No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

—v.—

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TEXAS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of these principles, the ACLU has appeared both as direct counsel and amicus curiae in numerous racial justice cases before this Court, including *Gratz v. Bollinger*, 539 U.S 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas at Austin,* 570 U.S. ___, 133 S. Ct. 2411 (2013), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). The ACLU of Texas is a statewide affiliate of the national ACLU.

STATEMENT OF THE CASE

Abigail Fisher began this lawsuit seven years ago when she was still an undergraduate student seeking admission to the University of Texas (UT). Because she has since graduated from college, her only remaining interest in this case involves an application fee that is charged to *every* student and never returned to *any* student. This Court has, nonetheless, twice granted review in this case to

[1] No counsel for either party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief. Blanket letters of consent to the filing of *amicus* briefs have been lodged by both parties with the Clerk of Court.

adjudicate the constitutionality of UT's admissions policy. As relevant here, the policy has two principal elements. First, by statute, 75% of incoming freshmen are admitted under the so-called Ten Percent Plan, which guarantees admission to the top 10% of every high school graduating class in the state. Second, the remainder of the freshmen class is admitted each year through an individualized, holistic process in which race is one factor among many considered by university officials as they seek to put together a class that will best advance the university's educational goals.

Two years ago this Court reaffirmed that public universities have a compelling interest in creating a diverse student body, citing *Grutter v. Bollinger*, 539 U.S. at 330, but remanded to the court of appeals for a closer examination of whether UT's holistic consideration of race in its admissions policy is narrowly tailored to promote that compelling interest. After careful scrutiny of the record, the Fifth Circuit again concluded that "UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission – as described by *Bakke* and *Grutter*." *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 657 (5th Cir. 2014).

SUMMARY OF ARGUMENT

This case has been argued and analyzed by the parties, the lower courts, and this Court under a strict scrutiny standard that renders any official

consideration of race constitutionally suspect regardless of whether it is intended to ameliorate discrimination or perpetuate it. As the Fifth Circuit has now twice held, and we agree, UT's admissions policy satisfies that stringent standard.

Petitioner does not so much quarrel with the Fifth Circuit's conclusion as challenge its premises. Thus, Petitioner questions the educational value of a racially diverse student body by suggesting that it does not rise to the level of a compelling state interest, contrary to the view adopted by this Court and educators throughout the country. In addition, Petitioner's contention that UT's admissions policy is not narrowly tailored rests on the proposition that diversity should be measured in purely numerical terms. The University and numerous amici have effectively responded to those arguments by noting, among other things, that it is Petitioner who seeks to reduce each student to nothing more than a racial or ethnic representative stripped of all other individual characteristics and experiences. It is a paradoxical position, to say the least, for a party arguing in favor of color blindness.

We submit this brief to make a different point. While the judgment below can be affirmed by applying strict scrutiny, we urge the Court to reconsider the appropriateness of applying strict scrutiny in this case. The Constitution promises equality to all persons regardless of race. In recent years, the Court has treated any consideration of race as inconsistent with that promise and therefore meriting strict scrutiny. *E.g.*, *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 294-96 (1978); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94

(1989). We respectfully suggest that the time has come to reevaluate that approach and that the Court might usefully begin with the famous observation by Justice Holmes that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

Here, both the history and purpose of the Fourteenth Amendment highlight the fallacy of treating color blindness as a substitute for equality. The framers of the Fourteenth Amendment understood that the consideration of race is sometimes necessary to achieve equality; indeed, they adopted the Fourteenth Amendment against the backdrop of post-Civil War legislation that was expressly designed to assist the recently freed slaves. Likewise, strict scrutiny was developed as a legal doctrine to protect "discrete and insular minorities" who could not rely on the political process to achieve equal rights. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). And, one need look no further than this Court's cases to understand the persistence of racial discrimination today. *See, e.g.*, *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515 (2015).

Efforts to encourage diversity, like UT's admissions policy, are not the same as exclusionary policies targeted at disadvantaged minorities, and they should not be subject to the same legal standard. Doing so creates a false equivalency that makes it unnecessarily difficult to sustain programs and policies designed to confront inequality and promote an inclusive democracy.

