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 THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we seek to ensure that the protections of the Constitution apply to all Americans equally regardless of race, without politically correct bias.

STATEMENT OF THE CASE

White female Abigail Noel Fisher was denied admission to the University of Texas (UT) in 2008, even though her academic qualifications exceeded those of many minority applicants who were admitted. Before the decision in *Hopwood v. Texas*, 78 F. 3d 932 (5th Cir. 1996), UT directly considered race in admissions, and it was often a controlling, determinative factor. App. 16a.

After *Hopwood* prohibited UT from using race in admissions, the University adopted an admissions system involving a Personal Achievement Index (PAI) for each applicant, designed to increase minority enrollment through race neutral means. App. 17-18a. The PAI was subjectively based on two essays and several "special circumstances" disproportionally affecting minority applicants, such as ""the socioeconomic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household." App. 121a. This was considered in addition to the applicant's Academic Index (AI), which was based on the

student's high school class rank and standardized test scores. App. 15a.

Also in 1997, Texas enacted the Top 10% Law, which required UT to admit all Texas high school seniors in the top 10% of their graduating classes. H.B. 588, Tex. Educ. Code Sect. 51.803 (1997). But the AI and PAI scores still determined whether students would be admitted to particular majors, courses of study, and academic programs within the university. App. 129a, 130a; JA 164a. The race-neutral Top 10% Law substantially increased minority enrollment, returning it to the levels before the *Hopwood* decision by 1999, App. 19a; JA 343a, and beyond by 2003, JA 348a; App. 20a.

Despite the success of these race neutral policies, UT announced on the very day of the release of *Grutter v. Bollinger*, 539 U.S. 306 (2003) that it would restore race as a factor in admissions decisions. JA 356a-357a. Under the adopted policy, race was added to the list of "special circumstances" in calculating each applicant's PAI score. JA 432a-433a; SJA 29a. UT uses race in admissions to favor African-Americans and Hispanics, but to disfavor Asian-Americans, who it considers overrepresented among UT students even though the UT student body includes fewer Asian-Americans than Hispanics. App. 154a. UT's explanation for restoring race to the admissions process in spite of record minority enrollments under the former race neutral admissions criteria is that it considers minorities inadequately represented in every small class with as few as 5 to 24 students, App. 21a; SJA 25a-26a, and to achieve

racial balance between the university's undergraduate population and the state's population. SJA 24a. This racial component of the PAI score also affects placement of all those admitted among particular majors, courses of study, and academic programs within the university. App. 30a-31a.

UT officials have conceded on the record that race "can make a difference" in individual admission decisions. App. 33a. But for the student body overall, the racial component of the admissions process makes little difference. Just over 80% of incoming freshmen are automatically admitted each year under the Top 10% Law. In 2008 when Petitioner applied, with the racially based admission policies in force, a total of 216 African-American and Hispanics students were admitted who were not among the top 10% in a Texas high school, comprising 3.4% of the incoming Freshman class. SJA 157a.

Moreover, many of these would have been admitted without regard to their race, qualifying on the basis of AI scores, or under the former race-neutral PAI system. App. 103a-104a; JA 410a. Indeed, assuming the same proportion of minorities in the student population admitted under the race neutral policies of 2004 would have been admitted under those policies in 2008, the racially based admissions policies of 2008 admitted a total of 33 additional African-American and Hispanic students that year, out of a total incoming freshman class of 6,322 students. SJA 157a. So the racially based admission policies accounted for 0.5% of the freshman class of 2008. That is what led Judge Garza to observe in his special concurrence below that UT's "use of race has

had an infinitesimal impact on critical mass in the student body as a whole." App. 107a.

Indeed, by 2008 African-American and Hispanic students accounted for 25.5% of the incoming freshmen class, up from 16.2% in 1998, almost all due to the race neutral Top 10% Law that dominates admissions at UT. SJA 156a. By 2010, a majority of the incoming freshmen class were minority students, with only a negligible impact from the racially based admissions criteria.[2] Yet UT continues to use racial considerations in its admission decisions.

