No. 09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Abigail Noel Fisher,

Plaintiff–Appellant,

v.

University of Texas at Austin, *et al.*,

Defendants–Appellees.

On Appeal from the United States District Court
for the Western District of Texas
No. 1:08-cv-00263-SS
The Honorable Sam Sparks

Brief of the Cato Institute as *Amicus Curiae* in Support of the Appellant Urging Reversal

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Supplemental Statement of Interested Parties
***Fisher v. University of Texas at Austin*, No. 09-50822**

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that he is aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation and that the Cato Institute has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

/s/ Andrew M. Grossman
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Interest of the *Amicus Curiae*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

This case implicates Cato's longstanding belief that all citizens should be treated equally before the law and that, accordingly, government's use of racial and ethnic classifications must be strictly circumscribed. Such classifications are, at the very least, in tension with the equal protection and due process guarantees of the Fifth and Fourteenth Amendments. Their use must therefore be subject to searching judicial review, consistent with the Supreme Court's Equal Protection jurisprudence and, in particular, its opinion in this case.[1]

[1] In accordance with Fed. R. App. P. 29(a), all parties to this appeal have consented to the filing of this *amicus curiae* brief. No person or entity other than *amicus* or its counsel had any role in authoring this brief or

Introduction and Summary of Argument

The Supreme Court has directed this Court to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013). In the course of rejecting this Court's substantial deference to the University's "good faith" in assessing the necessity of a race-based admissions policy, the Supreme Court explained that the proper "guidance" to implementing strict scrutiny here "may be found in the Court's broader equal protection jurisprudence *which applies in this context*." *Id.* at 2418 (citing, *inter alia*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)) (emphasis added). That jurisprudence consistently requires a "strong basis in evidence" to support the necessity of a governmental entity's use of racial classifications, even where the government's avowed interest is one that has been recognized, in general terms, to be compelling. *See, e.g., Croson*, 488 U.S. at 500; *Miller v. Johnson*, 515 U.S. 900, 922 (1995). That is the standard that this Court must now apply. And the University's showing falls far short.

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made a monetary contribution intended to fund the brief's preparation or submission.

I. As the Supreme Court's opinion in this case made clear, *Grutter v. Bollinger*, 539 U.S. 306 (2003), did not overrule or limit its equal protection cases requiring that a "strong basis in evidence" support the necessity of a governmental entity's use of racial classifications. *See Fisher*, 133 S. Ct. at 2421. Absent such a showing, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493 (plurality op.). A strong basis in evidence is essential to define the contours of the government's interest so as to make possible the narrow tailoring of racial preference that is required. *Id*. Only such specificity prevents general assertions of interest—for instance, a university's interest in diversity—from being used to "'justify' race-based decisionmaking essentially limitless in scope and duration." *Id*. at 498.

II. Logically, the strong-basis-in-evidence standard entails three separate showings in the context of public university admissions. First, rather than gesture toward the broad concept of "diversity," the university must demonstrate that its particular conception or measure of racial diversity among students—for example, "critical mass" or

classroom-level diversity—actually furthers a legitimate educational objective and is not a pretext for bare racial discrimination. Second, the university must demonstrate that minority enrollment in the absence of racial classification is sufficiently inadequate as to necessitate the use of that "highly suspect tool," *Croson*, 488 U.S. at 493, to achieve its conception of diversity. And third, the university must demonstrate that each aspect of its use of racial preferences is, in fact, necessary.

III. The University's evidence falls short on all counts. While the Supreme Court accepted "critical mass" as a legitimate conception of student-body diversity in *Grutter*, the University's "classroom diversity" rationale is unsupported by either precedent or evidence and was, in any case, abandoned before the Supreme Court. The University's "critical mass" rationale, meanwhile, is unsupported by the evidence. Unlike in *Grutter*, where the University of Michigan Law School's minority student population would have plummeted to almost nothing absent preferences, the University has achieved real and substantial racial diversity—far beyond that which Michigan accomplished with preferences—through Texas's race-neutral "Top 10% Law." Moreover, particular aspects of the University's program—for example, its choice to accord preference to Hispanic applicants while denying preference to Asians, who

comprise a smaller portion of the student body—have no basis in evidence, underscoring the overall arbitrariness of its approach.

"Strict 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." *Fisher*, 133 S. Ct. at 2418 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (Powell, J.)). Because the University has failed to do so, this Court must reject its use of racial classifications.

