No. 11-345

In the Supreme Court of the United States

ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*, RESPONDENTS

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

BRIEF OF RUBEN HINOJOSA, MEMBER OF CONGRESS; CHARLES A. GONZALEZ, MEMBER OF CONGRESS; AND 64 OTHER MEMBERS OF CONGRESS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STEVEN D. GORDON
Counsel of Record
HOLLAND & KNIGHT LLP
800 17th Street NW, Suite 1100,
Washington, D.C. 20006
202-955-3000
steven.gordon@hklaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES AND RULES

OTHER MATERIALS

INTEREST OF AMICI CURIAE[1]

This brief is filed on behalf of United States Representatives Ruben Hinojosa, Charles Gonzalez, Emanuel Cleaver, Henry "Hank" Johnson, Charles Rangel, Lucille Roybal-Allard, Joe Baca, Marcia Fudge, Bobby Rush, Silvestre Reyes, Jan Schakowsky, Laura Richardson, Gene Green, Edolphus Towns, Barbara Lee, Luis Gutierrez, Grace Napolitano, Nancy Pelosi, Earl Blumenauer, Andre Carson, Keith Ellison, Judy Chu, Lloyd Doggett, James Clyburn, Michael Honda, Madeleine Bordallo, Steve Cohen, George Miller, Ed Pastor, Jared Polis, Jerrold Nadler, Bob Filner, Pedro Pierluisi, Danny Davis, Al Green, Robert C. "Bobby" Scott, Raul Grijalva, Jose Serrano, Xavier Becerra, Rosa DeLauro, Eleanor Holmes Norton, Joseph Crowley, Albio Sires, Donna Edwards, Elijah Cummings, Janice Hahn, Eddie Bernice Johnson, Gregorio Sablan, Dennis Kucinich, Lynn Woolsey, James P. McGovern, John Tierney, Sam Farr, John B. Larson, Sheila Jackson Lee, Karen Bass, John

---

[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Blanket letters from the parties consenting to the filing of this brief are on file with the Clerk pursuant to Rule 37.3.

Olver, John Lewis, Yvette Clarke, Steny Hoyer, Marcy Kaptur, Hansen Clarke, Linda Sanchez, Brad Miller, John Conyers, and Mazie Hirono.

As elected representatives, *amici* have first hand knowledge of the compelling interest that the federal, state and local governments have in promoting diversity in their programs and through their laws, regulations, policies and practices. Ours is a very diverse society that is becoming more so. It is vital for all the diverse elements of our society to participate fully in the processes of government and in government programs of interest to them. It is also vital for them to be able to work together for the common good in public and private settings. A considerable part of *amici's* time and effort as legislators and representatives is devoted to promoting these interests.

One important component of the diversity that *amici* seek to promote is racial and ethnic diversity. A number of *amici* are Hispanic, African-American, Asian-American or Pacific Islanders and/or represent large numbers of constituents who are Hispanic, African-American, Asian-American or Pacific Islanders or Native American. *Amici* are keenly aware that ours is a society "in which race unfortunately still matters." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). At the same time, *amici* are deeply committed to the constitutional guarantee of equal protection of the laws for all persons.

Accordingly, *amici* have a profound interest in how this case is resolved because the Court's decision will affect the legislative and policy options available to *amici* to address the needs and concerns of their constituents.

SUMMARY OF ARGUMENT

The University of Texas at Austin ("UT") has a compelling interest in attaining a diverse student body that justifies the consideration of race in its admissions. *See Grutter*, 539 U.S. at 325. Indeed, diversity is a compelling government interest in a number of other contexts as well, including the selection of our future military leadership, the selection of leaders of Executive Branch agencies, and the selection of federal and state judges. Accordingly, the Court's resolution of this case should be informed by these broader concerns and the need for clear guidance from this Court about how race, ethnicity, and gender can be taken into account in government programs in a manner that is consistent with the Constitution.

The Court, in *Grutter*, formulated a sound method for taking account of an applicant's race as part of a lawful effort to achieve diversity. This method forbids the use of quotas but permits diversity goals based on a good-faith effort to come within a range demarcated by the goal itself. It requires each applicant to be evaluated as an

individual and compared with all other candidates for the position(s). The method allows race to be considered as a "plus" factor as part of a holistic review of each applicant's file that does not make race determinative or give it a predetermined weight, and which gives substantial weight to other diversity factors as well. *See* 539 U.S. at 335-38. This methodology is logical, straightforward and readily enforceable.

