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 *AMICI CURIAE* OF CONSTITUTIONAL LAW SCHOLARS AND CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

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Books, Articles, and Other Materials

INTEREST OF *AMICI CURIAE*

The following scholars are experts in the field of constitutional law, each of whom has published a book or law review article on the Fourteenth Amendment. *Amici* law professors teach courses in constitutional law and have devoted significant attention – in some cases, for several decades – to studying the Fourteenth Amendment:

Bruce Ackerman, Sterling Professor of Law and Political Science, Yale Law School.

Vikram Amar, Associate Dean for Academic Affairs and Professor of Law, University of California at Davis School of Law.

Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment.

Burt Neuborne, Inez Milholland Professor of Civil Liberties, New York University School of Law.

James E. Ryan, William L. Matheson & Robert M. Morgenthau Distinguished Professor of Law, University of Virginia School of Law.

Adam Winkler, Professor of Law, UCLA School of Law.

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and

with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the Fourteenth Amendment's protections. CAC has filed *amicus curiae* briefs in the U.S. Supreme Court in cases raising significant issues regarding the text and history of the Fourteenth Amendment, including *Northwest Austin Municipal Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Fisher contends that the University of Texas at Austin's use of race as one factor in its holistic admissions policy runs afoul of the "'central mandate' of equal protection: 'racial neutrality in governmental decisionmaking.'" Pet. Br. at 24 (quoting *Miller v. Johnson*, 515 U.S. 900, 904 (1995)). Fisher's claim that the Constitution requires UT-Austin to employ a

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

color-blind admissions procedure cannot be squared with the text and history of the Fourteenth Amendment or this Court's cases.

Far from establishing a constitutional ban on the use of race by the government, the Framers of the Fourteenth Amendment rejected proposals to prohibit all racial classifications by the government. Indeed, the Reconstruction Congress enacted a long list of race-conscious legislation to ensure equality of opportunity to all persons regardless of race. These acts were not limited to the former slaves or the goal of redressing badges of slavery or other race-based government action; rather, like UT-Austin's use of race under review here, the race-conscious measures enacted by the Framers of the Fourteenth Amendment were forward-looking in design, seeking to ensure equality of opportunity for African Americans and fulfill the promise of equality contained in the Fourteenth Amendment.

At the heart of these race-conscious government measures were federal efforts to ensure equality of educational opportunity for African Americans. Recognizing the importance of providing pathways to leadership and professional life for African Americans, the federal government established schools and colleges throughout the South, making it possible for African Americans to realize the full potential of the freedom secured by the Civil War Amendments. The Framers also provided chaplains to assist in the education of African American soldiers. The Reconstruction Framers thus recognized that in certain contexts it was permissible to use race – indeed, to classify on

account of race – to help ensure that educational opportunities were available to all regardless of race. Fisher's contrary view – that UT-Austin may take into account every sort of diversity except for racial diversity – would turn the Fourteenth Amendment on its head.

In line with the Fourteenth Amendment's text and history, this Court's cases have consistently held that the government may use race as a factor in selecting a student body with a critical mass of diverse, academically accomplished students to admit to its public colleges and universities, so long as the university ensures individualized consideration to the diverse background and qualification of all persons regardless of race. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *see also Parents Involved In Community Schools v. Seattle School Dist., No. 1*, 551 U.S. 701, 787-89 (2007) (Kennedy, J., concurring). Applying strict scrutiny, *Bakke* and *Grutter* establish that use of race as a factor in selecting a student body with a critical mass of diverse students can withstand the rigorous judicial review that this Court has applied to judge the constitutionality of governmental racial classifications. As UT-Austin demonstrates, see UT Br. at 23-28, the University's holistic admissions policy comports in all respects with *Bakke* and *Grutter*.

Fisher's brief in this case argues that the Fifth Circuit failed to heed basic constitutional first principles concerning the meaning of the Fourteenth Amendment's guarantee of equal protection of the

laws to all persons. But it is Fisher who has lost sight of our Constitution's text, history, and original meaning. Fisher's plea to rewrite the text and history of the Fourteenth Amendment and cast aside decades of settled Supreme Court precedent upholding the sensitive use of race in university admissions should be rejected.