Denied admission to UT based on her race, Petitioner Abigail Fisher sued UT in the United States District Court for the Western District of Texas, alleging that UT's use of race in admissions is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. Sections 1981 and 1983, and Title VI of the Civil Rights Act of 1964. App. 3a. On cross motions for summary judgment, the district court concluded that UT's race-based admission's policy was constitutional "as long as *Grutter* remains good law." App. 169a.

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[2] The University of Texas at Austin, Division of Diversity and Community Engagement, 2010-2011 Impact Report, at 6 ("Fifty-two percent of our freshmen are minority students, including 23 percent who are Hispanic…."); *Class of First-Time Freshmen Not a White Majority This Fall Semester at [UT]* (Sept. 14, 2010), *available at* www.utexas.edu/news/2010/09/14student_enrollment2010/ (last visited May 25, 2012).

On appeal, the Fifth Circuit recognized that UT's admissions policies discriminate between applicants based on race, and so are subject to strict scrutiny. App. 35a. The court, however, did not apply strict scrutiny, but rather its own novel test that could perhaps best be called "due deference," in practice amounting to the rational basis test at best, if not just total deference to the university. The court held that the university did "reintroduce race as a factor in admissions" but upheld that because the decision to do so "was made in good faith," apparently meaning that as long as the decision to discriminate was made with good intentions, it is constitutional. App. 47a. That does not accord with the strict scrutiny test, however, that the court recognized does apply.

Judge Garza specially concurred with the majority because he felt that the court was bound by *Grutter*, which he saw as

> "abandon[ing] [strict scrutiny] and substituting in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades."

App. 109a. Moreover, Judge Garza found that UT's use of race could not be "narrowly tailored where the University's highly suspect use of race provides no discernible educational impact." App. 108a. Judge Garza concluded, regarding *Grutter*, "Like the plaintiffs and countless other college applicants denied admission based, in part, on government sponsored

racial discrimination, I await the Court's return to constitutional first principles." App. 114a.

The Fifth Circuit denied rehearing en banc 9 to 7. Chief Judge Jones writing for five of the dissenters argued that the panel had "extended *Grutter* in three ways" and consequently "abdicated judicial review of a race-conscious admissions program for undergraduate students." The decision, Jones wrote,

> "in effect gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires."

App. 175a.

Jones added,

> "*Grutter* does not countenance 'deference' to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications."

App. 178a. She noted that, "the Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment," but here the "additional diversity contribution of the University's race-conscious admissions program is tiny, and far from indispensable." App. 182a. She concluded that the panel had "approve[d] gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of

University entrants being African-American or Hispanic. *Id.*

SUMMARY OF ARGUMENT

Under the applicable strict scrutiny standard, and on the undisputed facts of this case, it could not be more clear that the time has come to end all racial preferences and quotas for admission to UT, and to any major, course of study, or academic program within the university.

Moreover, at this time in our nation's history, it would be desirable for this Court to announce a bright line decision that ends once and for all any racial preferences, quotas and discrimination for admission to any college or university in America. Such racial preferences in admissions have proved harmful to the very minority students that are supposed to be helped.

But even under *Grutter*, UT's racial preferences for admission are unconstitutional. The compelling interests advanced by UT to justify its racial preferences do not fall within the educational interest in student body diversity permitted under *Grutter*. Given that a majority of students at UT today are already minorities, clearly UT has already more than attained the critical mass necessary to achieve the educational benefits of diversity.

That was achieved, moreover, with race-neutral policies, particularly the Top 10% Law, and the race-neutral policies formerly mandated by *Hopwood*. The

"infinitesimal" number of minority students added to UT's minority majority by racial preferences further shows that such preferences are no longer necessary to achieve the educational benefits of diversity, and so should not be allowed under the Constitution's Equal Protection Clause.

Consequently, this Court should reverse the court below, with a decision making clear that racial preferences can no longer be used in any form for admission to UT, or to any academic activities within UT. It would be most desirable to do that by overruling *Grutter*. But even under *Grutter*, UT's racial preferences in admissions are unconstitutional under the Equal Protection Clause. This Court consequently can strike down those racial preferences without overruling *Grutter*.