Argument

I. The University's Burden Is To Demonstrate by a "Strong Basis in Evidence" that Its Use of Racial Classifications Is Necessary

"'[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.'" *Croson*, 488 U.S. at 505 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533-535 (1980) (Stevens, J., dissenting)); *Fisher*, 133 S. Ct. at 2419 (quoting the same). To that end, the Supreme Court's jurisprudence requires that the necessity of racial classifications be supported by a "strong basis in evidence," not just

generalized assertions of interest. The concerns that motivate this requirement—racial neutrality, individual dignity, and accountability—apply with special force to public universities' use of racial classifications to achieve "diversity," a vague and potentially limitless goal that may provide cover for politically-motivated or invidious discrimination. Accordingly, a public university bears the burden of demonstrating the necessity of its consideration of race in each instance, and a reviewing court must scrutinize the evidence to "verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." *Fisher*, 133 S. Ct. at 2420 (quoting *Bakke*, 438 U.S. at 305).

A. The Strong-Basis-in-Evidence Requirement Is Essential To Carry Out Strict Scrutiny of the University's Racial Classification Scheme

The use of racial classifications by government threatens individuals' "personal rights to be treated with equal dignity and respect." *Croson*, 488 U.S. at 493 (plurality op.) (internal quotation marks omitted). For that reason, the government's use of racial classifications is subject to strict scrutiny. To defend its use of racial classifications, a governmental entity must not only identify a legitimate "compelling interest," but also demonstrate a "strong basis in evidence" that the consideration of race is necessary to further that compelling interest. *See,*

e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality op.); *Croson*, 488 U.S. at 500. This requirement is essential to carrying out strict scrutiny of racial classification schemes in several respects.

1. Enabling the Court's independent judgment

Most directly, the strong-basis-in-evidence requirement enables a court to exercise its independent judgment as to whether racial classification is truly necessary. The "presumptive skepticism of all racial classifications" prohibits a court "from accepting on its face" a government's conclusion that such classification is necessary. *Miller*, 515 U.S. at 922 (citation omitted). Uncritical acceptance of the government's asserted interest "would be surrendering [the court's] role in enforcing the constitutional limits on race-based official action." *Id*. This a court "may not do." *Id*. (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). "Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." *Fisher*, 133 S. Ct. at 2421.

Nor may a court rely on sketchy facts to overcome the presumption against the racial classification of citizens by their government. The equal protection inquiry requires a precise balancing of

the overriding interest of racial neutrality with other interests, such as remediating historical discrimination or encouraging diversity. These competing interests "are not always harmonious" and "reconciling them requires . . . extraordinary care" on the part of governments seeking to employ race-conscious policies and, by extension, the courts reviewing those policies. *Wygant*, 476 U.S. at 277 (plurality op.); *see also Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009) (importing the "strong-basis-in-evidence standard" to Title VII, where there is the same "tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other"). Imprecision is necessarily incompatible with that task.

Croson demonstrates the factual rigor required to balance these factors. There the Court considered five "predicate facts" proffered by a city in support of a minority-contractor quota. The quota ordinance's claim of remedial purpose was "entitled to little or no weight," as were "conclusionary" statements that there had been discrimination within the region's construction industry. 488 U.S. at 500. Reliance on disparities between the number of contracts awarded to minority firms, or membership in local contracting organizations, and the city's minority

population was "similarly misplaced," where the "city [did] not even know how many [minority firms] in the relevant market are qualified to undertake" construction projects. *Id*. at 501-02. And a congressional finding that there had been nationwide discrimination in the construction industry had little probative value where "the scope of the problem would vary from market area to market area." *Id*. at 504.

"None of these 'findings,' singly or together," *Croson* found, provided a strong basis in evidence supporting the use of racial preferences. *Id*. at 500. The city's burden, it explained, was to provide evidence of necessity by "identify[ing] [the prior] discrimination, public or private, with some specificity before [it] may use race-conscious relief." *Id*. at 504. But what the city presented was "a generalized assertion as to the classification's relevance to its goals" and "sheer speculation" as to the impact and existence of any prior discrimination. *Id*. at 499-500. Absent the requisite factual detail, a reviewing court's task was "almost impossible." *Id*. at 507.