I. THE FOURTEENTH AMENDMENT SHOULD NOT BE INTERPRETED TO FRUSTRATE THE CONSIDERATION OF RACE IN AN EFFORT TO FURTHER EQUALITY.

A. A Principal Purpose Of The Fourteenth Amendment Was To Constitutionalize Race-Conscious Remedies.

Although much recent jurisprudence has interpreted the Fourteenth Amendment in a way that is both blind to race and racial context, the "pervading purpose" of the Fourteenth Amendment was to eliminate the oppression of historically subjugated minorities and to provide equality of opportunity. *See Slaughterhouse Cases*, 83 U.S. 36, 71 (1872).[2] With that goal in mind, it was drafted to ameliorate the harmful impacts of racial subjugation rather than impose a system of color blindness that would have been inconsistent with other recent congressional action.

In the wake of the Civil War, Congress enacted a series of race-conscious programs to aid Blacks, including the Freedmen's Bureau[3], special assistance for Black servicemen[4], and special relief to Blacks in

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[2] The historical circumstances surrounding the enactment of the Fourteenth Amendment have been recounted elsewhere at great length. *See generally*, Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985).

[3] 1866 Freedmen's Bureau Act, Act of July 16, 1866, ch. 200, 14 Stat. 173-177 (1866).

[4] 1867 Colored Servicemen's Claims Act, Res. 25, 40th Cong., 15 Stat. 26 (1867).

the District of Columbia.[5] The race-conscious nature of this legislation was not accidental. To the contrary, it was debated and enacted against opposition arguments similar to those heard today. The most prominent piece of legislation was the Freedmen's Bureau Act, which provided assistance in various forms to recently freed slaves. Opponents argued that the bill would make "a distinction on account of color between the two races"[6] and would impose "injustice and oppression upon the white people of the late slave-holding states for the benefit of the free negroes to engender strife and conflict between the two races." [7] Proponents of the Act addressed these challenges and argued the strong need for race-conscious programs, successfully securing passage of the bill twice. On both occasions, the President echoed concerns about special treatment and exercised his veto.[8] In response to the second veto, Congress, which had consistently rejected such arguments, did so again, voting to override the veto by substantial margins.[9]

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[5] Resolution for the Relief of Freedmen or Destitute Colored People in the District of Columbia, Res. 4, 40th Cong., 15 Stat. 20 (1867).

[6] Cong. Globe, 39th Cong., 1st Sess. 397 (remarks of Senator Willey).

[7] Cong. Globe, 39th Cong., 1st Sess. 402 (remarks of Senator Davis).

[8] VI Messages and Papers of the Presidents (James D. Richardson ed. 1902).

[9] The Senate vote was 33-12. Cong. Globe, 39th Cong., 1st Sess. 3842. The House vote was 104 to 33. *Id.* at 3850.

The Fourteenth Amendment was drafted, debated, and adopted against this backdrop. [10] Supporters and opponents alike viewed the Freedmen's Bureau Act and the Fourteenth Amendment to have the same goals.[11] Not only did Congress view the Fourteenth Amendment as consistent with the Freedmen's Bureau Act, a principal purpose of the Fourteenth Amendment was to provide clear constitutional authority for race-conscious remedial measures. "The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt." Jacobus tenBroek, *Equal Under Law* 201 (rev. ed. 1974).

The original purpose of the Fourteenth Amendment was thus to secure equality and to protect the use of race-conscious affirmative measures to achieve these ends. If affirmative action "conflicts with idealistic equality, that tension is original Fourteenth Amendment tension,

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[10] *See* Cong. Globe, 39th Cong., 1st Sess. 2545 (House vote, 128-37); *id.* at 3042 (Senate vote, 33-11); *id.* at 3149 (House concurrence with Senate amendments, 120-32); *id.* at 3562 (House vote on conference report, 25-102 defeating motion to table).

[11] *See* Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. at 785 ("No member of Congress hinted at any inconsistency between the fourteenth amendment and the Freedmen's Bureau Act. Indeed, while debating the amendment, opponents frequently went out of their way to criticize the Freedmen's Bureau, while supporters of the amendment praised it." (citations omitted)).

constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield." *Bakke*, 438 U.S. at 405 (Blackmun, J., concurring).

