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

REPLY BRIEF FOR PETITIONER

WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201

PAUL M. TERRILL
THE TERRILL FIRM, P.C.
810 W. 10th Street
Austin, TX 78701

BERT W. REIN
Counsel of Record
CLAIRE J. EVANS
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
brein@wileyrein.com

Attorneys for Petitioner

Date: November 25, 2015

262854

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

Respondents' brief confirms that UT's strategy is to evade the probing review *Fisher I* requires. That is the only objective that could explain UT's decision to press justiciability arguments rejected three times already, its tortured argument that a remand is necessary so it may attempt to build a new record to justify a decision made years ago, and its unwillingness even to attempt to satisfy traditional strict scrutiny. UT's efforts to evade the Court's definitive resolution of whether it discriminated against Ms. Fisher are not only meritless. They tacitly concede the weakness of its substantive defense.

UT cannot remotely "demonstrate *with clarity* that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary … to the accomplishment of its purpose.'" *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013) (emphasis added and citation omitted) ("*Fisher I*"). UT previously asserted two rationales—classroom diversity and demographic parity—it later disclaimed, replaced them with a *post hoc* intra-racial-diversity rationale lacking record support, and now abandons that one too. Further, none of these rationales—nor UT's unsupported claim of racial isolation—can prove UT had a constitutional need to resort to the disfavored tool of race.

UT ultimately asks this Court to uphold its system based on nothing more than an abstract interest in the educational benefits of diversity. But UT had the burden of proving that those benefits could not be obtained through race-neutral means. The success of the Top 10% Law combined with race-neutral holistic admissions made that

impossible. UT's use of race under such circumstances "is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decisionmaking." *Grutter v. Bollinger*, 539 U.S. 306, 394, (2003) (Kennedy, J., dissenting). Ms. Fisher is entitled to summary judgment.

I. UT's Thrice-Rejected Standing And Mootness Arguments Are Meritless.

UT's decision to press Article III justiciability for a fourth time is revealing—especially given that the United States makes no similar argument. Remarkably, UT believes the Court has overlooked these issues. But the Court has an "obligation to assure" itself of "standing under Article III." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006). UT raised these issues in *Fisher I* (in opposition to certiorari and on the merits) and again in opposition to certiorari here. The Court necessarily considered and rejected these arguments each time.

UT's arguments expose its desperation to avoid a ruling on the merits. In opposing certiorari in *Fisher I*, UT conceded that Ms. Fisher has standing, but argued that her claim is moot for lack of a viable damages remedy. Br. in Opposition 10-13, *Fisher v. Univ. of Texas at Austin*, No. 11-345 (U.S. Dec. 7, 2011) ("*Fisher I* BIO"). In its merits brief, UT reversed course, conceding that Ms. Fisher's "damages claim" is "still alive in this case" and instead arguing that Ms. Fisher lacks standing because she would not have been admitted under a race-neutral system. Br. for Respondents 16-17 n.6, *Fisher v. Univ. of Texas at Austin*, No. 11-345 (U.S. Aug. 6, 2012) ("*Fisher I* Resp. Br."). This time, UT makes both arguments, apparently

hoping one will finally stick. But these arguments are as meritless now as they were the first three times UT raised them.

UT argues that Ms. Fisher lacks an injury-in-fact because "she would not have been admitted to the Fall 2008 class no matter what her race[.]" Resp. Br. 17. But the "question of [Petitioner's] admission *vel non* is merely one of relief," not standing. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978). All Ms. Fisher must show for injury-in-fact is unequal treatment in the process. *Grutter*, 539 U.S. at 327. Even if admission *vel non* were relevant to standing, there is no "unrebutted summary judgment record" proving she would have been denied admission. Resp. Br. 17. To the contrary, UT represented that it could not determine whether it would have admitted Ms. Fisher unless it rescored every applicant because race universally affected its admissions competition. Defs.' Opp. to Mot. for Prelim. Inj. at 12, *Fisher v. Univ. of Texas at Austin*, No. 08-263 (W.D. Tex.) (Doc. 42).[1]