Ricci is also illustrative. *Ricci* rejected a city's argument that it could discard the results of a promotional exam on the basis of its belief that certifying the result could expose it to disparate-impact liability from black firefighters. 129 S. Ct. at 2681. "[A] prima facie case of disparate-

impact liability—essentially, a threshold showing of a significant statistical disparity and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results." *Id.* at 2678 (citation omitted). The city's burden was to produce strong evidence that its exams were not job-related and consistent with business necessity or that there existed an equally valid, less-discriminatory alternative. *Id.* The city's evidence, however, consisted of little more than "a few stray (and contradictory) statements." *Id.* at 2680. Thus, there was "no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability." *Id.* at 2681.

For good reason, "any racial preference must face the most rigorous scrutiny by the courts." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring); *see also Fisher*, 133 S. Ct. at 2421 ("Strict scrutiny must not be strict in theory but feeble in fact."). This Court, in turn, is reliant on the strong-basis-in-evidence requirement to carry out that task.

2. "Smoking out" illegitimate use of race

A strong basis in evidence is necessary to demonstrate objectively that the use of racial classifications by government actually furthers legitimate interest. "Absent searching judicial inquiry into the

justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493 (plurality op.). Thus, the requirement of a factual showing of necessity "'smoke[s] out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.*; *see also Fisher*, 133 S. Ct. at 2421 ("It must be remembered that the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight.") (quotation marks omitted).

Courts have had ample grounds for suspicion on this score. In attempting to justify the necessity of its race-conscious anti-layoff policy, the school board in *Wygant* presented no contemporaneous evidence of prior discrimination and was reduced to "lodg[ing]" extra-record materials with the Court. 476 U.S. at 278 n.5 (plurality op.). The Supreme Court was appropriately wary of this *post hoc* effort: "If the necessary factual predicate is *prior discrimination* . . . then the very nature of appellate review requires that a factfinder determine whether the employer was justified in instituting a remedial plan." *Id.* On the facts

before it, the Court could only conclude that the school board's motivation was outright racial balancing. *Id*. at 276; *see Croson*, 488 U.S. at 497-98 (discussing *Wygant*).

Similarly, *Croson* inferred improper motive from the absence of a strong basis in evidence to support particular aspects of the city's minority-contractor preference scheme. The city presented "*absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." 488 U.S. at 506. Yet these groups were awarded preferences. This "random inclusion of racial groups," unsupported by any evidence of prior discrimination, "strongly impugns the city's claim of remedial motivation." *Id*. Given the absence of "[p]roper findings" regarding prior discrimination against black contractors, the Court could not dismiss the possibility that the city's preference scheme was simply the product of "racial politics." *Id*. at 510.

Most recently, the invidious results of racial politics were particularly pronounced in *Ricci*. The absence of any strong basis in evidence to support the city's asserted reason for scrapping its promotional exam—concern for disparate-impact liability—confirmed that its explanation "was a pretext and that the City's real reason was

illegitimate, namely, the desire to placate a politically important racial constituency." 129 S. Ct. at 2684 (Alito, J. concurring).

The strong-basis-in-evidence standard has been applied in other cases to expose motivations that, although well-meaning, were nevertheless illegitimate. In *Miller*, the Supreme Court identified and rejected the Justice Department's policy of "maximizing majority-black districts" through enforcement of Section 5 of the Voting Rights Act, rather than "grounding its objections [to proposed redistricting maps] on evidence of a discriminatory purpose." 515 U.S. at 924. Similarly, *Shaw v. Hunt*, 517 U.S. 899, 910 (1996), found that "an interest in ameliorating past discrimination did not actually precipitate the use of race in [a state's] redistricting plan." In each case, what revealed the improper motivation was the absence of a strong basis in evidence to support race-conscious redistricting. *See id.* at 908 n.4 (discussing standard and evidence).

Because "[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system," *Adarand v. Pena*, 515 U.S. 200, 226 (1995) (quotation marks and citation omitted), this Court must be in a position

to satisfy itself that consideration of race serves a legitimate end. Nothing short of a strong basis in evidence allows it to do so.

3. Tailoring the use of race

The strong-basis-in-evidence requirement facilitates the evaluation of whether racial classifications are narrowly tailored. Under strict scrutiny, "racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Fisher*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 326). Indeed, "[t]he purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Grutter*, 539 U.S. at 333 (quoting *Croson*, 488 U.S. at 493); *see also Walker v. City of Mesquite*, 169 F.3d 973, 982-83 (5th Cir. 1999).