ARGUMENT

I. THE TIME HAS COME TO END RACIAL PREFERENCES IN COLLEGE ADMISSIONS.

The Equal Protection Clause provides, "No State shall…deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV, Sect. 1. The state of Texas has denied that equal protection to Petitioner Abigail Fisher.

Petitioner Fisher applied for admission to UT expecting to be treated the same as anyone else under the law, as she has a right to expect under the rule of law and the United States Constitution. But she was denied admission even though she presented

superior academic qualifications to many others who were admitted.

The undisputed reason for that denial is that she is white, a member of the Caucasian race or classification, while those favored with admission despite lesser academic qualifications were of different racial classifications. This institutionalized, government racism has no place in 21st century America.

The greatest warrior in the 20th Century for equality under the law, the very principle embodied in the Constitution's Equal Protection Clause, was the Reverend Martin Luther King, who called for a day when every American would be judged by the content of their character rather than the color of their skin. But Petitioner Fisher was judged for admission to UT by the color of her skin, in violation of the Equal Protection Clause.

The motivation for such institutionalized government racism may be different today than in the past, involving more political favoritism for the preferred class than hatred or disdain or unreasoned stereotyping for the disfavored class. But it still amounts to inequality under the law, in violation of the Equal Protection Clause.

And such discrimination based on political favoritism can be just as stubborn and long-lasting as discrimination based on old-fashioned racism, because it can be the root of political power for the

governing or ruling class. But our Constitution does not respect or provide protection for such political favoritism. It provides protection for equality under the law, which is what Petitioner Abigail Fisher has a right to expect. Only this Court can now enforce that right.

In *Miller v. Johnson*, 515 U.S. 900, 904 (1995) this Court recognized that the "central mandate" of equal protection is "racial neutrality in governmental decisionmaking." That is why any government classification based on race is subject to "the strictest judicial scrutiny" regardless of the race of those "burdened or benefited by a particular classification." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). *ACCORD: Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Grutter*.

Under strict scrutiny, a racial classification must be "necessary to further a compelling governmental interest," and must be "narrowly tailored to that end." *Johnson*, 543 U.S. at 514; *Adarand*, 515 U.S. at 227, 236; *Croson*, 488 U.S. at 495, 500; *Grutter*, 539 U.S. at 342. "[T]he mere recitation of a benign or legitimate purpose" is not "an automatic shield which protects against any inquiry" into the necessity of race-based preferences. *Croson*, 488 U.S. at 500. "[G]overnment may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227.

This Court, of course, is deciding only the case before it, and not setting policies for the entire nation

in all circumstances. Under the applicable strict scrutiny standard, and on the undisputed facts of this case, it could not be more clear that the time has come to end all racial preferences and quotas for admission to UT, and to any major, course of study, or academic program within the university.

There is no dispute that race is currently used by the university in such admission considerations. But UT is now a university where minority students constitute a majority of the entire student body. Moreover, there is not a whiff of invidious racial discrimination against minorities anywhere among the administration at UT. On such facts there can be no compelling interest in government racial discrimination any longer. The compelling interest at UT is now equal protection for all.

Consequently, this Court should reverse the court below, with a decision making clear that racial preferences can no longer be used in any form for admission to UT, or to any academic activities within UT. It would be most desirable to do that by overruling *Grutter*, for Judge Garza is right that *Grutter* abandons strict scrutiny and substitutes instead "an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades." App. 109a. *Grutter* today serves only to confuse rather than clarify the law.

But, as discussed in detail below, the continued racial preferences and discrimination at UT cannot

be justified even under the loose, open-ended standards of *Grutter*. Consequently, this Court can end any further racial preferences in admission anywhere at UT without overruling that case.