UT's mootness argument is equally weak. UT does not dispute that damages are *capable* of redressing Ms. Fisher's injury, Resp. Br. 20 n.4, the issue to which

1. UT concedes that "64 minority students with lower AI scores" than Ms. Fisher were admitted to UT through its summer program, *Fisher v. Univ. of Texas at Austin*, 556 F. Supp. 2d 603, 607 (W.D. Tex. 2008), yet claims that program is off the table because it has not been the focus of appellate briefing. Resp. Br. 13 n.3. But the summer program remains at issue. There has been no reason to address the summer program separately; UT had one admissions process, and the summer program was an avenue for admission to the fall class for applicants narrowly missing the initial fall admissions cut. *Id.*; Joint Appendix ("JA") 210a, 228a.

the Article III inquiry is addressed. Specifically, UT concedes Ms. Fisher may be awarded "nominal damages" and/or "compensation for losses potentially caused by UT's rejection of her application, such as lost future earnings or higher tuition." *Fisher I* BIO 10. UT nonetheless argues that Ms. Fisher's alleged failure to explicitly plead entitlement to these forms of relief moots her case. Resp. Br. 21-22. UT is wrong.

Relief is not controlled by pleadings: "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). Thus, "the mooting of the complaint's request for injunctive relief does not require dismissal of the suit if monetary relief would be available on the claim, even if monetary relief was not requested." 10 J. Moore, Moore's Federal Practice § 54.70; 10 Wright, Miller & Kane, Federal Practice and Procedure § 2664. In short, a "court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 65 (1978).

In fact, Ms. Fisher did not fail to seek damages. She sought "[a]ll other relief this Court finds appropriate and just." JA 129a. Residual demands encompass nominal and compensatory damages. *Mitchell v. Horn*, 318 F.3d 523, 533 n.8 (3d Cir. 2003); *Liberty Nat'l. Ins. v. Charter Co.*, 734 F.2d 545, 560 n.31 (11th Cir. 1984). But even if not, the complaint may be "freely" amended to conform to the evidence, Fed. R. Civ. P. 15, and Ms. Fisher preserved the right to seek further relief "in the remedy phase of this case." JA 82a. Even assuming that entitlement to relief is judged "based on the complaint," Resp. Br. 23, Ms.

Fisher could amend her complaint to more explicitly seek nominal and compensatory damages after prevailing in the liability phase.[2]

Finally, these pleading disputes are immaterial because Ms. Fisher sought return of her application fee. Resp. Br. 18. UT argues that this "would not redress her alleged injuries," *id.*, but restitution is a standard form of relief capable of at least partially redressing her equal-protection injury, Restatement (Third) of Restitution and Unjust Enrichment § 3 (2011) ("A person is not permitted to profit by his own wrong."). UT contends it was not "unjustly enriched" because it "did exactly what it promised" in considering her application. Resp. Br. 22. But UT was obligated to review Ms. Fisher's application in conformity with the Constitution. If UT did not, she is entitled to restitution.

2. UT incorrectly claims Ms. Fisher made a "binding" statement that damages cannot remedy her injury. Resp. Br. 18-19. That statement was not a "stipulation of facts it jointly submitted … at the summary-judgment stage." *CLS v. Martinez*, 561 U.S. 661, 675 (2010). It was an allegation of incomplete relief made in support of a preliminary-injunction request, JA 119a, which UT denied, JA 147a. Ms. Fisher's initial focus on injunctive relief demonstrates, moreover, why pleadings do not control relief and why amendment is freely permitted: "the circumstances bearing on the feasibility of particular forms of relief often change between initiation of the suit and the rendition of final judgment." 21A Oakes, Federal Procedure, Lawyers Ed. § 21.51.

II. The Court Should Reject UT's Attempt To Re-Litigate *Fisher I*.

UT claims a compelling interest in "the educational benefits of student body diversity." Resp. Br. 24. But the issue here concerns the specific rationale upon which UT purports to justify its resort to racial preferences. In UT's view, it should not be required to further explain its rationale because, under *Grutter*, a university need not "identify a more specific interest" to sustain its use of race. *Id.* at 27. If the argument sounds familiar, it should. *Fisher I* rejected it.