Absent a precise delineation of the necessity of employing racial classifications, it is "impossible to assess" whether the use of racial classifications "is narrowly tailored" to fit that interest. *Croson*, 488 U.S. at 507; *see also O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992) (same); *W.H. Scott Constr. Co., Inc. v. City of Jackson,*

Miss., 199 F.3d 206, 219 (5th Cir. 1999) (requiring "particularized findings of discrimination" for that reason).

Further, it is precision in defining the government's compelling interest that prevents "race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498. As *Croson* explained, "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It has no logical stopping point." *Id*. (internal quotation marks omitted). The permissible means to address that interest would likewise be without limit.

In short, this Court could not possibly evaluate the relationship between race-conscious remedies and their purpose when that purpose is adduced only in the most general terms. *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) (the use of racial classifications must be "supported by empirical evidence" to facilitate "rigorous judicial review, with strict scrutiny as the controlling standard"); *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring) (explaining how "the district fails to account for the classification system it has chosen").

4. Limiting racial stigma and hostility

When the use of racial classifications extends beyond what is necessary and narrowly tailored, the "unhappy consequence" is "to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). In particular, "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493. Instead of promoting inclusiveness and cross-racial understanding, they may bring about the perverse result of "reinforc[ing] common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (Powell, J.).

A strong basis in evidence supporting the necessity of racial preferences limits this harm by preventing over-inclusiveness in race-conscious policies. By forcing government to identify and work to achieve its interest with precision, such a showing ensures that these harms will be minimized or, where race-neutral means may be substituted, entirely eliminated. By contrast, imprecision—that is,

adopting racial preferences that are not necessary to achieve a compelling interest in *all applications*—only amplifies the "inequity in forcing innocent persons . . . to bear the burdens" of what may understandably appear to be arbitrary or invidious classifications. *Bakke*, 438 U.S. at 298 (Powell, J.). This can only stoke racial divisiveness and hostility.

5. Transparency and accountability

The strong-basis-in-evidence requirement reinforces transparency and accountability where public institutions are involved. In light of the nation's experience, recent and historical, in racial relations, the use of racial classifications by government is understandably a matter of intense public interest. But racial classification schemes often lack the clarity and transparency necessary for public understanding and scrutiny. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 253-57 (2003) (presenting a mere "summary" of college's admissions guidelines); *Parents Involved*, 551 U.S. at 785-86 (Kennedy, J., concurring) (describing "problematic" discrepancies and ambiguities in a "complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools") (quotation marks omitted); *compare with Bakke*, 438 U.S. at 316-17

(Powell, J.) (describing Harvard's more straightforward diversity program).

Loose standards give universities "few incentives to make the existing minority admissions schemes transparent." *Grutter*, 539 U.S. at 394. By facilitating transparency and disclosure, the strong-basis-in-evidence requirement empowers citizens to "hold . . . elected officials accountable for their positions," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010), usually well before the courts have an opportunity pass judgment on challenged governmental action. And democratic accountability through the political process is the hallmark of "enlightened self-government," *id.* at 339, and is preferable in fundamental respects to remedial judicial action. By contrast, where "programs have not been openly adopted and administered . . . . they have not benefited from the scrutiny and testing of means to ends assured by public deliberation." Drew Days, III, Fullilove, 96 Yale L.J. 453, 459 (1987).

B. The Concerns Motivating the Strong-Basis-in-Evidence Requirement Apply with Special Force to Universities' Use of Racial Classifications to Achieve Diversity

"[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized," including the use of racial

preferences in public university admissions. *Gratz*, 539 U.S. at 270 (quotation marks omitted); *see also Fisher*, 133 S. Ct. at 2418-19 ("the most rigid scrutiny" applies) (quotation marks omitted). It follows that a public university's use of racial classifications must be supported by a strong basis in evidence that consideration of race is necessary to achieve a legitimate and compelling interest. *Id*. at 2418 (directing this Court to apply the Supreme Court's "broader equal protection jurisprudence"); *see also Wygant*, 476 U.S. at 277 (plurality op.); *Croson*, 488 U.S. at 500; *Shaw v. Reno*, 509 U.S. 630, 656 (1993); *Miller*, 515 U.S. at 922; *Hunt*, 517 U.S. at 908 n.4, 910; *Bush v. Vera,* 517 U.S. 952*,* 977 (1996). While deference may be due to a school's choice of educational objectives, *Grutter*, 539 U.S. at 328-29, the Supreme Court has never suggested that public universities need not meet this basic evidentiary standard when they employ racial classifications to achieve student-body diversity. Indeed, this requirement carries special weight when diversity is offered as a justification for the use of racial classifications, because the problems of improper motive, unlimited duration, and imprecise tailoring are acute.

