

**In the Supreme Court of the United States**

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ABIGAIL NOEL FISHER, PETITIONER

*v.*

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

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

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

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**QUESTION PRESENTED**

Whether the University of Texas at Austin's use of race as one of several diversity considerations in a holistic analysis of individual applicants violates the Equal Protection Clause of the Fourteenth Amendment.

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**INTEREST OF THE UNITED STATES**

The United States has significant responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of institutions of higher learning, see 42 U.S.C. 2000c-6, and for the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color or national origin by recipients of federal funds, including institutions of higher education. Numerous federal agencies—including the Departments of Defense, Justice, Education, Commerce, Labor, Homeland Security, and Health and Human Services, among others—have concluded that well-qualified and diverse graduates are crucial to the fulfillment of their missions. The United States thus has a strong in-

terest in the development of the law regarding the consideration of race and ethnicity in admissions in higher education.

#### STATEMENT

1. The University of Texas at Austin (the University) is the flagship institution of Texas’s public university system. Pet. App. 119a. The University is a selective institution, and its admissions policy reflects two decades of evolution and experimentation.

a. Until 1996, the University admitted undergraduates by considering each applicant’s Academic Index (AI)—a projection of freshman academic performance—and race. Pet. App. 120a; S.J.A. 41a. In 1996, the Fifth Circuit invalidated that policy. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).

In 1997, the University began using a Personal Achievement Index (PAI) to supplement the AI. The PAI is a numerical score based on a “holistic review of applications,” including essays, leadership, extracurricular activities, work experience, socioeconomic status, language spoken at home, and other similar characteristics. Pet. App. 121a; S.J.A. 41a.

Beginning with the entering class of 1998, the University implemented House Bill 588, Tex. Educ. Code Ann. § 51.803 (West 1997), also known as the Top Ten Percent law (Top Ten plan). J.A. 259a. The Top Ten plan grants public-university admission to Texas high school graduates who are in the top ten percent of their class. Pet. App. 123a. After admitting applicants through the Top Ten plan, the University filled the remainder of its entering class using its AI/PAI analysis.

b. In 2004, following this Court’s approval of the University of Michigan Law School’s consideration of

race in individual admissions decisions, see *Grutter v. Bollinger*, 539 U.S. 306 (2003), the University concluded that considering race in some individual admissions decisions was necessary to achieve the educational benefits of diversity. Pet. App. 125a-126a; S.J.A. 1a, 23a-24a.

The University explained that its educational mission includes “produc[ing] graduates who are capable of fulfilling the future leadership needs of Texas” and who are “able to lead a multicultural workforce and to communicate policy to a diverse electorate.” S.J.A. 24a. The University concluded that African Americans and Hispanics were currently underrepresented in its student body, which resulted in a marked lack of diversity in the classroom. S.J.A. 24a-26a. As a result, “the University [was] less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.” S.J.A. 25a. In addition, “significant differences between the racial and ethnic makeup” of the student body and the State’s population meant that “students at the University [were] currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow.” S.J.A. 24a-25a.

c. The University first used its current admissions policy, which permits officers to consider individual applicants’ race as one factor among many, in the selection of the 2005 entering class. J.A. 432a-433a. After admitting applicants through the Top Ten plan, the University evaluates remaining applicants based on their AI and PAI scores. In calculating the PAI score, in order to “establish[] a contextual background for the student’s achievements,” officials may consider an applicant’s race in addition to the factors adopted in 1997. S.J.A. 29a;

J.A. 208a-209a, 432a-434a. Race is not considered in isolation or given independent weight. S.J.A. 29a. To ensure consistent PAI scoring, admissions officers undergo rigorous training. J.A. 117a-118a; S.J.A. 28a; Bremen Dep. 27-28.

Once the AI and PAI scores are calculated, they are plotted on a matrix representing the school or major to which the applicants seek admission. Each cell contains all applicants with a particular AI/PAI combination. Admissions officers establish a cut-off that divides the matrix along a stair-step line. Applicants whose scores place them in cells above the cut-off line are admitted. J.A. 411a-412a; see J.A. 420a.

2. Petitioner, a white applicant denied admission to the University in 2008, brought this action, alleging that the University discriminated against her on the basis of race in violation of the Fourteenth Amendment and 42 U.S.C. 1981, 1983, and 2000d *et seq.* Pet. App. 117a-118a.

The district court granted summary judgment to respondents. Pet. App. 115a-171a.

3. The court of appeals affirmed. Pet. App. 1a-114a. The court held that the University “has a compelling interest in obtaining the educational benefits of diversity” and that its policy satisfies the constitutional standards set forth in *Grutter*. *Id.* at 3a, 33a; *Grutter*, 539 U.S. at 328-343. The court rejected petitioner’s argument that the University sought to attain minority representation proportional to that of the Texas population, reasoning that respondents’ “methods and efforts belie the charge.” *Id.* at 45a. The court also rejected petitioner’s contentions that the University had attained sufficient diversity without considering race through the Top Ten plan, *id.* at 62a-68a; and that the University’s

consideration of race was not narrowly tailored because it resulted in only small increases in minority enrollment, *id.* at 69a-70a.

Judges King and Garza specially concurred. Pet. App. 72a; *id.* at 72a-114a.

4. The court of appeals denied rehearing en banc. Pet. App. 172a-174a. Seven judges would have granted the petition. Chief Judge Jones, joined by four judges, authored a dissenting opinion, in which she argued that the panel had failed to apply strict scrutiny. *Id.* at 174a-184a.

#### SUMMARY OF ARGUMENT

I. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court held that a university may conclude that the educational benefits of diversity, including racial and ethnic diversity, are essential to its educational mission, and that a university can therefore have a compelling interest in assembling a diverse student body. Diverse student enrollment not only “promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races”; it also prepares all students to succeed in, and eventually lead, “an increasingly diverse workforce and society.” *Id.* at 330, 333 (brackets in original; citations and internal quotation marks omitted).