B. Application Of Strict Scrutiny To Equality-Furthering Considerations Of Race Is Contrary To The Purpose For Which The Standard Was Developed.

The logic supporting the creation of the strict scrutiny standard leads inescapably to the conclusion that equal protection distinguishes between policies created to extend a helping hand, necessitating less searching judicial review, and those whose purpose is likely to be contrary to the Constitution, requiring the application of strict scrutiny.

The Court articulated a "more searching judicial inquiry" for certain kinds of legislation in its 1938 decision, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The famous "footnote 4" in the decision was written as the Court relaxed *Lochner*-era scrutiny of economic regulation in order to distinguish the use of closer review of classifications that disadvantaged minorities. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886); *Strauder v. State of W. Virginia*, 100 U.S. 303, 305-06 (1879). The Court explained that the "more searching judicial inquiry" should apply because "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Carolene Products*

Co., 304 U.S. at 153 n.4. In 1938, the structures of Jim Crow were the prominent example of prejudice that might create a "special condition" of the sort referenced by the Court.

Consistent with these origins, the indicia of "suspect classification" developed through the Court's jurisprudence following *Carolene Products* reflect a particular concern with laws "imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Thus, classifications based upon race have been considered suspect "not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003)(Ginsburg, J., dissenting)(internal citation omitted). The purpose of strict scrutiny is not served by its application to considerations of race in an effort to further diversity and equal participation in a deeply unequal society. *See id.* ("[W]here race is considered for the purpose of achieving equality, no automatic proscription is in order.")(internal quotation and citation omitted); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 246 (1995)(Stevens, J., dissenting)("A state actor inclined to subvert the Constitution might easily hide bad intentions in the guise of unintended 'effects'; but I should think it far more difficult to enact a law intending to preserve the majority's hegemony while casting it plausibly in the guise of affirmative action for minorities.").[12]

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[12] *See also* Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 Mich. J. Race & L. 51, 80 (1996) ("In

The historical purpose of equal protection and of the strict scrutiny standard was to secure the rights and equal opportunities of disenfranchised people. This history affirms the importance of attention to persisting inequalities in conducting equal protection analysis. Far from a position of blanket skepticism, equal protection contemplates and at times even necessitates race-conscious measures to secure the guarantee of equality. [13] Application of strict scrutiny in this case upends the original conceptions of equal protection and strict scrutiny.

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strictly scrutinizing all uses of racial classifications, the Supreme Court has lost sight of the central concern underlying Footnote 4–not the use of racial classifications per se, but the checking of defects in the democratic process that disadvantage discrete and insular minorities.").

[13] A full conception of equal protection that distinguishes actions intended to perpetuate *inequality* from those designed to advance *equality* is not relegated to history. The guarantee of equal protection under International Human Rights law not only permits, but where necessary requires, signatories to take "special and concrete measures" to guarantee certain racial and ethnic groups "full and equal enjoyment of human rights and fundamental freedoms." Convention on the Elimination of All Forms of Race Discrimination (CERD) art. 2(2), *adopted*, Dec. 21, 1965, S. Treaty Doc. No. 95-18, 660 U.N.T.S. 195; *see also* Brief of Human Rights Advocates, et al. as Amici Curiae Supporting Respondents at 10-14, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3418597, at *10-12 (describing CERD committee actions to promote affirmative measures to correct inequalities).

C. Color-blind Equal Protection Divorced from History and Context Has Served to Undermine the Purpose of Equal Protection.

Although our history gives us cause for vigilance against invidious discrimination, reliance on formalistic and color-blind notions of equal protection have too often failed to provide a safeguard against discrimination for people of color.

The adoption of the Fourteenth Amendment should have placed beyond doubt the principal that equality under the Constitution incorporated an understanding of meaningful participation in democratic society, and that achieving this goal may necessitate measures designed to redress inequality. *See* pp. 5-8, *supra*. However, acceptance of this understanding was short-lived. Following the Reconstruction Era, a series of Court decisions "whittled away a great part of the authority presumably given the government for protection of civil rights." *Bakke*, 438 U.S. at 391-92 (Marshall, J., concurring)(quotations and citation omitted). For example, in the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court struck down a federal law banning racial discrimination in public accommodations. And, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court upheld racial segregation in railway cars under the discredited doctrine of separate but equal.