As *Fisher I* stressed, race may be employed as a factor "only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny." *Fisher I*, 133 S. Ct. at 2418. Strict scrutiny would be a nullity if UT could survive it merely by making a general claim of seeking the educational benefits of diversity without ever explaining why it needed race to do so. There would be no way for "the reviewing court [to] verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." *Id*. at 2420. Strict scrutiny requires a court to assess both the legitimacy of a university's rationale for employing racial preferences and the necessity of using race to achieve it.

UT claims that it is Ms. Fisher who seeks to require UT to identify its reasons for using race "'with clarity.'" Resp. Br. 27 (quoting Pet. Br. 20). Not so. *Fisher I* reaffirmed that "[s]trict scrutiny requires the university to demonstrate *with clarity* that its 'purpose or interest

is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.'" 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 305 (Powell, J.) (emphasis added)); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 505 (1989) ("[I]t is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."). Notably, the United States does not join UT's refusal to acknowledge settled law. U.S. Br. 17 ("[A] university must clearly explain its objectives, including by setting forth the concrete circumstances that will constitute achievement of the educational benefits of diversity." (internal citation omitted)).

UT is also wrong in asserting that Ms. Fisher seeks to impose a new requirement that UT "'produce evidence'" justifying its decision to use race. Resp. Br. 27 (quoting Pet. Br. 31). *Fisher I* explained that UT must produce "sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity" and that the Court must look to "the record—and not 'simple ... assurances of good intention.'" 133 S. Ct. at 2421 (quoting *Croson*, 488 U.S. at 500); Pet. Br. 31. Here too, the United States disagrees with UT, acknowledging that UT can withstand strict scrutiny only by "identifying in concrete, measurable terms what it views as attainment of the educational benefits of diversity." U.S. Br. 19; *id*. at 26 ("concrete evidence").

UT understandably would like to resurrect the "good faith" review the Fifth Circuit originally employed. Deferential review allowed UT to avoid answering difficult questions. Why did the combination of the Top 10% Plan and race-neutral holistic admissions not achieve

a "critical mass" of minorities on UT's campus? Where in the record can UT's contemporaneous reasons and supporting evidence for the 2004 decision to use racial preference be found? What does UT mean by "diversity within diversity," how did UT know that such diversity was lacking on its campus, and how will UT know when it will be achieved? Is UT pursuing "classroom diversity" and is UT's admissions system narrowly tailored to achieve it? Is UT using racial preference to bring its student body more in balance with the demographics of Texas? Why does UT emphasize "racial isolation" if it is pursuing "qualitative" diversity not "quantitative" diversity? If UT is focused on numbers, how can an admissions system producing such miniscule gains in minority enrollment be narrowly tailored to achieve that objective? How could race-neutral alternatives not work "about as well" given how ineffectual UT's system is in achieving these goals?

Requiring UT to answer these hard questions is what separates strict scrutiny from deferential review. Pet. Br. 30, 32. UT may wish that review were "strict in theory but feeble in fact." *Fisher I*, 133 S. Ct. at 2421. But *Fisher I* requires "a reviewing court" to "closely scrutinize a race-conscious admissions plan to ensure that it is necessary and narrowly tailored to achieve the university's compelling interest in the educational benefits of diversity." U.S. Br. 6. UT's racial preferences must stand or fall under real strict scrutiny.