The educational benefits of diversity identified in *Grutter* are of critical importance to the United States. Careers in a range of fields that are vital to the national interest—such as the military officer corps, science, law, medicine, finance, education, and other professions (for which a university degree is a prerequisite)—must be open to all segments of American society, regardless of race and ethnicity. That is not simply a matter of civic

responsibility; it is a pressing necessity in an era of intense competition in the global economy and ever-evolving worldwide national-security threats. The government, moreover, has a vital interest in drawing its personnel—many of whom will eventually become its civilian and military leaders—from a well-qualified and diverse pool of university and service-academy graduates of all backgrounds who possess the understanding of diversity that is necessary to govern and defend the United States. In particular, the Department of Defense (DoD) has concluded that a highly qualified and broadly diverse officer corps is essential to military readiness. Officer training programs run by DoD and the Department of Homeland Security (DHS)—including service academies and Reserve Officer Training Corps (ROTC) programs located at civilian institutions such as the University—therefore must produce a racially and ethnically diverse range of graduates who are prepared to lead a multiracial force.

This Court has held that a university may institute a narrowly tailored policy that considers race as part of a holistic, individualized admissions process, when doing so is necessary to achieve the educational benefits of diversity. *Grutter*, 539 U.S. at 333. Race should, however, be considered in individualized admissions decisions only when other means are insufficient to achieve the benefits of diversity. *Id.* at 340. “[S]earching judicial review” is thus an essential safeguard that ensures that race is used in admissions only when necessary to further a compelling interest in educational diversity and when narrowly tailored to achieve the university’s goals. *Id.* at 395 (Kennedy, J., dissenting).

II. The admissions program instituted by the University is constitutional under *Grutter*. A core component

of the University's educational mission, as Texas's flagship public university, is to train students to become the next generation of Texas leaders by exposing them to the many diverse perspectives and cross-racial interactions that they will encounter in civic life. The University therefore determined that the educational benefits of diversity are essential to its mission, that its student body was insufficiently diverse to attain those benefits, and that it was necessary to consider race in individual admissions decisions in order to achieve the University's compelling interest. Those conclusions are amply supported by the record.

To attain its educational objectives, the University relied on *Grutter* in instituting a holistic analysis that permits consideration of an applicant's race as one factor among many. See *Grutter*, 539 U.S. at 327-337; *id.* at 393 (Kennedy, J., dissenting). Race is considered not on its own, but as a piece of information that provides valuable context in understanding an applicant's achievements and his likely contributions to the University. See *ibid.* That individualized consideration is designed to work in conjunction with the Top Ten plan to enable the University to construct a class that is diverse in all ways valued by the institution. It not only enables the University to seek a "critical mass of students from traditionally underrepresented backgrounds," S.J.A. 25a, but also ensures that the University fills the limited number of non-Top Ten admissions slots with students who are diverse in all respects valued by the University. This contextual, limited consideration of race is narrowly tailored to achieve the University's compelling interest, and it should be upheld.

## ARGUMENT

**I. THE UNITED STATES HAS A CRITICAL INTEREST IN ENSURING THAT EDUCATIONAL INSTITUTIONS ARE ABLE TO PROVIDE THE EDUCATIONAL BENEFITS OF DIVERSITY****A. The Court Has Recognized That Institutions Of Higher Education Have A Compelling Interest In Attaining A Diverse Student Body**

1. In *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), this Court held that “student body diversity is a compelling state interest that can justify the use of race in university admissions.” *Grutter* reaffirmed the reasoning of Justice Powell’s opinion announcing the judgment of the Court in *Regents v. Bakke*, 438 U.S. 265, 311-315 (1978), which served as “the touchstone for constitutional analysis of race-conscious admissions policies” and the model for the admissions programs of “[p]ublic and private universities across the Nation.” 539 U.S. at 323. Justice Powell had approved a university’s consideration of race to further a compelling interest in a student body that is diverse in all respects valued by the institution, reasoning that the “[N]ation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Bakke*, 438 U.S. at 311-312, 313 (internal quotation marks omitted).

Drawing on Justice Powell’s reasoning, *Grutter* held that a university may conclude that “diversity is essential to its educational mission.” 539 U.S. at 328-330; accord *id.* at 387-388 (Kennedy, J., dissenting). *Grutter* explained that racially and ethnically diverse student enrollment “promotes ‘cross-racial understanding,’ helps break down racial stereotypes, and ‘enables [students]

to better understand persons of different races.’” *Id.* at 330 (citation omitted); see *Bakke*, 438 U.S. at 312. Student-body diversity also “better prepares students for an increasingly diverse workforce and society,” *Grutter*, 539 U.S. at 330, while ensuring that “the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity,” *id.* at 332 (internal quotation marks and citation omitted).

*Grutter* therefore held that a university may seek to assemble a class that contains sufficient numbers of underrepresented minorities to attain the “educational benefits [of] diversity.” 539 U.S. at 330. A university may “consider race or ethnicity \* \* \* flexibly as a ‘plus’ factor in the context of individualized consideration” of each applicant, *id.* at 334, when doing so is necessary to attain the educational benefits of diversity and the program is narrowly tailored, *id.* at 333.

2. The University relied on *Grutter*’s guidance in analyzing its educational mission and interest in diversity and in tailoring its admissions policy. S.J.A. 24a, 26a-32a. Many other post-secondary institutions throughout the country have done the same. The Departments of Education and Justice have issued guidance designed to assist post-secondary educational institutions in determining whether considering race is necessary to achieve their educational missions and in tailoring any consideration of race to meet the standards delineated in *Grutter*. See generally U.S. Dep’ts of Education and Justice, *Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education* (2011).

