes a compelling interest, permitting a law school to racially discriminate in its admissions policies. The law school was permitted to do so until it had achieved a so-called "critical mass" of preferred minority students, which the law school represented was necessary to achieve diversity.

In so holding, this Court abandoned strict scrutiny of the racially discriminatory admissions policy of the law school and ruled that the law school's "good faith" must be presumed when it decided that achieving diversity was a compelling interest and that a "critical mass" of minority students was necessary to achieve that diversity. *Grutter* also deferred to the law school's judgment that such a "critical mass" could be achieved only through racially discriminatory admissions policies.

But a "critical mass," like societal discrimination, is such an amorphous and indefinable concept that no narrowly tailored remedy to achieve it can be identified. In other words, the *Grutter* majority simply deferred to the decision of the discriminator to justify its discrimination. In doing so, the *Grutter* majority turned equal protection principles on their head and adopted the equivalent of rational basis review, or

something even less demanding, thus giving universities carte blanche to engage in racially discriminatory admission decisions so long as they, in their sole, presumptively "good faith" judgment, determined necessary. The holding of the *Grutter* majority was tantamount to disclaiming any judicial role in reviewing racially discriminatory admissions policies of law schools.

MSLF agrees with Petitioner and its arguments that the Fifth Circuit's decision goes beyond the holding of the *Grutter* majority and that this Court could reverse the Fifth Circuit for that reason, without *necessarily* overruling *Grutter*. But the Fifth Circuit relied on *Grutter*, which itself abandoned all prior equal protection precedent of this Court. Without any meaningful standards on which to rely, other courts will make the same mistakes as the Fifth Circuit. The only solution to the problem is to overrule *Grutter*.

Accordingly, this Court should revisit and overrule *Grutter*, thereby returning to this Court's longstanding equal protection precedent by applying strict scrutiny to racially discriminatory university admissions policies. In so doing, this Court should also reverse the decision of the Fifth Circuit.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE PROHIBITS CLASSIFICATIONS OF INDIVIDUALS BASED ON RACE EXCEPT IN THE RAREST OF CIRCUMSTANCES.

A. Racial Classifications Pose A Danger Of Lasting Harm To Society.

"Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw*, 509 U.S. at 657. Indeed, "[p]referment by race . . . can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality," *Grutter*, 539 U.S. at 388, (Kennedy, J., dissenting), and may "balkanize us into competing racial factions carry[ing] us further from the goal of a political system in which race no longer matters. *Shaw*, 509 U.S. at 657. Thus, "[t]he equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand Constrs., Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring); *see also City of Richmond v. Croson*, 488 U.S. 469, 521 (1988) ("*Croson*"), 488 U.S. at 521 (Scalia, J., concurring) (discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society").

Furthermore, "[c]lassifications based on race carry a danger of stigmatic harm" to the individuals

benefitted by racial preferment. *Croson*, 488 U.S. at 493. And such racial classifications "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* Thus, a racial classification:

> [I]nevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become truly irrelevant[.]

Adarand, 515 U.S. at 229 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); *see also Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) ("The dangers of such classifications are clear [–] [t]hey endorse race-based reasoning and the conception of a nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."). Indeed, "[s]uch policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution." *Id*. at 604 (O'Connor, J., dissenting). In fact, "[r]acial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit." *Id*.

In short, the "central purpose [of the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV § 1] is to prevent the states from purposefully discriminating between individuals on the basis of race," *Shaw*, 509 U.S. at 642 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)), and thereby "do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

B. A Governmental Racial Classification Is Presumptively Invalid And May Be Upheld Only Upon A Showing Of Extraordinary Justification.

The essence of strict scrutiny is that a court may not defer to the judgment of the governmental discriminator, or its professions of good faith: "Blind judicial deference to legislative or executive pronouncements, of necessity, has no place in equal protection analysis." *Croson*, 488 U.S. at 501. "The presumption [of statutory validity] is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently 'suspect.'" *Parham v. Hughes*, 441 U.S. 347, 351 (1979). Therefore, "[a] racial classification, regardless of purported motivation, is *presumptively invalid* and will be upheld only upon an *extraordinary justification*." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (emphasis added).