The Court in *Plessy* rested its holding on what it saw as a distinction between social inequalities (segregation) and formal equality. In devising the separate but equal doctrine, the *Plessy* Court reasoned that the Fourteenth Amendment was not intended "to enforce social, as distinguished from

political, equality" *Plessy*, 163 U.S. at 544. The Court's holding denied the reality of discrimination and inequality entirely, and "[i]n the wake of *Plessy*, many states expanded their Jim Crow laws." *Bakke*, 438 U.S. at 393 (Marshall, J., concurring).

In his *Plessy* dissent, Justice Harlan recognized the consequences of this limited view of equality: although slavery was abolished, states would continue to "interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens." 163 U.S. at 563 (Harlan, J., dissenting). Although Justice Harlan invoked the term "color–blind," he clearly understood that the harm of Louisiana's supposedly neutral segregation law did not fall evenly. *Id.* at 559. Justice Harlan found no difficulty concluding that "[e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." *Id.* at 557 (Harlan, J., dissenting). It was the intent to exclude and deem inferior, made clear by the historical circumstances and contemporary effect, that animated Justice Harlan's dissent. The concept of color blindness as invoked in Justice Harlan's opinion has been aptly summarized:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense,

> the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.

Gratz, 539 U.S. at 301-02 (Ginsburg, J., dissenting)(quoting *United States v. Jefferson County Bd. of Ed.,* 372 F.2d 836, 876 (5th Cir. 1966) (Wisdom, J.)).

Against calls for color blindness, early desegregation rulings were attentive to context and the purpose behind state actions. When the Court in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954), finally repudiated *Plessy* a half century later, it "did not speak about the wrongs of racial classifications. Instead, Brown focused on the harms of segregation." Reva B. Siegel, *Foreword: Equality Divided*, 127 Harv. L. Rev. 1, 9-10 (2013). Similarly, in *Loving*, the Court probed the purpose of the racial classifications at issue, finding them illegitimate "as measures designed to maintain White Supremacy." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Courts generally understood that the strict scrutiny of racial classifications was not color blind and "wielded the principle to protect blacks against status-enforcing harm but did not employ it to constrain race-based state action designed to alleviate segregation." Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 Harv. L. Rev. 1470, 1518 (2004)(citing *Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1382-83 (Rehnquist, Circuit Justice 1978)); *see also* J. Skelly Wright, *Public School Desegregation:*

Legal Remedies for De Facto Segregation, 16 Case W. Res. L. Rev. 478, 489 (1965).

Justice Powell's opinion in *Bakke* returned to a color blind understanding of equal protection removed from concern with purpose or circumstance. In *Bakke*, Justice Powell recognized that *Brown* and similar cases were concerned with "discrimination by the 'majority' white race against the Negro minority." 438 U.S. at 294 (1978)(Powell, J.). Yet he rejected this as the focus of equal protection and instead favored a reading that divorced these cases from their historical context, offering the bare principle that "distinctions between citizens solely because of their ancestry" are "odious to a free people." *Id.* at 294 (Powell, J.)(quotation marks and citation omitted). In this conception of equal protection, strict scrutiny applies without regard to the purpose for which race was considered. In Justice Powell's view, "[t]he concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments." *Id.* at 295 (Powell, J.).

Yet the "temporary arrangements" Justice Powell described have persisted for hundreds of years. *See id.* at 395 (Marshall, J., concurring). Blacks had been enslaved, legally subjugated, and discriminated against by the private sector and government alike, resulting in deep inequalities. Nor is this racial hierarchy a mere political distinction, as might have been argued if the equal participation in the political process envisioned by *Carolene Products* had been realized. The limits of Justice Powell's conception of equal protection were highlighted by Justice Blackmun, who wrote:

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.

Bakke, 438 U.S. at 407; *see also id.* at 327 (Brennan, J., concurring in judgment in part and dissenting in part)("[W]e cannot let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."); *id.* at 402 (Marshall, J.)("I fear that we have come full circle. After the Civil War our Government started several 'affirmative action' programs. This Court in the *Civil Rights Cases,* 109 U.S. 3 (1883), and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts.").