**B. The United States Military And Federal Agencies Have Recognized The Importance Of The Educational Benefits Of Diversity**

The *Grutter* Court recognized that the educational benefits of diversity “are not theoretical but real.” 539 U.S. at 330. The United States’ experience confirms that conclusion. The armed services and numerous federal agencies have concluded that well-qualified and diverse graduates are crucial to the fulfillment of their missions. The Nation’s interests in a range of areas—including military readiness, national security, public health, federal law enforcement, global competitiveness, and education—will be more readily achieved if the pathways to professional success are visibly open to all segments of American society. The government endeavors to recruit well-qualified graduates who are diverse and prepared to succeed in a diverse society, and it benefits directly when selective universities ensure that their student bodies are diverse so that all students receive the educational benefits of diversity.

***1. The United States armed services have a strong interest in a well-qualified and diverse officer corps, and the educational benefits of diversity are critical to serving that interest***

a. The armed services have long recognized that building and maintaining a military force that is both highly qualified and broadly diverse—including in its racial and ethnic composition—is a “strategic imperative, critical to mission readiness and accomplishment, and a leadership requirement.” DoD, *Diversity and Inclusion Strategic Plan—2012 to 2017*, at 3 (2012) (*Strategic Plan*). As both the enlisted ranks of the military and the population of the Nation have become in-

creasingly diverse, military leaders have concluded that an officer corps that is markedly less diverse than the enlisted ranks, and that is unattuned to the diverse perspectives of those they must lead, can undermine the military's combat readiness. Fostering a pipeline of well-prepared and diverse officer candidates is therefore an urgent military priority.

That military policy judgment reflects the lessons of actual battlefield experience during the Vietnam War, when the disparity between the overwhelmingly white officer corps and the highly diverse enlisted ranks "threatened the integrity and performance" of the military. Military Leadership Diversity Comm'n, *Final Report, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military* xvi (Mar. 15, 2011) (*MLDC Report*). Officers often failed to perceive racial tensions among enlisted personnel that threatened combat readiness. Bernard C. Nalty, *Strength for the Fight: A History of Black Americans in the Military* 303-317 (Free Press 1986). The absence of diversity in the officer corps also undermined the military's very legitimacy by fueling "popular perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders." *MLDC Report* 15.

Against this background, military leaders have concluded that a diverse officer corps is essential to the military's operational readiness. An officer corps that reflects the diversity of the enlisted ranks improves performance by "facilitat[ing] greater confidence" in leadership and assuring enlisted personnel that advancement is possible "regardless of \* \* \* background." *MLDC Report* xvi, 14-15, 44. In addition, as then-Secretary of Defense Robert M. Gates observed, there is a risk over time of developing a corps of military leaders

who “politically, culturally, and geographically have less and less in common with the people they have sworn to defend.” *Lecture at Duke University: All-Volunteer Force* (Sept. 29, 2010). Countering that risk by fostering diversity of all kinds “engender[s] trust among the population” and helps ensure democratic legitimacy. *MLDC Report* 44. And maintaining a diverse leadership corps ensures that the military contains the “cultural and racial identities that allow us to create lasting relationships to better understand our partner forces.” Gidget Fuentes, *SEALs Reach Out to Increase Diversity*, NavyTimes, Apr. 30, 2012; *MLDC Report* 17. Diversity is “absolutely a combat multiplier, especially in the environments that we see coming at us and that we are dealing with today.” *MLDC Report* 16 (quoting General George Casey, Jr., former Chief of Staff of the Army).

The military thus has a powerful interest in developing an officer corps that is prepared to lead a diverse force and whose makeup is not divorced from those of the enlisted ranks and the general population. *Strategic Plan* 3-4; Adm. Michael G. Mullen, Chairman, Joint Chiefs of Staff, *The National Military Strategy of the United States of America*, at 16-17 (Feb. 8, 2011). Despite progress toward that objective, minorities remain “underrepresented among the Armed Forces’ top leadership, compared with the servicemembers they lead.” *MLDC Report* xiii.

b. To meet these concerns, creating a diverse pipeline of officer candidates is an urgent military priority. *Strategic Plan* 3-4, 7. Because the military does not hire line officers laterally, as a corporation might, *MLDC Report* xvi, the military’s top leadership in future decades will be drawn from those who join the military today. The educational practices of the military’s pri-

mary officer-training programs—the service academies and ROTC programs—will therefore shape the next generation of military leaders.

The services have concluded that fostering student-body diversity is vital to the service academies' and ROTC programs' ability to provide a rigorous education for all students and prepare cadets for leadership roles. For instance, the United States Air Force Academy (USAFA) has concluded that the highest quality military education comes from “exposing [cadets] to a broad range of ideas and experiences in both a formal classroom setting and in informal interactions with individuals whose background and experience offer dissimilar information.” Lt. Gen. Michael C. Gould, USAFA Superintendent, *USAFA Diversity Plan 1* (June 2009). The USAFA's leadership training program is “best realized when the cadet cadre itself is widely diverse” so that cadets can “learn to bring out the best in each individual regardless of his or her background.” *Id.* at 3. Similarly, the United States Coast Guard Academy (USCGA), which is operated by DHS, has concluded that “developing the skills to think critically and communicate effectively with people of different backgrounds [is a] fundamental learning outcome[] of the cadet experience.” Rear Adm. Sandra L. Stosz, USCGA Superintendent, *Coast Guard Academy Admissions Statement 2* (2011).

ROTC programs, which provide military and leadership training to undergraduates interested in a military career and are the single largest source of new officers, can best achieve these goals when their participating institutions are diverse. In particular, selective universities that admit talented students with leadership potential and provide the educational benefits of diversity

are a critical source of future officers. DoD has found that minority officers who enter the military from “more selective colleges” have “significantly higher performance ratings” than similarly situated officers from less selective colleges. Office of the Under Sec’y of Def. for Pers. & Readiness, DoD, *Career Progression of Minority and Women Officers* 62 (1999).

The University is a prime example of such an institution: it hosts Army, Navy, and Air Force ROTC detachments, provides a dynamic and diverse learning environment, and is highly selective. See *College of Liberal Arts—Academic Units*, <http://www.utexas.edu/cola/resources/offices/>. Because of the efforts of institutions like the University, the services can confidently rely on ROTC programs to provide a pipeline of highly qualified, diverse officer candidates.