ARGUMENT

I. The Text and History of the Fourteenth Amendment Permit Governments To Enact Race-Conscious Measures To Ensure Equality of Opportunity To All Persons Regardless of Race.

The Fourteenth Amendment, in relevant part, provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, §1. Rejecting efforts to establish a constitutional proscription solely on racial discrimination, the Framers of the Fourteenth Amendment wrote a broad universal guarantee of equality that swept men and women of all races and groups into its coverage. As Justice Kennedy has explained, "[t]hough in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color, or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring). Rather than simply prohibiting discrimination on account of race or previous condition of servitude, "[t]he fourteenth

amendment extends its protection to races and classes, and prohibits any state legislation, which has the effect of denying to any race or class, or to any individual, the equal protection of the laws." *Civil Rights Cases*, 109 U.S. 3, 24 (1883).

In choosing the broader language of equal protection, the Framers of the Fourteenth Amendment established an all-encompassing guarantee of equality under the law in order to protect, among other persons, newly freed slaves,[2] white Union sympathizers residing in the South,[3] and Chinese immigrants in the West[4] from state-

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[2] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xiii (1866) (explaining that "[i]t was impossible to abandon [the newly freed slaves] without securing them their rights as free men and citizens").

[3] Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (Rep. Bingham) ("The adoption of this amendment is essential to the protection of Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been at arms against them"); *id.* at 1263 (Rep. Broomall) ("[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country").

[4] Cong. Globe, 39th Cong., 1st Sess. 1090 (Rep. Bingham) (arguing that "all persons, whether citizens or strangers within this land" should "have equal protection in every State in this Union in the rights of life and liberty and property"); Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870) (Sen. Stewart) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . .; let them be protected by all the laws and the same laws that other men are.").

sponsored discrimination. As the text of the Equal Protection Clause makes clear, every person in this country can invoke its universal guarantee of equality. In this respect, the Framers of the Fourteenth Amendment established that "in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). As its Framers explained, the Equal Protection Clause "abolishes all class legislation," "does away with the injustice of subjecting one caste of persons to a code not applicable to another," and "establishes equality before the law." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard). In their view, the "words caste, race, color," were "ever unknown to the Constitution." *Id.* at 630 (Rep. Hubbard).

At the same time, in writing the text, the Framers recognized that, after a century of racial slavery, the Constitution could not be simplistically color-blind. Faced with the task of fulfilling President Abraham Lincoln's promise of a "new birth of freedom," and integrating African Americans into the civic life of the nation, the Framers of the Fourteenth Amendment concluded that race-conscious efforts were appropriate to further "the legitimate interest government has in ensuring all people have equal opportunity regardless of their race." *Parents Involved In Community Schools v. Seattle School Dist., No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring). The Fourteenth Amendment's Framers time and again rejected

proposed constitutional language that would have precluded race-conscious measures designed to assist African Americans in the transition to their new status as equal citizens.[5]

Not only did the Reconstruction Framers reject proposed constitutional language that would have prohibited race-conscious efforts to guarantee equality of opportunity, but, contemporaneous with the drafting and passage of the Fourteenth Amendment, they enacted a long list of race-conscious legislation to help ensure that the Amendment's promise of equality would be a reality for African Americans. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-84 (1985) (cataloguing race-conscious measures enacted by Framers of the Fourteenth Amendment); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 429-32 (1997) (same); JACK M. BALKIN, LIVING ORIGINALISM 223, 417 n.20 (2011) (same). The Framers of the Fourteenth Amendment recognized that forward-looking, race-conscious measures would

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[5] *See* Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (proposing that "[a]ll national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color"); JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONGRESS, 1865-1867, at 46 (Benjamin B. Kendrick ed. 1914) (proposing that "all laws, state or national, shall operate equally and impartially on all persons without regard to race or color"); *id.* at 83 (proposing that "[n]o discrimination shall be made . . . as to the civil rights of persons because of race, color, or previous condition of servitude").

help fulfill the promise of equality contained in the Fourteenth Amendment, "break down discrimination between whites and blacks," and "ameliorat[e] of the condition of the colored people." Cong. Globe, 39th Cong. 1st Sess. 632 (1866) (Rep. Moulton).