UT considered appropriate benchmarks in formulating its admissions program. While eschewing any numerical goals for the admission of minority students, UT concluded that African-Americans and Hispanics are underrepresented in its student-body in comparison to state demographics. Thus, they are eligible to have their race considered as a diversity "plus" factor when their applications are reviewed. "First Amendment interests give universities particular latitude in defining diversity." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring). This Court has approved diversity goals that constitute "reasonable aspirations" for correcting underrepresentation. *See Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 635 (1987). UT's use of state demographics as a benchmark is clearly reasonable for a state university. Furthermore, UT's effort to increase diversity at the classroom level, as well as the student body level, is also reasonable. The Court

has recognized that multiple benchmarks may be appropriate to measure underrepresentation in a refined manner, such as by job categories rather than by reference to the overall workforce. *See id.*

UT concluded that its existing practice of admitting the top 10% of graduates from every Texas high school was not producing sufficient diversity in its incoming class. Under *Grutter*, UT could have scrapped this race-neutral "percentage plan" and implemented a race-conscious methodology for all of its admissions without violating the Equal Protection Clause. Instead, it chose to retain the percentage plan for most of its admissions and implement a race-conscious process for only 20-30% of its admissions. UT not only gave good faith consideration to a race-neutral method but adopted that approach to the maximum extent that it deemed workable as part of an overall plan to achieve its various admissions goals.

Petitioner asks the Court to second-guess the judgment of UT and the Texas legislature and rule, in essence, that the top 10% approach produces "enough diversity" so that it precludes UT from using any race-conscious component to help fulfill its diversity goals. This argument contravenes this Court's tradition of giving a degree of deference to a university's academic decisions, including the selection of its student body. *See Grutter*, 539 U.S. at 328-29. Accepting this argument would

undermine the "narrow tailoring" of race-conscious admissions programs and experimentation with race-neutral alternatives. The lesson drawn by other universities would be to employ an entirely race-conscious methodology if they want to preserve some leeway to conduct individualized assessments to assemble a well-rounded, diverse student body. Universities would be discouraged from developing and using race-neutral admissions approaches in combination with race-conscious approaches.

ARGUMENT

I. ATTAINING DIVERSITY IS A COMPELLING GOVERNMENT INTEREST IN A NUMBER OF CONTEXTS

This Court has ruled that "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325. A college or university "has a compelling interest in attaining a diverse student body." *Id.* at 328. Accordingly, the Court upheld an admissions program that used race as a "plus" factor in "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment," *id.* at 337, and which gave "substantial weight to diversity factors besides race." *Id.* at 338.

Diversity is a compelling government interest in a number of other contexts as well. This Court, in *Grutter*, noted that a "highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security." 539 U.S. at 331 (quoting Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5). This compelling interest requires the service academies and the ROTC to use limited race-conscious recruiting and admissions policies to achieve an officer corps that is both highly qualified and racially diverse. *Id.*

Grutter also recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." 539 U.S. at 332. Moreover, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.*

Both the legislative and executive branches of the federal government share these views. Both branches have taken a series of steps in recent years to increase diversity in the public sector. In 2010 the House of Representatives launched a bipartisan initiative to increase racial diversity among congressional staff after an internal assessment revealed that only 13 percent of House chiefs of staff

were minorities versus 35 percent of the United States population. *See* Jordy Yager, "House Leaders launch program aimed at increasing racial diversity of staffers," The Hill (2010), *http://thehill.com /homenews/house/91921-house-leaders-launch-racial-diversity-program*.

Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010) created 20 Offices of Minority and Women Inclusion at the various financial regulatory agencies, including the Treasury, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the 12 Federal Reserve banks and the newly created Consumer Financial Protection Bureau. These offices are charged with monitoring the diversity at the agencies as well as at any contractors or subcontractors.

Other federal agencies independently have undertaken the promotion of diversity in their ranks to increase their effectiveness. For example, the Central Intelligence Agency states that "[i]n order for the CIA to meet our mission of protecting our national security interests, we need to employ a workforce as diverse as America itself--the most diverse nation on earth." Central Intelligence Agency's Mission Statement Regarding Diversity, https://www.cia.gov /careers/diversity/index.html. Toward that end, the CIA "review[s] the Agency's

diversity achievements in light of benchmarks that are meaningful to meeting mission requirements." *Id.*

In 2011, the President issued an Executive Order establishing a coordinated government-wide initiative to promote diversity and inclusion throughout the federal workforce. Exec. Order No. 13583, 76 Fed. Reg. 52847 (Aug. 23, 2011).