Diversity is particularly susceptible to abuse as a pretext for illegitimate purposes. In the remedial context, courts have had little

difficulty determining when remedial purpose has been employed as a pretext for other ends, by focusing on evidence of prior discrimination and the lingering effects of such discrimination—both relatively straightforward factual inquiries. *E.g., Parents Involved*, 551 U.S. at 720-21; *Croson*, 488 U.S. at 499-500. Evaluating the necessity of racial preferences to accomplish a diversity goal is a more complex inquiry. Universities' views of the meaning of diversity, its specific benefits and the proper means of achieving it may differ; diversity programs operate on more complex statistical terrain than remedial efforts targeting a discrete number of racial groups; and courts may not simply look backwards at historical evidence to assure themselves that a firm basis exists for the use of racial classifications.

Absent clear and specific evidence of the need to consider race, it is impossible to distinguish invidious racial balancing from permissible diversity-related preference, so long as a university espouses a diversity interest and provides some measure of individual consideration. *See* Ian Ayres & Sydney Foster, Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz, 85 Tex. L. Rev. 517, 543 (2007). This risk is not hypothetical: "Many academics at other law schools who are 'affirmative action's more forthright defenders readily concede that

diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.'" *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (quoting Peter Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 34 (2002)). Only a clear accounting—in the form of strong evidence showing a need for racial preferences in light of the institution's circumstances and goals—can guard against the risk that a diversity program, even one justified using language from *Bakke* and *Grutter*, may in fact operate "as a cover for the functional equivalent of a quota system." *Bakke*, 438 U.S. at 318 (Powell, J.).

Greater factual scrutiny is also necessary to prevent claims of diversity from being "used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 498 (plurality op.). The *Grutter* Court "expect[ed]" that the use of racial preferences would no longer be necessary in 25 years, 539 U.S. at 343. Only if universities are required both to justify with precision their asserted need and then to tailor their use of race narrowly to that need, will such limits on scope and duration become apparent, as an incident of the demonstration of a strong basis in evidence that the consideration of race is necessary. *See Croson*, 488 U.S. at 506; *Peightal v. Metro. Dade*

Cnty., 26 F.3d 1545, 1553 (11th Cir. 1994) ("[G]eneralized assertions of past discrimination . . . afford no logical terminus for a remedy"). At some point, racial preferences would necessarily fall by the wayside.

"'[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Gratz*, 539 U.S. at 270 (quoting *Fullilove*, 448 U.S. at 537 (Stevens, J. dissenting)). In light of the heightened risk of pretext, universities claiming a diversity interest should not be absolved from having to demonstrate the factual necessity of racial preferences to achieve that end; if anything, judicial scrutiny should be *more searching* than for purely remedial programs.

II. The University Must Validate the Necessity of Racial Classification by a Strong Basis in Evidence

Commensurate with the heavy toll that consideration of race exacts, the strong-basis-in-evidence standard compels a public university employing racial classifications to come forward with evidence that justifies their use. "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." *Adarand*, 515 U.S. at 228. To that end, a public

university bears the burden of demonstrating by a strong basis in evidence that racial classifications are necessary to achieve its educational objectives. This logically entails three discrete showings:

First, the university must demonstrate, by empirical evidence or precedent, that its particular conception of racial diversity among students—for example, classroom diversity—actually furthers a legitimate educational objective. *See Grutter*, 539 U.S. at 387–88 (Kennedy, J., concurring); *cf. Dean v. City of Shreveport*, 438 F.3d 448, 458 (5th Cir. 2006) (strong-basis-in-evidence analysis rejecting test passage to establish the demographics of the qualified applicant pool in the absence of evidence that passage predicted the quality of future firefighters). This showing is essential to uncovering pretextual use of the diversity rationale, identifying forbidden quota systems implemented in *sub rosa* fashion, and ensuring that the university's interest is, in fact, sufficiently compelling to warrant consideration of race. *See Fisher*, 133 S. Ct. at 2419 ("Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'") (quotation marks omitted).