*Grutter’s* holding that post-secondary institutions may, when necessary, consider race as one factor in individualized admissions decisions provides the flexibility necessary to achieve the armed services’ objective of assembling an officer corps that is prepared to lead a diverse force. The military relies on the University and other schools with ROTC detachments to ensure that their student bodies are highly qualified, diverse, and trained in a diverse setting—by considering race in individualized admissions decisions, if necessary. See *Grutter*, 539 U.S. at 331. The service academies similarly need to ensure that their student bodies are highly qualified, diverse, and prepared to lead a diverse force.<sup>1</sup>

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<sup>1</sup> Non-individualized measures like the Top Ten plan would not work for the service academies in light of their nationwide applicant base, rigorous academic and physical standards, and the fact that candidates for West Point, the Naval Academy and the Air Force Academy must

If and when outreach and recruiting measures fall short, the academies need the flexibility to be able to consider race as one factor in a holistic review of each applicant in making admissions decisions.

**2. *Well-qualified and diverse graduates are critical to other national interests***

Numerous federal agencies, including those discussed below, have concluded that well-qualified and diverse graduates are crucial to the fulfillment of their missions.

a. A pipeline of highly qualified, diverse graduates is critical to the Nation’s law-enforcement and national-security needs. As Federal Bureau of Investigation (FBI) Director Robert Mueller III has explained, diversity is “absolutely vital to getting the job done for our country. \* \* \* The reality is, to be effective, we have to look like America. We have to understand and reflect the communities we serve. And we must be global in our reach.” *Speech at the Nat’l Conference of the Historically Black Colls. & Univs.: FBI Diversity Employment in a New Age of Global Terror* (Sept. 17, 2002).

Similarly, DHS requires a “workforce with diverse backgrounds, experiences, and competencies” in order to “optimize[] DHS’s effectiveness in serving a heterogeneous public and coordinating with international partners to secure the homeland.” Office for Civil Rights & Civil Liberties, DHS, *MD-715 EEO Program Status Report 7* (FY 2009). Accordingly, DHS administers grants to minority-serving educational institutions—including many public universities—to build scientific research and education capacity and increase the num-

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be nominated by public officials. See 10 U.S.C. 4342, 6954, 9342 (2006 & Supp. IV 2010); *Grutter*, 539 U.S. at 340.

ber and diversity of future professionals in areas critical to homeland security. See, e.g., *DHS Funding Opportunity Announcement: 2012 Scientific Leadership Awards for Minority Serving Institutions (MSI) Granting Bachelor Degrees*.

b. The Department of Health and Human Services (HHS), whose mission includes promoting advances in the sciences, medicine, and public health, has made it a priority to foster diversity among undergraduates who major in health-care-related fields. Despite considerable progress, minorities remain less likely to have access to quality health care or to participate in clinical studies, and are more likely to suffer from common serious illnesses. See *Secretarial Statement on National Minority Health Month 2012* (Apr. 2, 2012); Committee on Understanding & Eliminating Racial & Ethnic Disparities in Health Care, Inst. of Med. of the Nat'l Acads., *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* 29-30 (Brian D. Smedley et al. eds., 2003). Developing a national workforce of practitioners and researchers who are prepared to address minority health issues, and who also have diverse backgrounds, will help address these concerns. See *id.* at 2, 186 (citing studies). University sciences programs must therefore be visibly open to qualified minority students and must prepare all students to address minority health concerns.

In the Minority Health and Health Disparities Research and Education Act of 2000, Congress identified a “national need” for minority scientists and doctors, and concluded that federal agencies should promote a diverse scientific workforce and institute programs that “effectively overcome barriers such as educational transition from one level to the next.” Pub. L. No. 106-525,

§ 2, 114 Stat. 2495-2497. In addition, Congress has provided that HHS “shall make grants to \* \* \* designated health professions schools \* \* \* and other public and nonprofit health or educational entities, for the purpose of assisting the schools in supporting programs of excellence in health professions education for underrepresented minority individuals.” 42 U.S.C. 293(a).<sup>2</sup>

## II. THE UNIVERSITY’S CONSIDERATION OF RACE IN ADMISSIONS IS CONSTITUTIONAL

As the flagship university in Texas and one of the Nation’s leading public institutions of higher education, the University trains students who will become the next generation of professional, civic, military, and community leaders. Accordingly, the University’s educational mission focuses on preparing students to lead the professions and communities in which they will take their place when they graduate. To achieve its mission, the University, relying on the guidance provided in *Grutter*, S.J.A. 23a-24a, instituted a “nuanced, individual evaluation of school needs and student characteristics that \* \* \* include[s] race as a component” of a holistic ad-

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<sup>2</sup> Other agencies also have concluded that well-qualified and diverse graduates are essential to their missions. For instance, the Department of Education, whose mission encompasses fostering educational excellence and promoting diversity in post-secondary institutions, encourages grant applicants to develop “[p]rojects that are designed to promote student diversity, including racial and ethnic diversity.” 75 Fed. Reg. 78,508 (Dec. 15, 2010); see *id.* at 78,500. It also administers programs designed to increase the number of individuals from underrepresented groups, including minority groups, in many fields. *E.g.*, 20 U.S.C. 1070a-15 (2006 & Supp. IV 2010). In addition, the Department of Commerce has an interest in promoting equal educational and economic opportunities and in promoting diversity among the leaders of commercial enterprises.

missions analysis. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in the judgment). That program is constitutional because it is “necessary to further a compelling governmental interest” and is narrowly tailored. *Grutter*, 539 U.S. at 327.

*Grutter* emphasizes that in evaluating the constitutionality of a university admissions program, “[c]ontext matters.” 539 U.S. at 327. Here, the University designed its holistic process to work in tandem with the Top Ten plan to build a student body that will fulfill the University’s educational mission. These two components—although adopted sequentially by the University—should therefore be considered together.