III. UT Cannot Carry Its Strict-Scrutiny Burden.

A. UT's Shifting Rationales Lack the Requisite Clarity to Enable Strict Scrutiny Review.

After nearly eight years of litigation, it is still impossible to discern how UT justifies its reintroduction of racial preferences. Through the first Fifth Circuit appeal, UT relied on demographic imbalance and a lack of classroom diversity to justify its decision. Petition Appendix ("App.") 290a-93a. That made sense because these were the actual reasons UT gave when it made the decision. Supplemental Joint Appendix ("SJA") 23a-25a; *Fisher I*, 133 S. Ct. at 2416; U.S. Br. 3. Before this Court and on remand, however, UT abandoned these interests, going so far as to claim that they had been "concocted by Fisher." Pet. Br. 16. In their place, UT asserted a new rationale: "intra-racial diversity" or "diversity within diversity." UT relied on this novel interest both before this Court and on remand. *Fisher I* Resp. Br. 33-34, 37, 42; Br. for Appellees 47-48, *Fisher v. Univ. of Texas at Austin*, No. 09-50822 (5th Cir. Oct. 25, 2013). Not surprisingly, then, this was the Fifth Circuit's rationale for endorsing UT's use of race. App. 31a-40a.

Now, UT disclaims all of its previous rationales, in favor of an abstract reference to *Grutter*'s educational benefits. Resp. Br. 27. UT continues to claim that it is not pursuing demographic parity or classroom diversity. *Id.* at 26-27. And UT claims that it is "not pursuing a *post hoc* interest in intra-racial diversity." *Id.* at 29. Yet when pressed about the necessity of using racial preferences to achieve the educational benefits of diversity, UT tacitly returns to all three abandoned interests. UT claims it

is not pursuing intra-racial diversity, but states that it "seek[s] diversity within diversity" through the use of race. *Id.* at 34. UT writes that it is not trying to align the student body with State demographics, but concedes that it considers the "dwindling odds of admission" for Hispanics as compared to the "number of [them] in the applicant pool." *Id.* at 38. UT disclaims the pursuit of classroom diversity, but relies on a purported lack of minority representation in "undergraduate classrooms." *Id.* at 26. And, after spending years chiding Ms. Fisher for trying to make this case about "numbers," App. 40a, UT now claims that it used racial preferences because of "glaring racial isolation that persisted at UT," Resp. Br. 7, a justification that could only be about "numbers."

UT's has patently failed to "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.'" *Fisher I*, 133 S. Ct. at 2418 (quoting *Bakke*, 438 U.S. at 305). The United States' brief proves the point. In its view, UT is relying on lack of "classroom diversity and demographic disparities" as the deficiencies that made it necessary to use racial preferences to achieve the educational benefits of diversity. U.S. Br. 27-28. If UT and the United States cannot agree on the interests UT is pursuing, it is difficult to see how this Court can perform strict-scrutiny review. The short answer is the Court cannot. Pet. Br. 25-30. UT's use of racial preferences fails for this reason alone.

B. None of UT's Shifting Rationales Withstand Strict Scrutiny.

Even assuming that *all* of UT's varying rationales could fulfill the clarity requirement, UT still cannot meet its strict-scrutiny burden. None come close to meeting the test of necessity. Nor are any of them narrowly tailored to achieve UT's claimed objective.

Intra-Racial Diversity. Any claimed interest in intra-racial diversity fails at the outset for two reasons. First, as the United States implicitly acknowledges, U.S. Br. 3, 27-28, it is not "the actual [reason] underlying the discriminatory classification," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982), but a *post hoc* rationalization for a classification imposed for different reasons, Pet. Br. 32-35. Second, there is no record evidence "to support [UT's] conclusion" that racial preferences were necessary to achieve its asserted goal "at the time it acted." *Shaw v. Hunt*, 517 U.S. 899, 915 (1996); Pet. Br. 33-35. UT does not seriously contest either charge; rather, it asks the Court to ignore *Fisher I* and relieve it of the obligation to comply with basic precepts of strict-scrutiny review. *Supra* at 6-8. That should be the end of the matter.

Reliance on this *post hoc* interest would fail strict scrutiny in any event. To see why, it is important to reiterate what Ms. Fisher's legal objection to "intra-racial" diversity is *not*. Ms. Fisher does not attack holistic admissions. Ms. Fisher has never challenged UT's use of its AI-PAI system to determine the admission of non-Top 10% applicants. Her challenge always has been directed solely at UT's use of race as a factor in that preexisting admissions process. UT's claimed need to employ a system

of holistic review is therefore irrelevant. What matters is whether UT has a constitutional necessity to use racial preferences as part of that process. UT's focus on holism instead of racial preferences is a stratagem intended to avoid scrutiny of its use of race and to credit the use of race with the diversity gains achieved by all of the other factors in its AI-PAI calculus. But UT's racial preferences must rise or fall based on their merits—not on the merits of holistic admissions.