Second, the university must present evidence that minority enrollment is sufficiently low as to necessitate the use of the "highly

suspect tool" of racial classifications, *Croson*, 488 U.S. at 493 (plurality op.), to achieve its legitimate educational objectives. In effect, this requires the university to apply its diversity theory to its unique situation, proving that an interest compelling in the abstract is also compelling in fact. *See Croson*, 488 U.S. at 505 ("We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another.").

To that end, a school espousing the "critical mass" theory of diversity approved in *Grutter* must present a strong factual basis that, prior to consideration of race, its student body lacks the "meaningful numbers" of minority students necessary to achieve the educational benefits of diversity. *Grutter*, 539 U.S. at 338. Moreover, the school must show that its use of racial preferences has more than a "minimal effect" and so is in fact superior to race-neutral alternatives; otherwise, consideration of race would hardly be "necessary." *Parents Involved*, 551 U.S. at 73. Racial preferences that have a *de minimis* effect on minority enrollment fail this test. *Id*. at 733-34. Only in this way may the university carry its burden of proving that its use of race "outweigh[s] the cost of subjecting [thousands] of students to disparate treatment based solely upon the color of their skin." *Id*. (quotation marks omitted).

Third, the university must present evidence that validates each aspect of its use of racial preferences. *See Hunt*, 517 U.S. at 909 (before states may take race-conscious action to remedy prior discrimination, "they must identify that discrimination . . . with some specificity" because a "generalized assertion of past discrimination . . . provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy") (quotation marks omitted). Just as prior discrimination against black-owned businesses cannot support preferences benefiting Eskimos or Aleutian Islanders, *Croson*, 488 U.S. at 506, failure to achieve a "critical mass" of blacks through race-neutral means, for example, would not justify preferences for Hispanics. *Accord Alexander v. Estepp*, 95 F.3d 312, 316 (4th Cir. 1996). And there must be a measure of consistency in the treatment of similarly situated minority groups. *Cf. Grutter*, 539 U.S. at 381-83 (Rehnquist, C.J., dissenting). Any over- or under-inclusiveness "strongly impugns" a university's asserted interest, suggesting that improper considerations are at work. *Croson*, 488 U.S. at 506.

III. The University Has Failed To Demonstrate the Necessity of Classifying Applicants by Race

The University therefore must demonstrate, by a strong basis in evidence, that its consideration of race is "necessary to further its compelling interest in securing the educational benefits of a diverse student body." *Grutter*, 539 U.S. at 333. Its showing falls far short.

A. The University's Conception of Diversity

In addition to espousing the attainment of a campus-wide "critical mass" of minority students as it goal, the University has at times asserted a compelling interest in attaining diversity at the classroom level. But that conception of diversity, even had the University not waived it before the Supreme Court, *see* Brief of Respondents at 25, 39, 43 (Aug. 6, 2012), is unavailing because it is unsupported by any evidence that classroom-level racial balancing is "necessary . . . to achieve the educational benefits of diversity," *Fisher*, 133 S. Ct. at 2420 (quotation marks omitted).

Grutter recognized the benefits of diversity in "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races." 539 U.S. at 330 (quotation marks omitted). But it recognized that those benefits accrue at the level of the student body, *id.* at 325, 328-31, which

the University also argues here. *Grutter* does not suggest that a more particularized focus on race at the classroom level would provide substantial additional benefit, much less that it is "necessary" to satisfy a university's interest in diversity.

Judge Garza identified just a few of the questions that a court would be required to answer before it could uphold a program that relies on a classroom-level conception of diversity:

> Nonetheless, assuming a critical mass of minority students could perceptibly improve the quality of classroom learning, how would we measure success? . . . How would we know whether the substantial social harm we are tolerating by dividing students based on race is worth the cost? That classroom discussion is, in fact, being enhanced? How can a party prove that it is? How can an opposing party prove that it is not?

Fisher v. Univ. of Tex., 631 F.3d 213, 255 (5th Cir. 2011) (Garza, J., concurring) (footnote omitted).