In the debates over these legislative acts, the Reconstruction Framers repeatedly rejected their opponents' arguments that race-conscious legislation was inconsistent with the principle of equality under the law because it classified people on the basis of race. In the Framers' view, efforts to ensure equality of opportunity and assist African Americans in securing the full measure of freedom promised in the Civil War Amendments were consistent with, not contrary to, the new constitutional guarantee of equality.

The Reconstruction Framers' principal effort to assist the newly freed slaves in the transition from slavery to freedom was the creation of the Freedmen's Bureau. Enacted in 1865 and expanded in 1866 to ensure that "the gulf which separates servitude from freedom is bridged over," Cong. Globe, 39th Cong., 1st Sess. 2779 (1866) (Rep. Eliot), the Freedmen's Bureau "provided its charges with clothing, food, fuel, and medicine; it built, staffed, and operated their schools and hospitals; it wrote their leases and their labor contracts, [and] rented them land . . . ." Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 559 (1998). As the Framers explained, "[h]aving made the slave a freeman, the nation needs some instrumentality which shall reach every portion of

the South and stand between the freedman and oppression," Cong. Globe, 39th Cong., 1st Sess. 585 (1866) (Rep. Donnelly), and "protect them in their new rights, to find employment for the able-bodied, and take care of the suffering . . . ." *Id.* at 937 (Sen. Trumbull); *see also id.* at 2779 ("[W]e have struck off their chains. Shall we not help them to find homes? . . . .We have not let them know the meaning of the sacred name of home.") (Rep. Eliot).

While the Act's provisions extended to freed slaves as well as refugees of any race, whose lives had been devastated during the war, the Act gave the two groups different benefits. The Act, as expanded in 1866, authorized the Bureau to "aid" the newly freed slaves in any manner "in making the freedom conferred by proclamation of the commander in chief, by emancipation under the laws of States, and by constitutional amendment," while providing support to "loyal refugees" only to the extent "the same shall be necessary to enable them . . . to become self-supporting citizens . . . ." Freedmen's Bureau Act, § 2, 14 Stat. 173, 174 (1866). Further, the Act's educational provisions permitted the Bureau's commissioners to use, sell, or lease certain property in the former Confederacy abandoned during the Civil War for "the education of the freed people." *Id.* at § 12, 14 Stat. at 176.

Congressional opponents of the Fourteenth Amendment and Reconstruction denounced the Act as discriminatory, arguing that it "make[s] a distinction on account of color between the two races," Cong. Globe, 39th Cong., 1st Sess. 397 (1866) (Sen. Willey). Using the same terminology the

Amendment's Framers had used in describing the Equal Protection Clause, Democrats in Congress denounced the Freedmen's Bureau Act as "class legislation," *id.* at 2780 (Rep. LeBlond); *see also id.* at 649 (Rep. Trimble); *id.* at app. 69-70 (Rep. Rousseau), that treats "freedmen" not "equal before the law, but superior" directly "in opposition to the plain spirit . . . of the Constitution that congressional legislation should in its operation affect all alike." *Id.* at 544 (Rep. Taylor). Likewise, President Andrew Johnson cited the "danger of class legislation" in twice vetoing the Act, 6 MESSAGES AND PAPERS OF THE PRESIDENTS 422, 425 (James D. Richardson ed. 1897) (veto message of July 16, 1866), arguing that there was no legitimate reason why the Freedmen's Bureau "should be founded for one class or color of our people more than one another." *Id.* at 401 (veto message of Feb. 19, 1866).

The Reconstruction Framers in Congress resoundingly rejected these arguments. They explained that "the very object of the bill is to break down discrimination between whites and blacks" and to make possible "the amelioration of the condition of the colored people," Cong. Globe, 39th Cong., 1st Sess. 632 (1866) (Rep. Moulton), and that race-conscious measures were appropriate "to make real to these freedmen the liberty you have vouchsafed to them," noting that "[w]e have done nothing to them, as a race, but injury." *Id.* at 2779 (Rep. Eliot). On July 16, 1866, barely a month after sending the Fourteenth Amendment to the States for ratification, Congress, by votes of 104-33 in the House and 33-12 in the Senate, overrode President Johnson's veto of the Act. *Id.* at 3842, 3850.