In 1998, had the University not been limited by *Hopwood*, it could have addressed the limited diversity in its student body—Hispanic and African-American students were 13% and 3% of the class, respectively, S.J.A. 30a—by simply instituting its current admissions process. In other words, the University could have admitted part of its class through the Top Ten plan and the remainder through its holistic analysis, including consideration of race. Admitting its entire class through the Top Ten plan would have required the University to sacrifice many dimensions of diversity—and selectivity—in favor of exclusive reliance on class rank. See p. 32, *infra*; *Grutter*, 539 U.S. at 340-341. And given that the PAI analysis, without consideration of race, had failed to increase diversity, Pet. App. 18a-19a, considering race in the holistic analysis would have been justified as a complementary means of attaining sufficient diversity and ensuring that admitted minority students were diverse in numerous respects. See pp. 28-30, *infra*. As *Grutter* confirms, the University would have had the

latitude to experiment with admitting part of its class without individualized consideration of race, and part of it with such consideration, thereby minimizing consideration of race while maintaining values and furthering goals important to the University.

In actuality, the University adopted the Top Ten plan first, and the holistic analysis that included race later. But that should not foreclose the University from concluding that it needed to give limited consideration to race in the non-Top Ten portion of the class to further its educational mission. The Top Ten plan's reliance on class rank to the exclusion of all other attributes made it important to fill the relatively few remaining admissions slots by making nuanced decisions based on a complete contextual understanding of each individual, in order to ensure that the student body contained people who possessed the many attributes valued by the University. And use of the Top Ten plan had not resulted in a level of minority enrollment that, in the University's judgment, was sufficient to provide students with a realistic environment that would prepare them to lead a highly diverse workforce. The University legitimately concluded in these circumstances that the holistic evaluation of each individual student would be both incomplete and insufficient without consideration of the applicant's race along with other factors.

**A. The University's Admissions Policy Is Supported By A Compelling Interest In Attaining The Benefits Of Diversity**

1. The University has a compelling interest in securing the educational benefits of a racially and ethnically diverse student body. See Pet. App. 33a-35a, 142a-158a. The University concluded that its educational mission,

as the “flagship” state university, is to provide a “comprehensive education,” S.J.A. 23a, and “to produce graduates who are capable of fulfilling the future leadership needs of Texas.” S.J.A. 24a. Because Texas will soon “have no majority race,” its leaders “must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate.” *Ibid.* To accomplish these objectives, the University concluded, it was necessary to foster the educational benefits of diversity for all students that *Grutter* identified: enhanced classroom discussion, decreased racial isolation, “a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.” S.J.A. 23a; 539 U.S. at 330.

That conclusion is precisely the sort of “complex educational judgment[]” that falls within the core of the University’s expertise, *Grutter*, 539 U.S. at 328, as well as its traditional freedom “to make its own judgments as to education,” *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). The University’s “good faith” in concluding that diversity is essential to its mission should therefore be “‘presumed’ absent ‘a showing to the contrary.’” *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 318-319 (opinion of Powell, J.)).

2. Petitioner contends (Br. 26-30) that the University is not actually pursuing the educational benefits of diversity approved in *Grutter*, but is instead pursuing the “patently unconstitutional” objective of racial balancing. *Grutter*, 539 U.S. at 330; Br. 27. Petitioner is incorrect.

a. Petitioner’s argument ignores the fact that, as the lower courts correctly found, Pet. App. 43a-52a, 153a-

156a, the University designed and implemented its admissions process to pursue the educational benefits of diversity, and not any form of proportional representation.

The modest, holistic manner in which the University incorporated consideration of race into its PAI assessment demonstrates that the University's objective is attaining the educational benefits of diversity. *Grutter*, 539 U.S. at 334; *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). Race is one of many characteristics (including socioeconomic status, work experience, and other factors) that admissions officials may consider in evaluating the contributions that an applicant would make to the University, including interactions that occur among students in small classes. J.A. 129a-130a, 207a-209a, 294a; S.J.A. 29a; see *Bakke*, 438 U.S. at 317 (discussing similar plan with approval). Race is not considered on its own, and it is never determinative of an applicant's admission by itself. J.A. 434a; see *Grutter*, 539 U.S. at 337. Rather, race is one of a number of contextual factors that provide a more complete understanding of the applicant's record and experiences. That is a far cry from impermissible racial balancing.

That conclusion is reinforced by the way the University implements its admissions policy. Racial balancing is impermissible because it makes race the predominant consideration at the expense of individualized assessment. See *Grutter*, 539 U.S. at 336-337; accord *id.* at 389 (Kennedy, J., dissenting). But the University has not subordinated individualized consideration of each applicant to the achievement of any level of race-based representation. As petitioner conceded below, the University's policy does not include any "goal, target, or other quantitative objective for the admission and/or enroll-

ment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008.” J.A. 131a. To the contrary, the process is designed so that officials are unaware of individual applicants’ race when making the ultimate admissions decisions. While race (like other characteristics) may have affected some applicants’ PAI scores, only the resulting numerical PAI scores, together with AI scores, are plotted on a matrix used to determine which groups of applicants are admitted.<sup>3</sup> J.A. 191a-192a, 213a, 379a-380a, 385a-389a; see p. 4, *supra*. And the University does not track the progression of minority admissions for the purpose of influencing subsequent admissions decisions. J.A. 415a; see *Grutter*, 539 U.S. at 391-392 (Kennedy, J., dissenting). Finally, the results of the policy—the University’s admissions and enrollment figures—do not support the charge of racial balancing. The University’s consideration of race since 2005 has not resulted in anything approaching proportional representation. See Pet. App. 156a n.11.

b. Petitioner’s racial balancing argument (Br. 26-29) relies heavily on the University’s recognition that “significant differences” between its student demographics and the State’s population—Hispanics and African Americans were substantially underrepresented in the student body, S.J.A. 25a—undermined both its ability to prepare students for success in Texas’s diverse community and its ability to ensure that the “path to leadership” was “visibly open” to “qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332; S.J.A. 24a-25a.