Consequently, no governmental entity may institute a race-conscious policy for any reason unless it has a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 (1986) (plurality opinion); *Croson*, 488 U.S. at 510. Thus, a court must subject a governmental entity's race-conscious policy to a "most searching examination," approaching the policy with "skepticism." *Adarand*, 515 U.S. at 223, 237. The use of racial preferences is "subject to the most exacting judicial scrutiny [and] it is . . . [the discriminator's] burden to satisfy the demands of the extraordinary justification." *Hunter v. Regents of the University of California*, 190 F.3d 1061, 1069 (9th Cir. 1999).[2] In fact, even in cases subject only to intermediate scrutiny, such as gender discrimination, "the burden of justification is demanding and it rests entirely on the state." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

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[2] *See also Johnson v. California*, 543 U.S. 499, 505 (2005) ("the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests") (quotations omitted); *Wessman v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) (the government bears "a heavy burden of justification [for] their use," because "*Croson* . . . leaves no doubt that only solid evidence will justify allowing race-conscious actions."); *Association of Gen'l Contr., Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) ("[T]he state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action is necessary."); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government.").

C. So-Called "Benign" Racial Classifications Require The Same Showing Of An Extraordinary Justification.

In *Croson*, this Court ruled that "recitation of a 'benign' or legitimate purpose for a racial classification[, such as racial diversity in education,] is entitled to little or no weight" because "racial classifications are suspect and . . . simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500. Later, this Court departed radically from *Croson*, holding that racial classifications to achieve broadcast diversity are "benign" and, therefore, subject only to intermediate scrutiny. *Metro Broadcasting*, 497 U.S. at 566-69. Five years later, this Court emphatically repudiated the holding in *Metro Broadcasting* and returned to the teachings of *Croson*. *Adarand*, 515 U.S. at 233-34 ("*Metro Broadcasting*, itself departed from our prior cases, [so] by refusing to follow *Metro Broadcasting*, . . . we do not depart from the fabric of the law; we restore it.") (emphasis in original).

Like *Croson*, *Adarand* ruled that "good intentions alone are not enough to sustain supposedly 'benign' racial classification[s,]" because such classifications would "inevitably [be] perceived by many as resting on the assumption that those who are granted this special preference are less qualified . . . purely by their race." *Id*. at 228-29. "Benign" racial classifications serve only to "exacerbate rather than reduce racial prejudice" and "will delay the time when race will become . . . truly irrelevant." *Id.* Consequently, "*all* racial classifications, imposed by *whatever* federal,

state or local governmental actor, must be analyzed . . . under strict scrutiny." *Id.* at 227 (emphasis added).

Indeed, "[u]nder our Constitution, there can be no such thing as either a creditor or a debtor race . . . [a] concept [that] is alien to the Constitution's focus on the individual." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in judgment). Therefore, "[i]n the eyes of government, we are just one race here [–] American[.]" *Id*. In other words, there is no "racial paternalism exception to the principal of equal protection" because "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law." *Id*. at 240 (Thomas, J., concurring in part and in judgment). Furthermore, "[t]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." *Id.* at 241. "These [benign] programs stamp minorities with a badge of inferiority[.]" *Id.* Thus, "government-sponsored [benign] racial discrimination . . . is just as noxious as discrimination inspired by malicious prejudice[;] each . . . is racial discrimination, plain and simple." *Id*.

D. Any Justification For A Racially Discriminatory Admissions Policy Must Be Extraordinary, And The Remedy Clearly Identified And Specific.

In *Croson*, this Court made it clear that, without defining a sufficiently detailed and specific compelling

interest, it is impossible to craft a narrowly tailored remedy:

> Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be *clearly identified and unquestionably legitimate*.

Croson, 488 U.S. at 505 (emphasis added). "[P]roper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects," and "[s]uch findings . . . assure all citizens that the deviation from the norm of equal treatment . . . is a temporary measure." *Id*. at 510. Thus:

> Unless [the governmental body] *clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the court should not uphold this kind of statute. . . . "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Croson*, 488 U.S. at 516-17.

Adarand, 115 U.S. at 229 (emphasis in original). An interest so amorphous or indistinct that its scope and nature cannot be defined and identified with particularity is neither "clearly articulated" nor "narrowly tailored," and, therefore, not compelling.

Instead, a compelling interest must be sufficiently concrete to "define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510. Societal discrimination is an example of an interest that does not meet this test: "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 497. "Relief for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority contractors] mirrored the percentage of minorities in the population as a whole." *Id*. "Societal discrimination is insufficient and over expansive [and] . . . could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 497; *Wygant*, 476 U.S. at 276.

As demonstrated below, a majority of this Court in *Grutter* failed to apply these longstanding principles of strict scrutiny analysis to the racially discriminatory admissions policies of the law school. Instead, it created the concept of "critical mass," a concept as amorphous and indefinable as societal discrimination.