II. THE PERSISTENCE OF PERVASIVE RACIAL INEQUALITY CALLS FOR THE COURT TO REVISIT THE APPLICATION OF STRICT SCRUTINY TO EFFORTS TO ADDRESS INEQUALITY AND PROMOTE DIVERSITY.

A. Our Country Continues To Be Divided Along Racial Lines As The Result Of A Long History Of Government And Private Discrimination.

Despite Justice Powell's wishful pronouncement that the racial inequalities of the

time were "transitory," our country remains divided along racial lines. *Bakke*, 438 U.S. at 298. "The enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved in Cmty. Sch.*, 551 U.S. at 787 (2007) (Kennedy, J., concurring in part, concurring in judgment). Much present inequality has roots in a long history of discrimination at all levels of government.

The history of government discrimination is felt deeply in the housing sector, where the vestiges of *de jure* segregation "remain today, intertwined with the country's economic and social life." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515 (2015). Housing discrimination evolved from one form into another through much of the 20th century, with private sector and government discrimination closely linked. After racially restrictive municipal zoning was declared unconstitutional in 1917, *see Buchanan v. Warley*, 245 U.S. 60 (1917), restrictive covenants which forbade the transfer of property to nonwhites became an increasingly common element of property deeds until their judicial enforcement was held unconstitutional in 1948. *See Shelley v. Kraemer*, 334 U.S. 1 (1948). Federal housing programs established in the 1930s and early 1940s worked to exclude people of color from middle class neighborhoods and from advantageous lending programs that allowed white families to accumulate wealth.[14] From the 1930s through 1968, the Federal Housing Administration published a rating system

[14] *See, e.g.*, Thomas J. Sugrue, *Northern Lights: The Black Freedom Struggle Outside the South*, 26 OAH Mag. of Hist., 9, 13 (2012).

that purported to assess risks associated with lending in specific neighborhoods; the racial makeup of a neighborhood was a chief criterion of lending security or risk.[15] On corresponding rating system maps, integrated or predominately Black neighborhoods were marked in red, indicating the highest level of risk.[16] Loans were virtually never made in these "redlined" communities.[17] The history of government redlining left deeply entrenched segregated housing patterns and persistent disparities in access to credit. This facilitated the advent of a new form of discrimination—reverse redlining. Beginning in the 1990's, predatory lenders targeted communities of color previously denied credit for higher cost and risky mortgage loans.[18] Disparities in subprime lending have lead to high rates of foreclosure, devastating communities of

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[15] *See* Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit*, 43-44 (1996); *cf.* Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality*, 59-60 (2013) (discussing similar risk assessments made by the Home Owners Loan Corporation).

[16] *See* Alys Cohen, et al., National Consumer Law Center, Credit Discrimination (5th ed. 2009); Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, *in* Segregation: The Rising Costs for America 40, 69–73 (James H. Carr & Nandinee K. Kutty eds., 2008).

[17] Massey, *Origins of Economic Disparities*, at 69.

[18] *See generally* Brief of The American Civil Liberties Union, The National Consumer Law Center, and Legal Momentum, et al., as Amici Curiae in Support of Respondent at 9, *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405733, at *6.

color.[19] This history has lead to segregated housing patterns that remain largely in place today.[20]

Efforts to dismantle segregated education systems continue into the present and many school desegregation cases remain in the federal courts. Education is also closely tied to housing, and the history of housing discrimination impacts the schools children attend. *See, e.g.*, *Parents Involved in Cmty. Sch.*, 551 U.S. at 806 (2007)(Breyer, J., dissenting)("[T]he distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, *e.g.,* by housing patterns or generalized societal discrimination) is meaningless in the present context . . . ."); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1542 (S.D.N.Y. 1985) ("The persistent and deliberate refusal to develop subsidized housing outside of Southwest Yonkers had clearly segregative consequences not only for residential conditions in the city; in light of the school district's historic neighborhood school policy, the perpetuation and exacerbation of racial imbalance in the school district was a natural, probable and actually foreseen consequence of the City's discriminatory housing practices as well."),

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[19] Jacob S. Rugh and Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 Am. Soc. Rev. 629, 645 (2010)("By concentrating foreclosures in metropolitan areas with large racial differentials in subprime lending, segregation structured the causes of the crisis, as well as the geographic and social distribution of its costs, on the basis of race. Segregation therefore racialized and intensified the consequences of the American housing bubble.").