Particularly important here, in approving the Freedmen's Bureau, the Framers of the Fourteenth Amendment recognized that education is "the very foundation of good citizenship," *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and that race-conscious efforts to guarantee equal educational opportunity were necessary to integrate African Americans into the civic life of the nation. Providing an equal educational opportunity for the newly freed slaves was the signature achievement of the Freedmen's Bureau, "the foundation upon which all efforts to assist the freedmen rested . . . ." ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 144 (1988). By 1869, at a time when public education in the South was still in a skeletal state, *see Brown*, 347 U.S. at 489-90, "nearly 3,000 schools, serving over 150,000 pupils reported to the Bureau," helping to "lay the foundation for Southern public education." FONER, *supra*, at 144. Among African Americans, the conviction that "'knowledge is power'" drew "hundreds of thousands, adult and children alike to the freedmen's schools, from the moment they opened . . . ." LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 473, 474 (1979).

The Freedmen's Bureau also "provided funds, lands, and other assistance to help establish more than a dozen colleges and universities," Schnapper, *supra*, at 781, recognizing the importance of providing pathways to leadership and professional life for African Americans. *See id.* at 781-82 (discussing Bureau's assistance in establishing Howard University, which was open to students of all

races but made special provisions for the education of freed slaves).

Championing these race-conscious efforts, the Framers explained that "th[e] Bureau, while it protects and directs the negro, may educate him, and fit him to protect and direct himself . . . ." Cong Globe, 39th Cong., 1st Sess. 585 (1866) (Rep. Donnelly); *see also id.* at 656 (observing that Freedmen's Bureau Act is designed to "lift them from slavery into the manhood of freedom, to clothe the nakedness of the slave, and to educate him into that manhood") (Rep. Eliot). Race-conscious education measures were meant to facilitate African Americans' transition to becoming self-sustaining citizens, while also enlightening young minds and breaking down prejudices. "Education has here fused all nations into one; it has obliterated prejudices; it has dissolved falsehoods; it has announced great truths; it has flung open all doors . . . ." *Id.* at 586 (Rep. Donnelly).

While the Freedmen's Bureau Act and its education-related provisions were at the heart of Reconstruction-Era efforts to assist African Americans in the transition from slavery to citizenship, Congress also enacted numerous race-conscious measures to ensure equality of opportunity to all persons regardless of race that were not limited to the newly freed slaves. The Reconstruction Framers designed these acts to be forward-looking in design, helping to fulfill the Fourteenth Amendment's promise of equality rather than remedying specific discriminatory practices.

For example, in 1866 and 1867, Congress enacted legislation designed to protect the rights of African American soldiers to receive bounties for enlisting in the Union Army. Concerned that African American soldiers who had served the Union in the Civil War were being cheated out of their bounties by the fraudulent acts of claims agents, Congress enacted race-conscious anti-fraud measures to ensure that African American soldiers, in fact, obtained the bounties to which they were entitled to for their military service. *See* Joint Resolution of July 26, 1866, No. 86, 14 Stat. 367, 368 (fixing the maximum fees chargeable by an agent to collect a bounty on behalf of "colored soldiers"); Resolution of Mar. 29, 1867, No. 25, 15 Stat. 26, 26-27 (providing for payment to agents of "colored soldiers, sailors, or marines" by the Freedmen's Bureau); *see also* Act of Mar. 3, 1869, ch. 122, 15 Stat. 301, 302 (appropriating money for "collection and payment of bounty, prize-money and other legitimate claims of colored soldiers and sailors"); Act of Mar. 3, 1873, ch. 127, 17 Stat. 510, 528 (same). *See also* Siegel, *supra*, at 561 (observing that these measures resulted in "the creation of special protections for black, but not white, soldiers").

Opponents of Reconstruction in Congress denounced these additional measures to protect the rights of African American soldiers as "class legislation" and argued that "there is no reason . . . why we should pass a law such as this applicable to colored people and not apply it to white people," Cong. Globe, 40th Cong., 1st Sess. 79 (Sen. Grimes) (1867). The Framers of the Fourteenth Amendment firmly rejected the argument that Congress could not adopt

race-conscious measures to protect African American soldiers from fraud and ensure that "the balance of this little bounty shall get into the hands of the soldier himself, so that he shall have the money to spend either in the education of himself or of his children." *Id.* at 444 (Rep. Scofield). Emphasizing that "[w]e have passed laws that made it a crime for them to be taught," the Reconstruction Framers concluded that it was permissible to enact race-conscious measures "to protect colored soldiers against the fraudulent devices by which their small bounties are taken away from them." *Id.*