Moreover, at this time in our nation's history, it would be desirable for this Court to announce a bright line decision that ends once and for all any racial preferences, quotas and discrimination for admission to any college or university in America. There is no continuing, meaningful, invidious discrimination today against minorities among our nation's colleges and universities. Indeed, today an African-American sits as President of these United States, and numerous minority officials hold office in the Congress, in the federal courts, and throughout state and local governments. This Court does need to find that there is no racism anywhere in the United States to conclude that it is time to end all such racism and discrimination in admission to our nation's colleges and universities, even where well-intentioned.

Indeed, such racial preferences in admissions have proved harmful to the very minority students that are supposed to be helped. Because of such racial preferences, some minority students are admitted to schools that are more academically competitive than their academic skills warrant. Consequently, they perform less well, or drop out altogether at higher rates, than if they had been admitted to schools better matched to their capabilities. That result harms or disadvantages their future careers, rather

than helping to advance them.[3] That problem has been recognized by this Court. *Croson*, 488 U.S. at 493 (Racial preferences "carry a danger of stigmatic harm" and may "promote notions of racial inferiority."); *Adarand*, 515 U.S. at 229 (Because a racial preference "inevitably is perceived by many as resting on an assumption that those who are granted this

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[3] Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier & Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Ed. 681 (1996); Frederick Smyth & John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 Res. Higher Ed. 353 (2004); Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?*, Working Paper 23-24 (Draft July 2009)("Minority attrition in science is a very real problem, and the evidence in this paper suggests that 'negative mismatch' probably plays a role in it….[S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers."); Elizabeth Culotta, Black Colleges Cultivate Scientists, 258 Science 1216, 1218 (Nov. 13, 1992) ("The way we see it, the majority schools are wasting large numbers of good students. They have black students with admissions statistics [that are] very high, tops. But these students wind up majoring in sociology or recreation or get wiped out altogether."); Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124, 212 (2003)("African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools."); Richard Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 367 (2004); James Davis, The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men, 72 Am. J. Socio. 17 (1966).

special preference are less qualified in some respect that is identified by their race," it can perversely harm its supposed beneficiaries.).

But, for all of the reasons stated above, this Court should at a minimum reverse the court below, and end all racial preferences, quotas and discrimination for admission to UT, or to any academic activities within UT.

II. EVEN UNDER *GRUTTER*, UT'S RACIAL PREFERENCES FOR ADMISSION ARE UNCONSTITUTIONAL

Grutter held that universities can have "a compelling interest in obtaining the educational benefits that flow from a diverse student body." 539 U.S. at 343. *Grutter* consequently allows racial preferences in college and university admissions to produce a "critical mass" of minority students in the student body to obtain these educational benefits. *Id.* at 333.

This "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id.* at 330. In other words, racial preferences in admissions are allowed to produce the critical mass of minority students needed to achieve the educational benefits of diversity. But a university is not allowed to utilize racial preferences in admissions "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin," such as to achieve a racial

balance in its student population in proportion to the racial balance of the general population. *Id.*

The compelling interests advanced by UT to justify its racial preferences do not fall within the educational interest in student body diversity permitted under *Grutter*. UT asserts a compelling interest in using racial preferences for admissions to achieve student body demographics in the same proportions as the racial demographics of the state. App. 47a - 51a. But this is exactly what was expressly not allowed by *Grutter* or by *Parents Involved*. Just as in *Parents Involved*, 551 U.S. at 727, there is "no evidence that the level of racial diversity necessary to achieve the [compelling] educational benefits [of diversity] happens to coincide with the racial demographics" of Texas.

In other words, UT's goal is not the racial diversity necessary to achieve the educational value of campus experiences and exchanges that result from a racially diverse student body where minority students do not feel "isolated or like spokespersons for their race," 539 U.S. at 319, which is what *Grutter* allowed as a compelling interest. Rather, UT's goal or asserted compelling interest is "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin," *Id.* at 329, which is nothing more than the "outright racial balancing" which this Court actually found "patently unconstitutional" in *Grutter*. *Id.* at 330. As this Court said in *Grutter*, "proportional representation" can never be a constitutional "rationale for programs of preferential treatment." *Id.* at 343.