II. *GRUTTER* RADICALLY DEPARTED FROM THIS COURT'S LONGSTANDING EQUAL PROTECTION PRECEDENT.

The Fifth Circuit based its ruling upholding the racially discriminatory admission practices of UT on *Grutter*. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231-47 (5th Cir. 2011). In *Grutter*, a majority of

this Court held that achieving the ostensible educational benefits that flow from diversity constitutes a compelling interest, permitting the University of Michigan Law School to racially discriminate in its admissions policies to achieve a so-called "critical mass" of preferred minority students, which is necessary to achieve diversity. *Grutter*, 539 U.S. at 333, 343.

In so holding, a majority of this Court abandoned strict scrutiny analysis and presumed the law school's good faith. In other words, a majority of this Court deferred to the judgment of the law school personnel that diversity was necessary and that a "critical mass" of minority students was necessary to achieve diversity, but was lacking, and that only discriminatory admissions policies could achieve that "critical mass." *Id*. at 328-29. But a "critical mass," like societal discrimination, is such an amorphous and indefinable concept that a narrowly tailored remedy cannot address it and it may not serve as a compelling interest.

A. *Grutter* Did Not Require An Extraordinary Justification, But Instead, Simply Deferred To The Judgment Of The Law School.

In *Grutter*, the law school argued that its racially discriminatory admissions policy was needed to obtain "the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 328. The law school asserted that such diversity could be achieved

only when a "critical mass" of underrepresented minority students had been admitted. *Id*. at 329. But the law school could neither describe nor quantify "critical mass":

> "[C]ritical mass" means "meaningful numbers" or "meaningful representation," which . . . [is] a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. . . . [T]here *is no number, percentage, or range of numbers . . . that constitute critical mass*.

Id. at 318 (emphasis added). The law school further elaborated that "critical mass" means numbers such that "underrepresented minority students do not feel . . . like spokespersons for their race." *Id.* at 319. The law school did not supply a meaningful, quantifiable standard by which a court could judge when "critical mass" did or did not exist.

This Court, however, did not engage in a searching and skeptical examination of the nature, details, and scope of the claimed compelling interest. *See Adarand*, 115 U.S. at 229. Nor did this Court require the law school to bear the substantial burden of identifying "critical mass" with sufficient clarity so that this Court or another could determine whether the law school had made the most exact connection between justification and remedy. *Id*. Instead, a majority of this Court deferred to the law school's judgment: "The Law School's educational judgment that such diversity [and the measure thereof] is essential to its educational mission is *one to which we defer*."

Grutter, 539 U.S. at 328 (emphasis added). Indeed, the *Grutter* majority seemed to suggest that this Court lacked competence to strictly scrutinize the law school's racially discriminatory admissions policy, ruling that such "complex educational judgments . . . lie primarily within the expertise of the university." *Id.*

Thus, a majority of this Court in *Grutter* ignored the teachings of *Adarand* and *Croson* that a court should not defer to, but critically and skeptically analyze, any justifications offered for racial classifications. Contrary to *Adarand* and *Croson*, this Court's majority in *Grutter* ruled that "'good faith' on the part of a university is 'presumed' [in the absence of] 'a showing to the contrary'" by the injured party against whom the law school discriminated. *Id*. at 329. But "more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." *Adarand*, 515 U.S. at 226 (internal quotation omitted). In contrast, the *Grutter* majority just "t[ook] the Law School at its word[.]" *Id.* at 343.

The *Grutter* majority's deferral to the judgment and presumed good faith motive of the discriminator is antithetical to the concept of strict scrutiny and constitutes the "blind judicial deference" so emphatically condemned by this Court in *Croson*. 488 U.S. at 501. The presumption of validity afforded to the law school's racially discriminatory admissions policy violates the longstanding principle that any racial classification is "presumptively invalid." *Pers. Adm'r of Mass.*, 442 U.S. at 272. Indeed, the "most searching

examination" with "skepticism" required by *Adarand*, 515 U.S. at 223, 227, was replaced by the *Grutter* majority with trust in the pronouncements of the law school, a standard less than rational basis scrutiny.[3]

In short, the majority's analysis in *Grutter* bears a resemblance to rational basis scrutiny or something even less than that. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) ("The Court . . . does not apply strict scrutiny [and] undermines both the test and its own controlling precedents.") Indeed, the *Grutter* majority's decision violated well-established equal protection jurisprudence, including *Adarand* and *Croson*. Therefore, this Court should overrule *Grutter* and correct its departure from the longstanding equal protection jurisprudence of this Court. *See Adarand*, 515 U.S. at 233-34 (overruling *Metro Broadcasting*).