Further, the Reconstruction Congress also established a bank, the Freedman's Savings and Trust Company, for "persons heretofore held in slavery in the United States or their descendants," Act of March 3, 1865, § 5, 13 Stat. 510, 511; BALKIN, *supra*, at 417 n.20 (observing that "because of the addition of the words 'their descendants' . . . the bill was not restricted to assisting only former slaves"); provided for the appointment of one chaplain "for each regiment of colored troops, whose duty shall include the instruction of the enlisted men in the common English branches of education," Act of July 28, 1866, ch. 299, § 30, 14 Stat. 332, 337; Siegel, *supra*, at 560-61 (noting that "chaplains for white troops had no similar responsibilities, and education for white troops remained an unfunded 'optional service' during and after Reconstruction"); appropriated money "[f]or the 'National association for the relief of destitute colored women and children," Act of July 28, 1866, ch. 296, 14 Stat. 310, 317, a corporation created three years earlier by Congress "for the purpose of supporting . . . aged or

indigent and destitute colored women and children," Act of Feb. 14, 1863, ch. 33, 12 Stat. 650, 650; and appropriated money "for the relief of freedmen or destitute colored people in the District of Columbia," Resolution of March 16, 1867, No. 4, 15 Stat. 20. Like other Reconstruction-era race-conscious legislation, these measures were not limited to assisting newly freed slaves and were not designed to remedy specific forms of racial discrimination; indeed, many "expressly refer[red] to color in the allotment of federal benefits," Rubenfeld, *supra*, at 431, in order to "ameliorat[e] the condition of the colored people." Cong Globe, 39th Cong., 1st Sess. 632 (1866) (Rep. Moulton). *See also* BALKIN, *supra*, at 223 (noting that the Reconstruction Framers provided federal benefits to African Americans "regardless of whether they were newly freed slaves").

In writing the text of the Fourteenth Amendment and in adopting race-conscious measures to fulfill the promise of that Amendment, the Framers rejected "an all-too-unyielding insistence that race cannot be a factor," *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring), concluding that government may properly take race into account to "ensur[e] all people have equal opportunity regardless of their race." *Id.* at 788 (Kennedy, J., concurring). While the Framers were intent on preventing state-sponsored racial discrimination and ensuring that the "words caste, race, [or] color," were "ever unknown to the Constitution," Cong. Globe, 39th Cong., 1st Sess. 630 (Rep. Hubbard), they concluded that race-conscious governmental measures were appropriate to ensure equal opportunities and remedy racial inequalities.

Thus, the text and history of the Fourteenth Amendment, including the efforts of the Framers to "expand the promise of liberty and equality" and to "confront the flaws and injustices that remain," *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring), establish that government may, consistent with the guarantee of equal protection, seek to use race-conscious measures in certain circumstances to ensure equality of opportunity for all persons regardless of race. The notion that, in *all* circumstances, the Constitution must be color-blind, prohibiting all race-conscious assistance, is inconsistent with "the history, meaning, and reach of the Equal Protection Clause." *Id.* at 782-83 (Kennedy, J., concurring).

II. This Court's Precedents Reflect the Reconstruction Framers' Judgment that Race-Conscious Measures Are Appropriate To Ensure Equal Educational Opportunity To All Persons Regardless of Race.

A. Case Law Establishes that Public Universities May Use Race as a Factor in Selecting a Diverse, Integrated Student Body.

This Court has interpreted the Equal Protection Clause to give effect both to the universal language of the Clause, protecting all persons from discrimination, as well as the Reconstruction Framers' recognition that certain circumstances warrant the use of race-conscious measures to ensure

equality of opportunity to all persons regardless of race.

Emphasizing that the Fourteenth Amendment protects "*persons*, not *groups*," this Court held that "governmental action based on race – a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry to ensure that the *personal* right to the equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995) (emphasis in original). This Court has also made clear that "[s]trict scrutiny is not 'strict in theory, but fatal in fact'" and that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 327 (quoting *Adarand*, 515 U.S. at 237); *see also Adarand*, 515 U.S. at 228 ("[S]trict scrutiny *does* take 'relevant differences' into account – indeed that is its fundamental purpose. . . . The point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race.").