[20] *See generally* Kyle Crowder, Jeremy Pais, & Scott J. South, *Neighborhood Diversity, Metropolitan Constraints, and Household Migration*, 77 Am. Soc. Rev. 325, 348-49 (2012).

aff'd, 837 F.2d 1181 (2d Cir. 1987). Black and Hispanic students attend racially isolated schools and schools with high concentrations of low-income students.[21] In Texas public schools, "over half of Hispanic students and 40% of black students attend a school with 90%-100% minority enrollment" and the "gaps between the quality of education available to students at integrated high schools and at majority-minority schools are stark." *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 651 (5th Cir. 2014)(citation omitted). Resources and educational outcomes often differ starkly between districts and between schools. *See, e.g.*, *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN),*

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[21] *See* John R. Logan, Elisabeta Minca, & Sinem Adar, *The Geography of Inequality: Why Separate Means Unequal in American Public Schools*, 85 Soc. of Educ. 287 (2012)("[U]nlike the typical white child, who attends a public school in which most of the children are above the poverty line, the typical black or Hispanic child attends a public school in which most of the children are below the poverty line."); John Kucsera, Gary Orfield & Genevieve Siegel-Hawley, The Civil Rights Project, *E Pluribus… Separation: Deepening Double Segregation for More Students* 9 (2012), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf ("In spite of the dramatic suburbanization of nonwhite families, 80% of Latino students and 74% of black students attend majority nonwhite schools (50-100% minority), and 43% of Latinos and 38% of blacks attend intensely segregated schools [those with only 0-10% of whites students] across the nation."); *id.* ("Latino students in nearly every region have experienced steadily rising levels of concentration in intensely segregated minority settings. In the West, the share of Latino students in such settings has increased fourfold, from 12% in 1968 to 43% in 2009.").

134 S. Ct. 1623, 1649 (2014)(Breyer, J., concurring in judgment)("The serious educational problems that faced Americans at the time this Court decided *Grutter* endure. . . . And low educational achievement continues to be correlated with income and race.")(citations omitted).

Our criminal justice system also reflects deep racial inequities. To cite but one example, prior to the passage of the Fair Sentencing Act in 2010, federal drug sentencing guidelines resulted in vast racial disparities for Blacks and whites convicted of comparable offenses.[22] The impacts of the criminal justice system are also felt in less visible ways in the daily lives of youth of color. Young Blacks and Hispanics are disproportionately subjected to stops and searches by police,[23] and Black and Hispanic

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[22] *See, e.g.*, U.S. Sentencing Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing: Demographic Differences in Sentencing* 2 (Dec. 2012), *available at* http://www.ussc.gov/news/congressional-testimony-and-reports/booker-reports/report-continuing-impact-united-states-v-bookerfederal-sentencing ("Sentences of similarly situated Black male offenders were 19.5 percent longer than those of similarly situated White male offenders [from 2007 through 2011].").

[23] *See, e.g.*, Rod K. Brunson, *"Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences,* 6 Crim. & Pub. Pol'y 71 (2007) ("Involuntary police/citizen encounters are more apt to occur in disadvantaged neighborhood contexts where aggressive policing strategies are disproportionately used. In fact, respondents noted that most of their personal and indirect experiences with police stemmed from officer-initiated contacts and described officers' demeanor as hostile, combative, and threatening. The combination of frequent involuntary police contact, coupled with what study participants considered poor treatment during such encounters, contributed to an accumulated body of unfavorable experiences

children are more likely to experience the incarceration of a parent, with detrimental consequences for development and education.[24]

Discrimination against Blacks also influenced the drafting of many employee protections still in place today. The Fair Labor Standards Act, 29 U.S.C. § 213, the Social Security Act, 42 U.S.C. § 410, and the National Labor Relations Act, 29 U.S.C. § 152, each exclude domestic and agricultural works as the result of legislative compromise with Southern