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[3] Under this standard, a university might determine, based on its expertise in educational matters, that classes should be segregated by race because it would enhance learning opportunities for minority students, who felt more free to express themselves and participate in single-race classes than in classes with non-minorities, resulting in greater achievement and career opportunity. Under the *Grutter* majority's new standard, the courts would be obligated to defer to the university's "complex educational judgment" and presume that the university acted in good faith. Indeed, under the *Grutter* majority's reasoning, a university might determine that it could best serve the educational needs of its students by providing a separate, but equal, higher education system and not run afoul of equal protection principles. *But see Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

B. "Critical Mass," Like Societal Discrimination, Is An Amorphous And Indefinable Concept That Cannot Be Addressed By A Narrowly Tailored Remedy.

An "exact connection between justification and classification," as required by *Adarand*, 115 U.S. at 229, is impossible when utilizing the concept of "critical mass." Indeed, "[t]here is no number that constitutes 'critical mass.'" *Grutter*, 539 U.S. at 318. Thus, "critical mass" is an indefinable pedagogical concept, created out of thin air by educators who can't define it, but apparently "know it when they see it." *Cf. Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing pornography). To make matters worse, under the majority's holding in *Grutter*, this Court must presume that judgment correct. Yet, because "[t]here is no number that constitutes 'critical mass,'" *Grutter*, 539 U.S. at 318, no court is able to determine whether a "critical mass" of minority students is present or lacking and whether racially discriminatory admissions policies are required. The inevitable result is the decision of the Fifth Circuit here.

The concept of "critical mass," like that of societal discrimination, is insufficiently particular in its scope or nature to determine "the extent of the remedy necessary to cure its effects," as required by *Croson*. 488 U.S. at 510. Also, like societal discrimination, the concept of "critical mass" "is too amorphous a basis for imposing a racially classified remedy . . . [and] has

little probative value in supporting a race-conscious measure." *Id.* at 497.

Moreover, attempts to achieve "such an ill-defined [goal] could extend until [university admissions of minority students] mirrored the percentage of minorities in the population as a whole," a measure also forbidden by *Croson*. *Id.* at 498. Indeed, achieving a "critical mass" of certain minorities may require admitting even more such minority students than the percentage they represent of the total population in Texas. Indeed, it is probable that even admitting more than such a number would not be sufficient to acquire "critical mass." Thus, the attempt to achieve "critical mass" is "timeless in [its] ability to affect the future" and has no end in sight, a situation categorically prohibited by *Croson*. *Id.* at 497.

Consequently, an "exact connection between justification and classification," as required by *Adarand*, 115 U.S. at 229, is impossible for the concept of "critical mass." That is, if lack of diversity is the absence of a "critical mass" of minority students, and "critical mass" cannot be defined, it is impossible to know whether it is present or absent in a particular situation, or when it has been achieved. Thus, diversity cannot constitute a compelling interest because its presence or absence ("critical mass") is impossible to ascertain. Nor, for the same reason, can there be a narrowly tailored remedy to achieve "critical mass," if it were absent. Therefore, this Court should overrule *Grutter* to correct its radical, and misguided departure from this Court's longstanding precedent.

III. THE FIFTH CIRCUIT'S DECISION DEMONSTRATES WHY THIS COURT SHOULD OVERRULE *GRUTTER*.

A. Relying on *Grutter*, The Fifth Circuit Concluded That Diversity Does Not Exist Until A "Critical Mass" Exists In All Major Fields Of Study.

The Fifth Circuit found that "minority students remain clustered in certain programs limiting the beneficial effects of educational diversity." *Fisher*, 631 F.3d at 240. Therefore, the Fifth Circuit ruled that if "UT is to have diverse interactions for a greater variety of colleges, not more students disproportionately enrolled in certain programs," it must racially discriminate in admissions. *Id*. (without a racially discriminatory admissions policy, UT cannot "achieve the maximum educational benefits of a truly diverse student body.") In other words, the Fifth Circuit believed that diversity is not achieved until a "critical mass" of minority students has enrolled in all the major areas of study offered by UT. It is highly unlikely that such a result could be achieved even if the favored minorities enrolled in direct proportion to their numbers in the general population or even greater numbers.