Accordingly, strict scrutiny cannot be applied to UT-Austin's admissions policy in a vacuum. Instead, strict scrutiny must be applied against the backdrop of constitutional text and history which endorses the use of race-conscious measures to ensure equality of opportunity for all persons regardless of race, as well as in keeping with "our tradition . . . to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain." *Parents Involved,* 551 U.S. at 787 (Kennedy, J., concurring).

As this Court observed in *Adarand*, "[t]he unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups is an unfortunate reality, and the government is not disqualified in acting in response to it." *Adarand*, 515 U.S. at 237; *see also Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that it often does.").

Consistent with the text and history of the Fourteenth Amendment, this Court's cases applying strict scrutiny have recognized that "this Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). In nearly four decades of equal protection jurisprudence, the Court has never wavered from the principle that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples," *Regents of the University of California v. Bakke,* 438 U.S. 265, 313 (1978), and that universities may take race into account "so that all members of our heterogenous society may participate in the educational institutions that provide the training and education necessary to succeed in America." *Grutter*, 539 U.S. at 333.

Nearly thirty-five years ago, in *Bakke*, this Court held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and national origin." 438 U.S.

at 321. Recognizing a compelling state interest in ensuring student body diversity, Justice Powell's plurality opinion explained that an applicant's race or ethnic background may be treated as "simply one element – to be weighed fairly against other elements – in the selection progress," thus "treat[ing] each applicant as an individual in the admissions process." *Id.* at 318. In those circumstances, "[t]he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background . . . would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.* *See also* UT Br. at 23-24.

A quarter of century later, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court upheld the University of Michigan's Law School policy of using race as one factor in admitting a critical mass of diverse, academically accomplished students. Applying strict scrutiny, *Grutter* "endorsed Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in admissions," *id.* at 325, emphasizing that the policy "ensure[d] that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.* at 337; *see also id.* at 387 (Kennedy, J., dissenting) (agreeing that the "opinion by Justice Powell states the correct rule"). *See also* UT Br. at 24-25.

In line with the text and history of the Fourteenth Amendment described above, *Grutter* recognized that race-conscious measures can assist in achieving equal educational opportunity for all

persons regardless of race and fulfilling the Fourteenth Amendment's promise of equality. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible is to be realized." *Id.* at 332. Noting the role of universities in serving as a "training ground for a large number of our Nation's leaders," *Grutter* recognized that it is constitutionally permissible to take race into account to ensure that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332, 333. Thus, consistent with Fourteenth Amendment history, *Grutter* held that the government may enact forward-looking measures that call for the sensitive use of race to foster equality in education.

In 2007, in *Parents Involved v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Court recognized that state and local governments have authority to employ race-conscious measures to combat racial isolation in schools. While no single opinion garnered a majority of the Court, five Justices agreed that school districts have a compelling state interest in using forward-looking, race-conscious measures to fulfill the Constitution's promise of "equal educational opportunity," firmly rejecting the notion that "the Constitution mandates that state and local authorities must accept the status quo of racial isolation in schools." *Id.* at 788 (Kennedy, J., concurring); *id.* at 803 (Breyer, J., dissenting). Importantly, while Justice Kennedy provided the fifth vote to strike down the specific policies under review for "reduc[ing] children to racial chits," *id.* at 798 (Kennedy, J., concurring), his

concurring opinion recognized that "it is permissible to consider the racial makeup of schools" and to adopt "race-conscious measures to address the problem," including "general policies to encourage a diverse student body" as well as "more nuanced, individual evaluation of school needs and student characteristics that might include race as a component . . . informed by *Grutter*." *Id.* at 788, 790 (Kennedy, J., concurring).

B. UT-Austin's Holistic Admissions Policy Is Constitutional Under *Bakke, Grutter,* and *Parents Involved.*

Under the doctrine of *stare decisis*, Fisher faces a heavy burden of explaining why this unbroken line of precedents stretching back more than three decades does not control this case. She cannot satisfy that burden. The University's policy of using race as a factor in admitting a critical mass of diverse, academically accomplished students for the state's flagship public university comports in all respects with the holdings and principles laid out *Bakke, Grutter*, and *Parents Involved*.