Ms. Fisher also does not challenge the pursuit of individualized diversity endorsed in *Bakke*. UT's version of intra-racial diversity has nothing to do with Justice Powell's limited endorsement of racial preferences. *Bakke* endorsed a specific admissions system; one in which race is employed only at the margins to make head-to-head, comparative decisions in order to fill the last few seats in the class. Pet. Br. 42-43. UT does not dispute that this was the context in which *Bakke* endorsed the use of racial preferences; nor does UT contend that its system functions in this manner. Resp. Br. 50. Rather, UT argues that its system is sufficiently individualized to claim the benefits discussed in *Bakke*, *id.* at 50, even while it instead pursues the "critical mass" interest found compelling in *Grutter*, *id*. at 42. That argument is untenable because the interests that *Bakke* and *Grutter* endorsed are antithetical. *Grutter*, 539 U.S. at 389-92 (Kennedy, J., dissenting).

UT's attempt to hide behind *Bakke* also fails on its own terms. UT's system does not allow for the kind of individualized assessment *Bakke* contemplated. UT's admissions decisions are made on a mechanized, cell-by-cell basis where each individual cell contains numerous applicants with the same AI/PAI scores. The line dividing those accepted from those who are not is drawn solely on

the basis of AI and PAI scores without any evaluation of the underlying individual characteristics that produced those scores. Pet. Br. 43. At the point of decision, in other words, UT does not "compare applicants based on what unique backgrounds, experiences, or other individual characteristics they would add to the campus." Resp. Br. 50. UT coyly asserts that its system is race-blind at the point of decision and claims this is a virtue. *Id.* at 49. But UT's system is the worst of all worlds. UT labels tens of thousands of students by race each year; and it does so in a manner that forecloses rather than promotes the kind of nuanced, individualized decisionmaking necessary to safeguard the personal right to equal protection.[3]

The fundamental problem with UT's intra-racial diversity interest is that it is nothing more than code for discrimination in favor of affluent minority candidates. UT demurs. Resp. Br. 29. But it cannot conceal what intra-racial diversity is all about. UT claims that the use of race is needed *not* to ensure a critical mass of minorities, but to ensure it enrolls enough minorities with "a different

3. UT suggests that it processes too many applications to use a tiebreaker-type admissions system. Resp. Br. 50. But there is no such thing as "too big" to comply with the Constitution, especially given that schools of similar size and prestige claim they are able to do so. Br. for Brown Univ. *et al.* as *Amicus Curiae* at 1, 20 (Nov. 2. 2015). But even if UT could not operate a tiebreaker system, this is no reason to lighten its burden. Different schools have different systems and race-neutral measures available to them. UT, of course, has a demonstrated history of success using the Top 10% Law and non-racial AI-PAI criteria. That certain tools work well for some universities and not others is why narrow tailoring requires universities to prove, "before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Fisher I*, 133 S. Ct. at 2420.

set of experiences and backgrounds" from those admitted through the Top 10% Plan. *Id.* at 30. And UT makes quite clear what it thinks those differences are. In UT's view, it needs underrepresented minorities that come from "an integrated community" and who are "not the first in their family to attend college." *Id.* More specifically, UT claims a need to enroll underrepresented minorities that, unlike those admitted via the Top 10% Plan, "do[] not *reinforce* stereotypes that Hispanics come from 'the valley' or African-Americans from 'the inner city.'" *Id.* at 43. This interest is based upon noxious, unproven assumptions about minority students from lower-income communities and thus is antithetical to the Fourteenth Amendment. App. 74a-76a (Garza, J., dissenting); Pet. Br. 36-37.