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that collectively shaped young men's views of police."); New York Civil Liberties Union, *NYPD Stop-and-Frisk Activity in 2011*, 2 (2012), http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf ("Young black and Latino men were the targets of a hugely disproportionate number of stops. Though they account for only 4.7 percent of the city's population, black and Latino males between the ages of 14 and 24 accounted for 41.6 percent of stops in 2011. The number of stops of young black men exceeded the entire city population of young black men [168,126 as compared to 158,406]. Ninety percent of young black and Latino men stopped were innocent."); American Civil Liberties Union of Massachusetts, *Black, Brown and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010*, 1 (2014), https://aclum.org/app/ uploads/2015/06/reports-black-brown-and-targeted.pdf ("[Between 2007 and 2010] young Black men were more likely than young white men to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations.").

[24] *See, e.g.*, Rucker C. Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, *in Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom* 2-3 (Steven Raphel & Michelle Stoll eds., 2009) ("On any given day, 7 percent of black children have an incarcerated parent, compared with 2.6 percent of Hispanic children and 0.8 percent of white children"); *id.* at 19 ("[P]arental incarceration exposure leads children to develop greater behavioral problem trajectories," including suspension and expulsion from school.).

Democrats.[25] At the time the law was enacted, "[o]ver half of the blacks living in the United States . . . lived in the South" and "[b]lack employment in the South was disproportionately concentrated in unskilled agricultural and domestic labor," forming an important component of the Southern economy.[26] The exclusion of agricultural and domestic workers "was well-understood as a race-neutral proxy for excluding blacks from statutory benefits and protections made available to most whites."[27] Today, the exclusion of agricultural and domestic workers continues to disadvantage people of color. A substantial majority of the country's "approximately two to three million agricultural workers" are Hispanic.[28]

In light of the deep and far reaching impact of government fostered discrimination and inequality, it should come as no surprise that the inequalities recognized by Justice Ginsburg in *Gratz* remain today. 539 U.S. at 299 (Ginsburg, J., dissenting). Disparities in unemployment,[29] poverty,[30] and access

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[25] *See generally* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act,* 72 Ohio St. L. J. 95, 100 (2010)(collecting scholarship); Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (2013).

[26] Perea, *Echoes of Slavery*, 72 Ohio St. L. J. at 100.

[27] *Id.*

[28] *Id.* at 127.

[29] Unemployment rate among whites was 5.2% in 2008, 8.5% in 2009, and 8.7% in 2010; during those years, the unemployment rate among African-Americans was 10.1%, 14.8%, and 16.0%, respectively; among Hispanics, 7.6%, 12.1%, and 12.5%. U.S. Dept. of Labor, Bureau of Labor Statistics, Labor Force Characteristics and Ethnicity: 2008 (2009); U.S. Dept. of Labor,

to health care[31] remain entrenched. Following the great recession, the wealth gap has widened, erasing previous gains by Black and Hispanic families.[32]

Bureau of Labor Statistics, Labor Force Characteristics by Race and Ethnicity: 2009 (2010); U.S. Dept. of Labor, Bureau of Labor Statistics, Labor Force Characteristics by Race and Ethnicity: 2010 (2011).

[30] *See, e.g.*, U.S. Dept. of Commerce, Bureau of Census, Income, Poverty and Health Insurance Coverage in the United States: 2012, 14 (Table 3) (2013) (In 2012, 9.7% of non-Hispanic whites, 27.2% of African-Americans, 11.7% of Asian-Americans, and 25.6% of Hispanics were living in poverty).

[31] *See, e.g.*, U.S. Dept. of Commerce, Bureau of Census, Income, Poverty and Health Insurance Coverage in the United States: 2012, 23 (Table 7) (2013) (In 2012, 11.1% of non-Hispanic whites were without insurance, as compared to 19.0% of African-Americans, 15.1% of Asian-Americans, and 29.1% of Hispanics.).