As in *Bakke* and *Grutter*, the University's use of race as part of a holistic review of the personal backgrounds and circumstances of applicants for admission satisfies the rigors of strict scrutiny. First, as the Fifth Circuit observed, App. 21a-24a, UT-Austin's holistic admission policy was adopted only after the University extensively studied racial diversity in classrooms and on campus and concluded that race-neutral alternatives alone had not been successful in preventing racial isolation on campus,

respecting the principle of using race only "as a last resort to achieve a compelling state interest." *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring). *See also* UT Br. at 43 (noting that "there was jarring evidence of racial isolation at UT" before UT decided to use of race as one factor in UT's holistic admissions policy). As in *Grutter*, the University concluded that "individualized assessments," including consideration of race as one factor among many, were "necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the University." *Grutter*, 539 U.S. at 340.

Second, the University ensures that "each individual receives individual consideration and that race does not become predominant in the admissions decisionmaking." *Grutter,* 539 U.S. at 393 (Kennedy, J., dissenting). To ensure a truly diverse student body, UT-Austin assigns each applicant for admission a personal achievement score designed to recognize students whose accomplishments are not fully reflected in their academic record or test scores. As the Fifth Circuit observed, the University does not single out race for special treatment, but gives "applicants of every race" the opportunity to "highlight their potential diversity contributions, which allows students who are diverse in unconventional ways to describe their unique attributes." App. 46a, 46a-47a. For example, "a white student who has demonstrated a substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same

school." App. 46a. Consistent with the Fourteenth Amendment's guarantee of equality for all persons, "all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." *Grutter*, 539 U.S. at 337. *See also* UT Br. at 12-15, 25-26.

Third, as the uncontested record demonstrates, "UT has never established a specific number, percentage or range of minority enrollment . . ., nor does it award any fixed number of points to minority students in a way that impermissibly values race for its own sake." App. 44a; *see also* J.A. 131 (conceding that "UT Austin has not established a goal, target, or other quantitative objective for the admission/enrollment of under-represented minority students"). Contrary to Fisher's unsupported charges, see Pet. Br. at 19, 27, "UT has not admitted students so that its undergraduate population mirrors the demographics of Texas. . . . The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African-Americans at UT is half the percentage of Texas' African American population, while the Asian-American enrollment is more than five times the percentage of Texan Asian-Americans." App. 45a. In fact, "[t]he summary judgment record shows that demographics are not consulted as part of any admissions decision . . . ." App. 47a. Ensuring genuine diversity in the University's academic community, not racial balancing, drives the University's admissions process. *See also* UT Br. at 29-30.

Finally, the University has improved on the admissions policy upheld in *Grutter*, providing additional protections to ensure that "individual assessment is safeguarded through the entire process." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting). As the Fifth Circuit explained, "[a]dmissions officers reviewing each application are aware of the applicant's race, but UT does not monitor the aggregate racial composition of the admitted applicant pool during the process. The admissions decisions for any particular applicant are not affected . . . by the number of students in her racial group that have been admitted during that year." App. 32a-33a; *see also* UT Br. at 13-15, 26.

This is a stark difference from *Grutter*, where the dissenters pointed to the "consultation of daily reports during the last stages of the admissions process" to show that "there was no further attempt at individual review save for race itself." *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting); *id.* at 385 (Rehnquist, C.J., dissenting) (arguing that facts established "careful race based planning"). Here, in sharp contrast, in order to narrowly tailor their admissions policy to the goal of ensuring a diverse student class and ensure that admissions officers "undertake their responsibilities in this most sensitive area with utmost fidelity to the mandate of the Constitution," *id.* at 393 (Kennedy, J., dissenting), the University has adopted procedures that ensure that "each applicant receives individualized consideration and that race does not become a predominant factor in the admissions decisionmaking." *Id.*

UT-Austin's admissions policy guarantees the equal protection of the laws to all of its students, ensuring a diverse and academically accomplished academic community capable of providing pathways to professional life and leadership for all of the state's residents regardless of race. As this Court's precedents in *Bakke*, *Grutter*, and *Parents Involved* establish, UT-Austin has a compelling interest in diversity that justifies its use of race as one factor among many in the University's holistic admissions process. The district court properly rejected Fisher's facial challenge to UT-Austin's policy, and the Fifth Circuit correctly affirmed that judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 13, 2012