Even assuming this interest were somehow compelling, UT had no idea whether its admitted class lacked these minorities when it deployed race to distinguish between applicants. App. 73a-77a (Garza, J., dissenting). UT asserts that "[n]o class selected according to a single-factor (such as class rank) will be as diverse, among many dimensions, as it could be if supplemented with students selected through holistic review." Resp. Br. 29. Again, the relative merit of holistic admissions is a red herring. Moreover, UT confuses the method of selection with the characteristics of those selected. UT bases its view on two general attributes it asserts that Top 10% admittees share: they exceled in high school and come from economically challenged, non-White communities. Based only on these assumptions, UT concludes that *none* of them have the "experiences" UT claims that only use of racial preferences can bring to its campus. The United States goes so far as to assert that "it would be surprising—and fortuitous—if the portion of the class admitted based solely on class rank were broadly

diverse in all the ways the University values." U.S. Br. 33-34 n.2. That UT thinks it is Ms. Fisher's position that "is an affront to individuality," Resp. Br. 36, is both ironic and disheartening.

Indeed, the record evidence demonstrates the opposite. Minority students admitted through the Top 10% Law are much more successful in obtaining entry to UT's most competitive schools and majors than are minorities admitted via holistic review. Pet. Br. 41; SJA 63a, 166a. At the same time, minority holistic enrollees are much more likely to be relegated to Liberal Arts, which is the bottom level of the admissions cascade. App. 282a. The record thus demonstrates that minority Top 10% enrollees tend to have higher combined AI-PAI scores than their minority non-Top-10% counterparts. UT is plainly wrong, then, to claim that Top 10% minority enrollees lack "all the qualities valued by the university." Resp. Br. 41.[4]

But even if UT had a strong evidentiary basis for concluding that Top 10% admittees were non-diverse in a measurable way, UT still has not "provided any concrete targets for admitting more minority students possessing these unique qualitative-diversity characteristics—that is, the 'other types of diversity' beyond race alone." App. 73a (Garza, J., dissenting). Nor has UT identified when

4. Minority students admitted through the Top 10% Law earn better grades than minority holistic enrollees. SJA 63a, 166a; JA 393a. By any measure, then, minority Top 10% enrollees are more broadly qualified when admitted to UT and perform better at UT than their non-Top 10% counterparts. The notion that race is needed to compensate for the Top 10% Law's purported inability to enroll either broadly diverse or academically capable students is contradicted by the record.

"this qualitative diversity target will be achieved." *Id.* Without concrete evidence, UT cannot meet its burden of showing that its admissions system is narrowly tailored to achieve this interest.

Finally, UT's "diversity within diversity" theory is fundamentally flawed because the factor of race can only be used to make distinctions on the basis of race. Pet. Br. 37; JA 261a. Using race as a factor cannot distinguish between "the black student with high grades from Andover" and "the black student from the South Bronx," Resp. Br. 33, or between Justice Powell's hypothetical African-American students "A" and "B," *Bakke*, 438 U.S. at 324. The same is true "for two Hispanic students from San Antonio"—"one of whom graduated from a high-performing, integrated school and the other from a low-performing, racially identifiable school." Resp. Br. 33. Adjudged against the factor of race, each is a Hispanic student—no more, no less. UT thus is correct that "two students who, while both African American, grew up in different communities" are not interchangeable. *Id.* at 36. Each may have "a far broader array of qualifications and characteristics." *Fisher I*, 133 S. Ct. at 2418. But labeling students by race says nothing about their non-racial attributes.

Classroom Diversity and Demographic Parity. The United States half-heartedly defends UT's abandoned interests in classroom diversity and demographic parity, U.S. Br. 27-29, recognizing that they are the only justifications offered in UT's Proposal, Pet. Br. 3. The United States claims—without analysis—that "classroom diversity" and the disparity "between the racial and ethnic makeup of the student body and the State's population"

are constitutionally acceptable goals. U.S. Br. 3. But that is wrong, and *Grutter* supports neither. Pet. Br. 44-45. Nor does the United States explain how UT's system is narrowly tailored to achieve either. Pet. Br. 45-47. UT abandoned both interests for good reason.