Even assuming that these questions could be answered, the University has provided absolutely no basis to do so and thereby failed to meet its burden. *See Cavalier v. Caddo Parish School Bd.*, 403 F.3d 246, 258 n.14 (5th Cir. 2005) (strong-basis-in-evidence analysis rejecting reliance on test-score gap as basis for preferences where school board "produced no evidence and provided no analysis whatsoever regarding a causal connection between the gap and past *de jure* segregation");

Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000) ("raw statistical disparity" does not satisfy the strong-basis-in-evidence requirement); *Middleton v. City of Flint, Mich.*, 92 F.3d 396, 406 (6th Cir. 1996) (same). Indeed, the University's completely arbitrary and unsupported definition of classroom diversity—at least two African-American, two Hispanic, and two Asian-American students, *Fisher*, 631 F.3d at 225—only proves that there is no real basis in evidence for this approach. It must be rejected.[2]

B. The Necessity of Racial Classifications To Achieve a "Critical Mass" of Minority Students

Nowhere in *Grutter* did the Court suggest that a university's present circumstances are irrelevant to proving the necessity of race-conscious admissions—that is, that a public university may satisfy its burden of demonstrating necessity merely by asserting its goal of enrolling a "critical mass" of minority students. To the contrary, the Court's decision rests on the uncontroverted factual determination that minority enrollment would have plummeted in the absence of racial preferences. 539 U.S. at 320; *see also id*. at 340 (race-neutral alternatives

[2] The University's surveys of students and faculty, *see* 631 F.3d at 225, measure only *opinion* and therefore provide "no *factual* support" for the necessity of racial classifications. *Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 215 (4th Cir. 1993).

would "require a dramatic sacrifice of diversity); *Parents Involved*, 551 U.S. at 734-35 (explaining that, in *Grutter*, "the consideration of race was viewed as indispensable in more than tripling minority representation at the law school—from 4 to 14.5 percent").

By contrast, the uncontroverted evidence in the instant case is that the University was among the nation's most diverse universities in 2004, immediately before its reintroduction of racial preferences,[3] and that its consideration of race since then has had only a negligible impact on the racial composition of the student body, *Fisher*, 631 F.3d at 263 (Garza, J., concurring). Even proceeding under the assumption that its consideration of race is narrowly tailored to its asserted interest, the University fails to demonstrate that enrollment of minorities is sufficiently low as to necessitate the use of the "highly suspect tool" of racial classifications.

First, the University enrolls more than "meaningful numbers," *Grutter*, 539 U.S. at 338, of both black and Hispanic students under Texas's race-neutral Top 10% Law. The entering freshman class of 2004, for example, was 4.5 percent black (309 students), 16.9 percent Hispanic

[3] *See, e.g.*, Press Release, *The University of Texas at Austin ranked fifth-best producer of degrees for minority undergraduates* (Jul. 12, 2005), *available at* http://www.utexas.edu/news/2005/07/12/rankings/.

(1,149), and 17.9 percent Asian (1,218), out of a total of 6,796 students. University of Texas, Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law* 6 (2008), Exhibit C to Lavergne Affidavit (W.D. Tex. Feb. 23, 2009) (Doc. 96-10, at 124) ("Results of TAAL"). Indeed, through race-neutral means, the University had managed to restore minority enrollment levels "to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies." Larry Faulkner, President, University of Texas, *The 'Top Ten Percent Law' Is Working for Texas* (2000), Exhibit 28 to Pls. Summary Judgment Motion (Doc. 94-31, at 2-3). Even since the University reintroduced consideration of race for some admissions decisions, enrollment of minority students through *racial-neutral* means has continued to climb. *See* Results of TAAL at 7 (reporting Top 10% Law admissions).

In light of the success of the Top 10% Law in achieving diversity, the University has failed to demonstrate that racial preferences are necessary to achieve a "critical mass" of underrepresented minorities. *Grutter* held that a total underrepresented-minority population (i.e., excluding Asians) of between 13.5 and 20.1 percent was sufficient to establish a "critical mass" to achieve the educational benefits of

diversity. *Grutter*, 539 U.S. at 336. In 2008, the year that Abigail Fisher sought admission, blacks and Hispanics admitted under the race-neutral Top 10% Law constituted fully 22 percent of the student body and 29 percent of the portion of the incoming class admitted under the Top 10% Law. Results of TAAL at 7. (Including Asians, minority students comprised a majority of students admitted under the Top 10% Law in 2008. *Id*.) Under the logic of *Grutter*, these students constitute a "critical mass" sufficient "[t]o ensure . . . minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes." *Grutter*, 539 U.S. at 380 (Rehnquist, J., dissenting) (describing University of Michigan Law School's policies). Having demonstrated its ability to achieve "critical mass" through race-neutral means, racial classifications become unnecessary to achieve diversity's benefits as identified in *Grutter* and embraced by the University. *See* University of Texas at Austin, *Proposal to Consider Race and Ethnicity in Admissions* 24 (June 25, 2004), Exhibit A to Walker Affidavit (W.D. Tex. Feb. 23, 2009) (Doc. 96-13, at 31) (discussing *Grutter*).