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<sup>3</sup> As petitioner observes (Br. 9), an applicant’s race is noted on her file during the PAI scoring process. J.A. 169a. The ultimate admissions decisions, however, are based solely on the scores.

Petitioner’s argument (Br. 26-27) is based on the erroneous premise that disparities between student-body and state-population demographics can never be a relevant consideration in assessing the educational benefits of diversity recognized in *Grutter*. That is incorrect. *Grutter* recognized that “prepar[ing] students for an increasingly diverse workforce and society,” 539 U.S. at 330 (citation omitted), is one of the educational benefits of diversity. That recognition is premised on a demographic fact about the population—that it is becoming increasingly diverse—and presupposes that a university need not ignore the characteristics of the community into which students will graduate when the university evaluates whether it is providing adequate leadership preparation.

In addition, the existence of stark demographic disparities is relevant to a university’s interest in being “visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332. A student body that bears little resemblance to the state population, thereby suggesting that the pathway to leadership is not truly open to all, could undermine future leaders’ “legitimacy in the eyes of the citizenry.” *Ibid.* It could also harm the institution’s efforts to recruit highly qualified minorities, who in turn will contribute to the educational benefits of diversity.

Statewide demographics thus may provide information relevant to whether an institution is providing the educational benefits of diversity. The University considered statewide demographics in this limited and permissible manner. S.J.A. 23a-25a. The University concluded that an environment in which the presence of African-American and Hispanic students was approximately half what it was in the state population was not conducive to

training the future leaders of an increasingly diverse State and was not consistent with being visibly open to all. S.J.A. 24a-25a. As admissions officials were aware, moreover, J.A. 285a, Texas high schools have high rates of de facto racial segregation. See also Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 Am. L. & Econ. Rev. 312, 312 (2006). The fact that college may be many students' first exposure to an environment that more realistically reflects the State's actual diversity increases the importance of providing many opportunities for cross-racial interaction.<sup>4</sup>

For these reasons, an institution's attention to significant demographic disparities does not in itself establish that it impermissibly seeks racial balancing rather than the educational benefits of diversity. See *Grutter*, 539 U.S. at 336-337. Here, as the lower courts correctly concluded, the factual record regarding the University's design and implementation of its policy refutes petitioner's charge. See pp. 21-22, *supra*.

3. Petitioner erroneously contends (Br. 29-30) that the University is pursuing "classroom diversity" rather

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<sup>4</sup> Petitioner argues (Br. 28) that the University's conclusion that Asian Americans were not underrepresented even though they were present in the 2004 class in approximately the same numbers as Hispanics indicates that the University was engaged in racial balancing. But the University's reasoning is consistent with its focus on being visibly open and providing students adequate opportunities to interact with people of all backgrounds represented in the State. The University had already achieved these goals with respect to Asian Americans, but not with respect to Hispanics and African Americans. S.J.A. 25a-26a. The University's policy, moreover, contemplates that Asian Americans' race may be favorably considered in the holistic analysis. J.A. 130a.

than the “student-body diversity” endorsed by *Grutter*. 539 U.S. at 328-329. The University used its classroom diversity study as one means of measuring cross-racial interaction on campus in those small classes that are most likely to foster discussion and student interactions. S.J.A. 69a; J.A. 266a. Because exposing students to diverse perspectives within the classroom is, as *Grutter* recognized, an important educational benefit of diversity, the University’s consideration of classroom-diversity figures is therefore entirely consistent with *Grutter*. 539 U.S. at 330.

In particular, the classroom study demonstrated that as the University increased the number of smaller classes between 1996 and 2002, the percentage of classes with one or no African-American or Hispanic students had increased (to 90% and 43%, respectively). S.J.A. 26a. That trend was of concern to the University, S.J.A. 25a, because the University intended to further increase the number of smaller classes in order to improve educational experiences, S.J.A. 70a, and an unintended consequence of that effort could be greater racial isolation and less cross-racial interaction. The University’s concern on that score contributed to its conclusion that increasing diversity in the overall student body was necessary. S.J.A. 24a-25a. But it is wrong to suggest that the University sought to ensure that “every small class has some minimum number of minority students,” Pet. Br. 30. The district court found that the University never suggested that it had such a goal in mind, J.A. 267a; Pet. App. 157a, and petitioner points to no evidence to the contrary. Indeed, the classroom representation to which petitioner refers would likely be unattainable. See Pet. Br. 30, 43-44; Pet. App. 157a.

**B. Considering Race As One Factor In The Holistic Component Of The University's Admissions Process Was Necessary To Serve The University's Compelling Interests**

The University's conclusion that limited consideration of race in its admissions process was "necessary to further a compelling governmental interest" in 2004, and remained necessary in 2008, *Grutter*, 539 U.S. at 327, is amply supported by the record.

1. Because the point at which a university reaches sufficient diversity is defined "by reference to the educational benefits that diversity is designed to produce," *Grutter*, 539 U.S. at 330, whether a university has attained that objective is largely an educational decision that, while based on "empirical data," *id.* at 388 (Kennedy, J., dissenting), ultimately entails a qualitative evaluation of the educational experience the university is providing. Accordingly, the University's conclusion that it had not attained its objectives was based on its assessment of its ability to provide the educational benefits of diversity, rather than a numerical calculation.<sup>5</sup> Whether that conclusion is justified by the empirical data should be evaluated with due regard for the multifaceted educational assessment the University's determination reflects.

Petitioner's exclusive focus on raw numbers is inapposite. As petitioner observes (Br. 35), in 2004, the last year before the University provided for consideration of an applicant's race as one factor in the holistic component of its admissions process, the entering class was

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<sup>5</sup> Petitioner faults the University (Br. 34) for failing to define a "percentage of its student body" that constitutes a critical mass for these purposes, but the plan upheld in *Grutter* also lacked a numerical target. 539 U.S. at 318.