Racial Isolation. Finally, UT asserts that it has an interest in using race to remedy "racial isolation." Resp. Br. 38-39. But such a goal must be about increasing the *number* of minorities in the student body—an interest UT has persistently disclaimed. Racial isolation is addressed by "bolster[ing] minority enrollment in the overall student body." U.S. Br. 34. The contention that UT is not at "critical mass" if that concept is defined quantitatively is incomprehensible. "[M]ore than 20% of the entering freshmen [were] already African-American and Hispanic, resulting in real diversity even absent [racial preferences]." App. 328a (Jones, J., dissenting from the denial of rehearing en banc). Moreover, more than 18% of the 2004 entering freshman class was Asian-American. By 2004, more than 40% of the incoming freshman class was composed of minority students. UT thus was a model of racial *integration*, not isolation. It had no need to resort to racial preferences in 2004 and certainly no need to employ them in 2008 as UT neared becoming a majority-minority campus. Ms. Fisher thus was right to paint a "rosy picture" of a "dramatic increase" in minority enrollment during this time period. UT painted the same "rosy picture" long before it became expedient to claim otherwise in this litigation. JA 396a, 393a.

UT attempts to sidestep this issue by claiming that racial isolation existed not in the student body, but within the pool of "holistic enrollees" between 1997 and 2003, as

evidenced by decreasing African-American and Hispanic "holistic enrollment" during that time period. Resp. Br. 38. But admission pools are not the constitutionally relevant unit of measure—the "student body" is. *Grutter*, 394 U.S. at 324-25. Statistical distortion aside, any decrease resulted from the rapid increase of Top 10% admissions during this same timeframe. There necessarily was a corresponding decrease in the number of "holistic enrollees" as the Top 10% Law became the dominant means of admission. The idea that a decrease in the number of underrepresented minority enrollees through a rapidly shrinking means of admission could prove the existence of a "growing" "racial isolation" on UT's campus strains credulity.

The record proves the point. UT notes that from 1997 to 2002 the number of African-American "holistic" enrollees dropped from 140 to 116—a 17% decrease not, as UT claims, a reduction by "half." Resp. Br. 38. At the same time, the number of African-American Top 10% enrollees more than tripled, rising from 50 in 1997 to 156 in 2002, JA 177a, thereby increasing the total number of African-American enrollees from 190 to 272. *Id.* Likewise, the rapidly increasing number of Hispanic Top 10% enrollees during this timeframe overwhelmed the reduction in the number of Hispanic "holistic enrollees."[5] *Id.* In total, there was an increase of 327 Hispanic and African-American enrollees, representing a 30% jump in minority enrollment during this five-year period. *Id.*

The "minimal impact" that racial preferences had on minority enrollment further "casts doubt on the[ir]

5. From 1997 to 2002, the number of Hispanic Top 10% enrollees increased from 358 to 703, driving the total number of Hispanic enrollees from 892 to 1137. JA 177a.

necessity," *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734 (2007); *id.* at 790 (Kennedy, J., concurring). UT's use of race could have resulted in no more than a few dozen additional minority enrollees. App. 247a-251a; Pet. Br. 46-47. UT attempts to inflate the number of minority enrollees whose admission was attributable to race, for example, by arguing that the relevant unit of measurement is admittees, not enrollees. Resp. Br. 46. But students admitted to UT who choose to enroll elsewhere cannot impact diversity at UT. App. 247a n.18. Ultimately, UT does not contest the fact that its use of race had only a "modest impact" on minority enrollment. *Id.* Nor could it. UT does not measure, much less track, "how many of these students would not have been admitted but-for the use of race as a plus factor." App. 250a.

UT thus is forced to portray the ineffectiveness of its racial preferences as somehow validating them. Resp. Br. 48; U.S. Br. 35. UT claims it would be "paradoxical" to limit the magnitude of racial preferences to only a modest plus in the admissions calculus yet require that they yield a dramatic increase in minority enrollment. Resp. Br. 46-48. UT misses the point. First, where racial preferences have only a negligible impact on minority enrollment, a race-neutral alternative likely could have achieved the same result. *Parents Involved*, 551 U.S. at 734. Second, a modest impact is a virtue only when race is a consideration in the competition for the last few seats. *Supra* at 12. Once a university chooses to label every student by race, its burden of proving necessity becomes more onerous given the danger such a system poses to the individual right to equal protection. *Parents Involved*, 551 U.S. at 733-35.