Importantly, this Court has rejected the concept that, in the absence of discrimination, minorities will be equally likely to choose any particular profession or field of study as non-minorities. Such an assertion "rests on the completely unrealistic assumption that minorities will choose a particular trade in lockstep

proportion to their representation in the local population[.]" *Croson*, 488 U.S. at 507. Indeed, it is "'completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination.'" *Id*. (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)); *see Eng'g Contr. Ass'n of S. Fla. v. Metro. Dade County*, 122 F.3d 895, 922 (11th Cir. 1997) ("In a pluralistic and diverse society, it is unreasonable to assume that equality of opportunity will inevitably lead different groups with similar human and financial capital characteristics to make similar career choices.").

It is equally unrealistic for the Fifth Circuit to predict that racial preferences in university admissions will result in an equal distribution of all minority candidates throughout all major areas of study offered by UT, much less that they will ever achieve the ethereal and illusive "critical mass," in each such area of study. Nothing in *Grutter* purported to require diversity not only at the university level, but also in all major fields of study. Thus, the Fifth Circuit greatly expanded *Grutter*. This is not surprising considering that the *Grutter* majority abandoned strict scrutiny analysis and adopted a new compelling interest that it could not define, which made it impossible to ascertain whether it had been narrowly tailored.

B. Because of *Grutter*, The Fifth Circuit Erroneously Concluded That Diversity Does Not Exist Until A "Critical Mass" Exists In Each Classroom.

The district court, relying on the unsupported assertions of UT, held that diversity requires the presence of a "critical mass" of minority students in *each classroom*. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 602 (W.D. Tex. 2009) (emphasis added).[4] However, UT is a very large university, with 5,631 class sections as of 2002. Supp. Jnt. App. 70a. Thus, UT has admitted that its minority students were more spread out, and, while UT's minority enrollment grew steadily, the number of classes deemed to have a "critical mass" of minority students decreased. Supp. Jnt. App. 71a, 73a.

The Fifth Circuit affirmed this remarkable proposition that an indefinable "critical mass" of minority students must be in every one of the 5,631 classes at UT because there was "no reason to doubt UT's

[4] UT relied for its assessment of classroom diversity on a survey it had completed of minority representation in classes containing from 5 to 24 students. *Id*. at 593, 602-03. The University did not explain how it chose this class size and why it did not look at *all* classes, including large classes that might have a significant, perhaps disproportionate, enrollment of minority students. There was no examination of the distribution of these classes throughout major areas of study, or distribution of these classes in upper or lower division levels. It appears that UT may have tried to skew the study to find underrepresentation of minority students.

considered, good faith conclusion that the university still has not reached a critical mass at the *classroom level*." *Fisher*, 631 F.2d at 244. This is an even more radical proposition than the unrealistic determination that diversity requires a "critical mass" of minorities across every major field of study. *See id.* at 240. In short, the Fifth Circuit approved limitless racial discrimination in university admissions that are "timeless in their ability to affect the future," contrary to the teachings of this Court. *Croson*, 488 U.S. at 497.

There is absolutely no support in *Grutter* for the proposition that a "critical mass" of minority students is needed in every classroom to achieve educational diversity at UT, and that it can be achieved only through racially preferential admissions policies. Instead, the *Grutter* majority ruled that the proper base for measuring "critical mass" is the "student body," not the classroom. *Grutter*, 539 U.S. at 325. But it is not surprising, that, given the *Grutter* majority's departure from strict scrutiny analysis, its deference to the unbridled discretion of university personnel, and its failure to define any meaningful standards on which to measure the presence or absence of diversity, that the Fifth Circuit reached the erroneous conclusion it did.[5] This Court should overrule *Grutter* to

[5] Judge Garza, even though he strongly disagreed with the majority holding in *Grutter*, voted to uphold the University's racially discriminatory policy because he believed he was compelled to do so by *Grutter*. *Fisher v. Univ. of Tex. at Austin*, 631

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bring it into conformance with longstanding equal protection precedent.

CONCLUSION

For the foregoing reasons, this Court should overrule *Grutter* and reverse the decision of the Fifth Circuit. In the alternative, this Court should reverse the decision of the Fifth Circuit because it misinterpreted and/or misapplied *Grutter*.

Respectfully submitted,

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F.2d 213, 247 (5th Cir. 2011) (Garza, J., specially concurring). He demonstrates the far reach and potential of *Grutter* due to the majority's failure to establish any meaningful standards.