Second, the University fails to show that its use of racial preferences has more than a "minimal effect" on student-body diversity, such that its consideration of race is in fact necessary. In 2008, 80.9 percent (5,114) of Texas residents in the incoming freshman class were admitted under the Top 10% Law. *Fisher*, 631 F.3d at 261 (Garza, J., concurring). The remaining 19.1 percent, or 1,208 students, were admitted based on their Academic Index ("AI") and Personal Achievement Index ("PAI") scores, the latter of which takes account of race as a "special circumstance." *Id*. Of the 363 in-state blacks enrolled (6 percent of in-state students), 58 (0.92 percent) were admitted based on their AI/PAI scores. *Id.* And of the 1,322 in-state Hispanic students enrolled (21 percent), only 158 (2.5 percent) were admitted based on their AI and PAI scores. *Id.*. "[A]ssuming the University gave race decisive weight in each of these 58 African-American and 158 Hispanic students' admissions decisions"—which would be, in itself, unconstitutional, *Grutter*, 539 U.S. at 329—"those students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322-person enrolling in-state freshman class." 631 F.3d at 261.

But even those small numbers overstate the contribution of the University's racial preferences to minority enrollment. The University

maintains that its consideration of AI and PAI scores is "holistic"; that race is but one of seven "special circumstances," which in turn comprise one of six PAI factors; and that race plays only a minor role, as a "factor of a factor of a factor of a factor." *Id.* at 262. Even assuming that race is determinative in fully 25 percent of decisions—still a more-than-minor role—the University's consideration of race would yield only 15 additional black students (0.24 percent) and 40 additional Hispanic students (0.62 percent). 631 F.3d at 262. Out of a class of 6,175 students, these numbers—which reflect a greater use of race than that to which the University admits—are plainly *de minimis*.

The "minimal impact . . . on school enrollment" of the University's racial classifications "casts doubt on the necessity of using racial classifications." *Parents Involved*, 551 U.S. at 734. Indeed, the infinitesimal effect of racial preferences in this instance throws into sharp relief the far-more-substantial "cost of subjecting [thousands] of students to disparate treatment based solely upon the color of their skin." *Id.* (quotation marks omitted).

C. The Scope of Preferences

The University also fails to justify the scope of its racial preferences and, in particular, its choice to accord preferences to

Hispanic applicants while denying them to Asians, who comprise a smaller portion of the student body. The entering freshman class of 2008 contained 1,249 Asian students and 1,338 Hispanic students, roughly in line with the numbers in each group over the preceding five years. Results of TAAL at 6. The former racial group, Asians, apparently amounts to a "critical mass," such that racial preferences are unnecessary, in the University's estimation. Meanwhile, the University maintains preferences for the latter group, Hispanics, despite their greater enrollment. Logically, then, the number of Hispanic students exceeds what the University considers to be a "critical mass," which renders its use of preferences "gross[ly] overinclusive[]." *Croson*, 488 U.S. at 506. The inconsistency in the University's treatment of different racial groups "'leave[s] one with the sense that the racial and ethnic groups favored by the [preferences] were added without attention to whether their inclusion was justified by evidence . . . .'" *Id.* (quoting Days, *supra*, at 482).

Rather than demonstrate by a strong basis in evidence that its use of racial preferences is necessary to achieve legitimate educational goals, the University attempts to deflect attention from the success of the race-neutral Top 10% Law in increasing the enrollment of underrepresented

minorities. But the University may not assume the necessity of racial classifications; it must prove their necessity. This it has failed to do.

Conclusion

For the foregoing reasons, the Court should hold the University's racial classification scheme unconstitutional and remand this case to the district court with instructions to grant the Appellant's motion for summary judgment on liability.

Respectfully submitted,

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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Calisto-MT typeface.

Dated: October 11, 2013

/s/ Andrew M. Grossman
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Certificate of Service

I hereby certify that I electronically filed a true and correct copy of the foregoing Brief with the Clerk of the Court by using the appellate CM/ECF system on October 11, 2013. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also caused one true and correct paper copy and one true and correct electronic copy of the foregoing to be delivered via first-class mail to the following counsel of record not registered to receive electronic service:

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