[32] *See, e.g.*, U.S. Board of Governors of the Federal Reserve System, Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances, 12 (Table 2) (2014) (From 2010 to 2013, the median net worth [wealth] of white, non-Hispanic families increased by two percent [from $139,900 to $142,000], while the median net worth of nonwhite or Hispanic families decreased by seventeen percent [from $21,900 to $18,100]); Sarah Burd-Sharp and Rebecca Rasch, Social Science Research Council, American Civil Liberties Union, *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations* 24 (June 2015), https://www.aclu.org/files/field_document/discrimlend_final.pdf ("[T]he Great Recession impacted households unevenly. Black households experienced greater declines in household wealth, both when including and excluding the wealth they hold in their homes. Moreover, while the typical white household showed strong signs of recovery between 2009 and 2011, the typical black household continued to experience significant declines in wealth."); Valerie Wilson, Economic Policy Institute, Projected Decline in Unemployment in 2015 Won't Lift Blacks Out of the

Conscious as well as unconscious biases persist. *See Gratz*, 539 U.S. at 300-01 (2003)(Ginsburg, J., dissenting)("Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.")(citations omitted).

Though we may wish it otherwise, discrimination and inequality fostered and promoted by government at all levels and with deep roots in our history continue to burden the lives of people of color. Now as ever, "[t]he historical and factual context in which these cases arise is critical." *Parents Involved in Cmty. Sch.*, 551 U.S. at 804 (Breyer, J. dissenting).

B. Context and Purpose, Not Rigid Formalism, Should Guide the Court's Equal Protection Analysis.

The inescapable reality is that race, and the persistent and government fostered practice of race discrimination and inequality, inform the experiences of individuals and in turn the operation of institutions of civil society. Against the backdrop of substantial and persisting inequality, application of a color blind strict scrutiny has not served to protect people of color but instead has placed increasing restrictions on sincere efforts to promote equality, diversity, and inclusiveness. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors*, 515 U.S. 200; *Gratz*, 539 U.S. 244;

Recession-Carved Crater (Mar. 26, 2015), *available at* http://s4.epi.org/files/pdf/81754.pdf.

Parents Involved in Cmty. Sch., 551 U.S. 701. Nor has it inoculated against racial divisiveness. Rather, eliminating the candid consideration of race where appropriate favors obfuscation and discourages important dialogue. As Justice Marshall recognized, "[t]o fail [to confront our history of discrimination] is to ensure that America will forever remain a divided society." *Bakke*, 438 U.S. at 396 (Marshall, J., concurring). An equal protection analysis that ignores history and deep-seated societal inequality increasingly does not "satisfy the appearance of justice." *Bakke*, 438 U.S. at 319 n.53 (Powell, J.)(quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)(Frankfurter, J.)).

Against increasingly formalistic application of equal protection, some members of the Court have continued to stress the need and ability of equal protection analysis to encompass the ability to address inequalities without being subject to strict scrutiny. *See Parents Involved in Cmty. Sch.*, 551 U.S. at 800-01(Stevens, J., dissenting)("rigid adherence to tiers of scrutiny obscures *Brown*'s clear message"); *Gratz,* 539 U.S. at 301 (Ginsburg, J., dissenting) ("[A]s I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.")(citation omitted); *id.,* at 282 (Breyer, J., concurring in judgment); *Adarand Constructors, Inc.,* 515 U.S. at 243 (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that

seeks to eradicate racial subordination."); *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 301–302 (1986) (Marshall, J., dissenting) (when dealing with an action to eliminate "pernicious vestiges of past discrimination," a "less exacting standard of review is appropriate")*; Fullilove v. Klutznick,* 448 U.S. 448, 518–519 (1980) (Marshall, J., concurring in judgment); *Bakke,* 438 U.S. at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part) ("racial classifications designed to further remedial purposes" should be subjected only to intermediate scrutiny).

Although UT's admissions policy unquestionably meets the strict scrutiny standard, as the Fifth Circuit's searching inquiry concluded, *Fisher*, 758 F.3d at 660, equal protection should not require such heightened skepticism. An equal protection doctrine that fails to distinguish invidious use of race from considerations of race intended to redress inequality and promote the promise of an open and inclusive society fails its historic purpose and the principals of our democracy. The Constitution compels a different answer.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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