The problem with racial preferences to achieve racial balance is shown by UT's differing treatment of Asian-Americans and other minorities. UT's racial preferences in admissions actually disfavor Asian-Americans, which UT considers "over-represented" in its student body, while those preferences favor Hispanics, even though "the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT." App. 154a. This disparity demonstrates that UT's racial preferences are not designed to achieve "the educational benefits of a diverse student body," 539 U.S. at 333, which is only what was allowed by *Grutter*. Otherwise, why would fewer Asian-Americans than Hispanics be needed to achieve the educational benefits of diversity?

Indeed, allowing universities to employ race in admissions decisions to achieve racial balance in student populations reflecting the racial balance of state populations could result to the detriment of qualified minority applicants in racially homogenous states, just as it has for Asian-Americans at UT.

The Fifth Circuit argued that UT's racial preferences were constitutionally acceptable because they represented "measured attention to the community [UT] serves" to "send a message" to that community "that people of all stripes can succeed at UT." App. 48a, 50a. But the Constitution does not allow racial preferences to send a message. If UT wants to send a message, it can use Western Union.

Given that a majority of students at UT today are already minorities, clearly UT has already more than attained the critical mass necessary to achieve the educational benefits of diversity. Indeed, UT is already one of the most diverse universities in the entire country. That is why it has already been recognized as one of the nation's "Best Schools for Hispanics" by *Hispanic Business Magazine*, JA 325a, and as one of the "top producers of undergraduates for Hispanics" in the nation by *Diverse Issues in Higher Education* magazine, JA 320a.

That was achieved, moreover, with race-neutral policies, particularly the Top 10% Law, and the race-neutral policies formerly mandated by *Hopwood*. The "infinitesimal" number of minority students added to UT's minority majority by racial preferences further shows that such preferences are no longer necessary to achieve the educational benefits of diversity, and so should not be allowed under the Constitution's Equal Protection Clause. Where "a nonracial approach…could promote the substantial interest about as well and at tolerable administrative expense," then racial preferences are prohibited by the Equal Protection Clause. *Wygant v. Jackson Board of Education*, 476 U.S. 276 (1986); *Parents Involved*, 551 U.S. at 728, 733-734, 745, 746; *see also id.* at 790 (Kennedy, J., concurring). That is the case here, with the racial preferences identified as ultimately resulting in 33 additional minority students attending UT, out of an incoming class of 6,322, or 0.5% of the class.

UT also argues that its racial preferences serve a compelling interest because otherwise its student

body racial diversity would not "translate[] into adequate diversity in the classroom." App. 68a. That is because UT defines adequate classroom diversity as at least two African-Americans, two Hispanics and two Asian-Americans in its small class sections of 5 to 24 students. App. 21a; SJA 25a-26a. But that goal is mathematically impossible to achieve in the smallest class sections. Moreover, UT's anti-Asian-American racial preferences in admissions actually work against this stated goal of classroom diversity.

In any event, this Court made clear in *Grutter* that the critical mass of minority students that racial preferences can be used to achieve is to be measured against the enrolled student body, and not the proportion of minority students in each individual class. *See id.* at 318, 325, 328, 329, 343. As Judge Garza recognized, if race based admissions are to be allowed until critical mass is attained "not merely in the student body generally, but major-by-major and classroom-by-classroom," the result will be "race-based preferences in seeming perpetuity." App. 87a. Chief Judge Jones added, "Will the University accept this 'goal' as carte blanche to add minorities until a 'critical mass' chooses nuclear physics as a major?" App. 183a.

Grutter retained limits on racial preferences in college and university admissions because of the "serious problems of justice connected with the idea of preference itself." *Id.* at 341. As Justice Kennedy added in dissent in *Grutter*, "Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the

idea of equality." *Id.* at 388. For these reasons, UT cannot be allowed to extend *Grutter* to an unprecedented classroom-diversity interest.

Consequently, even under *Grutter*, UT's racial preferences in admissions are unconstitutional under the Equal Protection Clause. This Court consequently can strike down those racial preferences without overruling *Grutter*.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully submits that this Court should reverse the judgment of the Fifth Circuit below.

Respectfully submitted,

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