If UT's complaint is that proving the necessity of its racial preferences is difficult, then the Equal Protection Clause is to blame. *Fisher I*, 133 S. Ct. at 2418-19. The heavy burden the State must carry before invoking racial classifications is why universities must experiment with race-neutral alternatives, *id.* at 2420, and may turn to racial classifications only as a "last resort," *Croson*, 488 U.S. at 519 (Kennedy, J., concurring). In the end, the reason why UT has had so much difficulty explaining why it needed to use racial preferences is straightforward: the demonstrated success of the Top 10% Law and the various race-neutral factors in the PAI calculus made them unnecessary.

IV. Ms. Fisher Is Entitled To Summary Judgment On Liability Without Further Proceedings.

In a last ditch effort, UT asks for a trial if the Court reverses the Fifth Circuit. Resp. Br. 51. But UT was aware that, under *Grutter*, it had the burden of constitutionally justifying its discrimination under strict scrutiny, and it had every opportunity to do so. And it stipulated that summary judgment is appropriate on this record. *See* Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. & Opp. to Pl's Mot. Partial Summ. J. at 1-2, *Fisher v. Univ. of Texas at Austin*, No. 08-263 (W.D. Tex.) (Doc. 96-1) ("After extensive discovery, the parties agree[d] on the material facts of this case, and that summary judgment is proper" because "this case presents no genuine issue of material fact."); Defs.' Reply Mem. in Supp. of Cross-Mot. for Summ. J. at 1, *Fisher v. Univ. of Texas at Austin*, No. 08-263 (W.D. Tex.) (Doc. 102); Br. for Appellees 8, 15, 34, 49 n.6, *Fisher v. Univ. of Texas*, No. 09-50822 (5th Cir.). UT's summary-judgment stipulation is binding. *CLS*, 561 U.S. at 675-78.

Moreover, there is no triable issue. UT remains correct that there is no genuine dispute between the parties as to any material fact. Rather, they dispute who is entitled to judgment as a matter of law—specifically, whether based on "this record—and not simple assurances of good intention," UT "has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Fisher I*, 133 S. Ct. at 2421 (quotations and alterations omitted). Whether a set of facts meets the governing legal standard is not an issue for trial—it is a summary-judgment issue. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).

UT wishes to reopen the record to proffer additional evidence in the hopes of manufacturing a factual dispute. But the Fifth Circuit rejected this ploy, "find[ing] that there are no new issues of fact that need be resolved" and that UT failed to demonstrate "any identified need for additional discovery." App. 13a. Simply put, UT's proffer of additional evidence is neither timely nor probative. Six years after merits discovery closed, UT seeks to re-establish the general educational benefits of diversity (which are not in dispute) and somehow construct new rationales for its racial preferences. But the crux of strict scrutiny is to ensure that universities have contemporaneous, evidence-based reasons justifying their resort to racial preferences. Finding new justifications for racial preferences under a new record is foreclosed. Universities cannot be permitted to reflexively institute race preferences and then cast about *post hoc* for constitutional justifications and supporting evidence once they have been sued. There is no justification for allowing UT to reopen the record.

The path forward is clear. Because UT discriminates on the basis of race and has failed to meet its strict-scrutiny burden based on the undisputed record, Ms. Fisher is entitled to summary judgment on liability.

CONCLUSION

The Court should reverse the judgment below and remand the case with instructions to enter summary judgment on liability for Ms. Fisher.

Respectfully submitted,

WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201

PAUL M. TERRILL
THE TERRILL FIRM, P.C.
810 W. 10th Street
Austin, TX 78701

BERT W. REIN
Counsel of Record
CLAIRE J. EVANS
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
brein@wileyrein.com

Attorneys for Petitioner

Date: November 25, 2015