16.9% Hispanic and 4.5% African American. Through a combination of circumstances unique to Texas—the Top Ten plan, operating in conjunction with the State’s demographics and largely segregated high schools—the University was able to attain what petitioner labels (*ibid.*) as “substantial” minority enrollment, at least with respect to Hispanics, without considering race in individual admissions decisions. But whether those figures were sufficient does not turn, as petitioner argues (Br. 35-36), on whether they seem “substantial” in the abstract, or how they compare to universities in other States. That approach would ignore *Grutter*’s recognition that sufficient diversity is not a number but the point at which a university concludes that it is achieving the educational benefits of diversity in light of its circumstances and educational mission. 539 U.S. at 330.

2. The University’s conclusion that in light of its educational objectives as Texas’s flagship university, it had not attained critical mass in 2004 or 2008, is amply supported in the record.

With respect to African Americans, who totaled 309 enrolled students out of 6796 in 2004, and 375 out of 6715 in 2008, S.J.A. 156a, petitioner does not attempt to argue that the University was required to find that those figures were sufficient to avoid racial isolation, break down stereotypes, or promote cross-racial understanding—much less provide a visible path to leadership.<sup>6</sup> *Grutter*,

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<sup>6</sup> Instead, petitioner elides (Br. 35) the considerations specific to African-American representation by considering African Americans and Hispanics as one group. But because individuals from each group bring distinct varieties of diversity—of experience, culture, language—to an institution, the University properly evaluated whether it had achieved its objectives with respect to each group separately. Pet. App. 67a (citing *Parents Involved*, 551 U.S. at 723).

539 U.S. at 332. These circumstances regarding African-American enrollment would alone have justified individualized consideration of race in admissions under *Grutter*. See 539 U.S. at 329-330.

With respect to Hispanic students, the fact that they made up 16.9% of the class in 2004 (and 20% in 2008) may have alleviated concerns about racial isolation and tokenism. S.J.A. 156a. But those figures also showed that Hispanics were substantially underrepresented compared to their numbers in the statewide population (34.9% in 2004 and 36% in 2008). Pet. App. 154a-155a; U.S. Census Bureau, U.S. Dep't of Commerce, *The American Community—Hispanics: 2004*, at 6 (Feb. 2006). In view of the significant—and growing—Hispanic proportion of the State's population and the trend toward less classroom diversity, the University concluded that it could not provide the degree of cross-racial interactions necessary to prepare its students for leadership in Texas. S.J.A. 24a; see pp. 23-24, *supra*. That determination took into account the University's educational mission, its evaluation of on-campus interactions, and student views. J.A. 267a-268a, 395a-396a; S.J.A. 24a.

3. The University's decision to consider race as one factor in the holistic component of its admissions process gains additional support from the Top Ten plan's effect on the University's educational priorities. Because the Top Ten plan guarantees admission based solely on class rank, the University must rely heavily on its holistic admissions process to ensure that the remainder of the student body is composed of students who are "diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340; J.A. 203a, 359a. Only the holistic analysis enables the University to select students

who have exhibited leadership potential or particular talents, but whose class rank does not place them in the Top Ten, as well as out-of-state students and students who are academically qualified but missed the Top Ten cut in the most rigorous high schools.

After the Top Ten plan became law, the University reconciled its desire to admit a significant portion of the student body using the holistic analysis (which did not then take race into account) with its automatic Top Ten admissions by increasing the overall number of students admitted each year. S.J.A. 31a. By 2003, however, the University was unable to sustain those increases, and it significantly reduced the non-Top Ten portion of the entering class. *Ibid.*

At that point, the non-Top Ten admissions process became extremely selective. Pet. App. 59a n.155. Excluding all consideration of race, the University had increasing difficulty ensuring that its non-Top Ten admissions included significant numbers of students who possessed the attributes valued by the University but not accounted for in Top Ten admissions. Taking race into account as one factor in the holistic individual assessment therefore helped ensure that the admissions process remained effective in admitting significant numbers of underrepresented minorities, as well as non-minorities, who would contribute the varieties of experience and attributes that the University sought in assembling its student body.

The University could legitimately conclude that excluding any consideration of race from the PAI analysis would fail to take the measure of the whole person, and would deprive the University of valuable context even as the shrinking size of the non-Top Ten portion of the class forced the University to make increasingly

nuanced admissions decisions. A student’s “own, unique experience of being a racial minority in a society \* \* \* in which race unfortunately still matters” may affect a student’s opportunities and views. *Grutter*, 539 U.S. at 333; accord *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). An applicant’s race therefore may provide necessary—and illuminating—context for evaluating the applicant’s achievements. For example, knowing that the student-body president at an overwhelmingly white school is African American provides a more complete understanding of his achievement. J.A. 204a-205a, 207a, 210a-211a, 309a-310a.

**C. The University’s Admissions Policy Is Narrowly Tailored**

The University’s admissions policy meets *Grutter*’s narrow tailoring requirement. The holistic component of that policy “affords \* \* \* individualized consideration to applicants of all races” rather than operating as a quota system; it was adopted only after the University concluded that other alternatives were not workable; and it is limited in time. 539 U.S. at 337-342.

1. a. As discussed above, see p. 21, *supra*, the University’s holistic admissions policy provides individualized consideration to every applicant. *Grutter*, 539 U.S. at 334; *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). The University does not “limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity.” *Grutter*, 539 U.S. at 338. While adding race to the PAI assessment “increases the chance” that an applicant of an underrepresented minority will be considered “meritorious and diverse” in all relevant respects, J.A. 434a, race is never determinative by itself. See *Grutter*, 539

U.S. at 337. The policy therefore does not operate as a “classification that tells each student he or she is to be defined by race.” *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

b. The University’s policy also does not function as a quota system. The University does not maintain numerical goals for minority admission or enrollment. S.J.A. 29a. Nor does it insulate individuals of different races from competing with each other, or give race “any more or less weight” based on admissions decisions previously made. J.A. 301a-303a, 407a, 415a; Pet. App. 160a; *Grutter*, 539 U.S. at 334-336. The University has also “taken steps to ensure individual assessment” at every point in the process: because the procedures insulate consideration of an applicant’s race from the ultimate admissions decision, the process is not geared to reach desired yearly demographic targets. See p. 22, *supra*; *Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting). There is thus no danger that admissions officials will weigh race more heavily and abandon individualized consideration as the admissions process progresses. Cf. 539 U.S. at 392.

In addition, although petitioner faults (Br. 38-39) the University for being “unable to identify any students” for whom race was determinative, that is hardly a flaw in the system. Rather, it underscores that the University properly treats race as one factor among many, making an attempt to identify *any* one dispositive factor largely futile. The University has built as much concreteness as possible into the analysis by giving admissions officials instructions on considering race only when appropriate to give context to an individual’s achieve-

ments, J.A. 168a-169a, and by training officials to ensure that scoring is consistent, Bremen Dep. 26-28.

c. The University gave “serious, good faith consideration [to] workable race-neutral alternatives.” *Grutter*, 539 U.S. at 339.

Although the University may have been able to increase minority admissions by selecting more of its student body through a percentage plan, that course was not a workable alternative. The University would have had to minimize the portion of the class selected through a holistic analysis, J.A. 203a, which would have curtailed individualized assessments, led to “a dramatic sacrifice of diversity” of all kinds, and stymied the University’s efforts to admit the most highly qualified students from more rigorous high schools and non-Texas schools. *Grutter*, 539 U.S. at 339-340.

Until 2003, the University raised its entering class size in an attempt to allow the number of Top Ten admissions—including admissions of underrepresented minorities—to increase without sacrificing holistic admissions. S.J.A. 31a; p. 29, *supra*. But the larger entering classes “threaten[ed] the quality of the educational experience” by straining the University’s faculty and budgetary resources. S.J.A. 31a-32a. Also for budgetary reasons, the University concluded that it could not indefinitely increase scholarship incentives designed to boost minority enrollment. *Ibid*.

Within the non-Top Ten portion of the class, the University used the PAI analysis, without consideration of race, but found that that analysis alone did not result in material minority gains. S.J.A. 30a-31a; Pet. App. 18a-19a. In 2003 and 2004, moreover, the proportion of non-Top Ten admittees who were Hispanic declined slightly, and the proportion of non-Top Ten admittees who were

African American remained stagnant. S.J.A. 45a; J.A. 126a.

Thus, the University not only gave good-faith consideration to race-neutral alternatives, *Grutter*, 539 U.S. at 339; it experimented with them over several years. This experience demonstrated that the University could not increase its underrepresented minority enrollment solely through such measures without sacrificing its emphasis on wide-ranging diversity and the quality of the education provided to all students. *Id.* at 339-340.

d. Finally, the University's policy is, as *Grutter* requires, "limited in time." 539 U.S. at 342. The University's policy contemplates performing an internal review every year and a formal review every five years.<sup>7</sup> J.A. 435a. The five-year timeframe reflects the University's commitment to considering race only while it remains necessary, but is expansive enough to allow the University to meaningfully assess trends in its enrollment results.

2. Petitioner contends (Br. 38-42) that the University's program is not narrowly tailored because it has yielded only minimal gains in minority enrollment relative to the overall size of the entering class, suggesting that race-neutral measures would have been equally effective. Petitioner is incorrect.

Petitioner asserts (Br. 39-40) that the University's consideration of race resulted in the enrollment of only 33 additional Hispanic and African-American Texas residents in 2008. Even accepting petitioner's exclusion of non-Texas residents and her assumption that Hispanics and African Americans would have been admitted in the

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<sup>7</sup> The University states that it has not finalized its five-year review because it has concluded that its analysis should be informed by this Court's decision. See Resps. Br. 12 n.4.

same proportion each year (15.2%, Pet. Br. 39-40) without considering race, petitioner's focus on 2008 is unrepresentative. That year, Top Ten admissions rose from 61% to 72% of admissions, reducing the number of available non-Top Ten slots relative to previous years. S.J.A. 157a, 170a; J.A. 414a. Petitioner's methodology suggests that 126 additional underrepresented minorities from Texas schools were enrolled in 2006, and 173 in 2007. S.J.A. 157a. Given that the University had only 387 and 431 African Americans, and 1386 and 1470 Hispanics, during those years—in freshman classes exceeding 7400—the admissions policy had a significant and positive effect on diversity. S.J.A. 156a.

In any event, the fact that the University's consideration of race produced measured rather than drastic increases is the inevitable—and salutary—result of the University's structuring of its admissions policy so that race is but one factor within an individualized, holistic assessment of all kinds of diversity. These modest effects confirm that the University is not operating the policy as a quota, and that it has designed the process to minimize the impact on non-minority students. See *Grutter*, 539 U.S. at 390-391 (Kennedy, J., dissenting) (describing plans that had an unpredictable—and relatively minor—effect on the number of admitted minorities as more likely to safeguard individualized consideration).

Petitioner is also wrong to suggest that *Parents Involved* establishes that the University's policy is unconstitutional on the ground that its costs outweigh its benefits. In *Parents Involved*, school districts used race to dictate school assignments. Despite that predominant, mechanical use of race, the policies in question had only minimal impact, suggesting that other less restrictive

measures—which the school districts had not considered—would have been as effective. 551 U.S. at 733-734. One such means would have been a “more nuanced, individual evaluation of school needs and student characteristics that might include race as a component” and that would be “informed by *Grutter*.” *Id.* at 790 (Kennedy, J., concurring in part and concurring in the judgment). That individualized evaluation is precisely what the University has instituted. *Parents Involved* does not suggest that in order to be narrowly tailored, such a holistic, individualized policy must have drastic effects.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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