The importance of diversity is evident in the staffing of the most senior level of the Executive Branch -- the presidential Cabinet. Presidents of both parties have recognized the need to have a diverse Cabinet that includes members of major racial and ethnic groups to head the federal agencies that comprise the Executive Branch. And Presidents of both parties have consciously taken diversity into account in choosing the members of their Cabinets. *See, e.g.*, Susan Page, "Bush is opening doors with a diverse Cabinet," *USA Today*, Dec. 9, 2004, available at http://www.usatoday.com/news/washington/2004-12-09-diverse-usat_x.htm.[2]

---

[2] Similarly, diversity in the leadership of private corporations has become increasingly important. In December 2009, the Securities and Exchange Commission approved new disclosure rules requiring public companies, for the first time, to provide disclosure regarding the diversity of their boards of directors. Item 407(c)(2)(vi) of Regulation S-K, 17 C.F.R. § 229.407(c)(2)(vi).

Still another example of the need for diversity is furnished by the federal and state judiciary. There is no question that diversity, including race, ethnicity and gender, has been a factor in selecting nominees for federal judgeships. "The president wants the federal courts to look like America," according to the White House counsel. John Schwartz, "For Obama, a Record on Diversity but Delays on Judicial Confirmations," The New York Times (2011), http://www.nytimes.com/ 2011/08/07/us/politics/ 07courts.html. Conservatives agree that diversity is desirable and that ethnic diversity is one factor that should be weighed with other factors in judicial selections. *See id.* President George W. Bush appointed a record number of Hispanic judges and a review of his appointments led one academic to comment in 2007 that "the second variable that comes through in the data is that clearly diversity is a big thing in this administration." Ken Herman, "Bush hold the Record on Hispanic Federal Judges Latino Advocacy Groups are Pleased; DNC Stays Mum," Chron.com (2007), http://www.chron.com/news/nation-world /article/Bush-holds-the-record-on-Hispanic-federal-judges-1541185.php.

Diversity is an explicit consideration in the appointment of state judges. Arizona has a constitutional provision requiring its judicial nominating commission to "consider the diversity of the state's population, however the primary

consideration shall be merit." Ariz. Const. art. VI, § 36. Maryland has an Executive Order which provides that the nominating commission "shall consider ... the importance of having a diverse judiciary." Md. Exec. Order No. 01.01.2007.08. In Missouri, the governing Supreme Court Rules direct that "the Commission shall further take into consideration the desirability of the bench reflecting the racial and gender composition of the community." Mo.Sup.Ct.R. 10.32(f) (2008).

Several other states have laws that mandate diversity in the composition of the judicial nominating commission. Florida, for example, requires that "the Governor shall seek to ensure that, to the extent possible, the membership of the Commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered." Fla. Stat. Ann. § 43.291(4) (2008). Tennessee law requires the appointment of "persons who approximate the population of the state with respect to race, including the dominant ethnic minority population, and gender." Tenn. Code Ann. § 17-4-102(b)(3) (2008). And Rhode Island provides that "[t]he governor and the nominating authorities hereunder shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the Commission." R.I. Gen. Laws § 8-16.1-2(a)(3) (2006).

The weight placed on diversity in the judicial nomination process is illustrated by a high profile case in which Florida Governor Charlie Crist refused to make an appointment from an all-white list of nominees developed by a nominating commission. He noted that the court at issue had no black judges and that he wanted to make an appointment that would make the judiciary more diverse. The Florida Supreme Court ultimately ruled that the state constitution did not permit the governor to reject all of the candidates, while applauding his "well-intentioned" interest in promoting diversity. *See Pleus v. Crist*, 14 So.3d 941, 946 (Fla. 2009).

In all of these contexts, diversity is being pursued to help promote "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation," including "a set of leaders with legitimacy in the eyes of the citizenry," *Grutter*, 539 U.S. at 332, and/or because diversity in the ranks of government agencies and programs increases their effectiveness.

II. GRUTTER ESTABLISHED A SOUND METHOD FOR TAKING ACCOUNT OF RACE, ETHNICITY, OR GENDER TO ACHIEVE DIVERSITY

Given the widespread importance of diversity to federal, state, and local governments, it is vital for them to have clear guidance from this Court about how race, ethnicity, and gender can be taken into

account in their programs in a manner that is consistent with the federal Constitution. As Justice Kennedy noted, "[e]xecutive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races." *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).

In his *Parents Involved* concurrence, Justice Kennedy enumerated a series of race-conscious, but facially race-neutral means for bringing together students of diverse backgrounds and races that pass constitutional muster. These include "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.* This sort of guidance is invaluable to legislators and administrators who must formulate laws and policies.

But such race-neutral measures are not always adequate to ensure that diversity is considered in selecting individuals who will participate in a government program. These measures do not enable

one to decide which candidate to choose as the new Secretary of Labor, or which candidate to nominate for a judgeship, or which applicants should be accepted to UT. If diversity -- racial, ethnic or gender -- is to be factored into such decisions, it must be done on an individualized basis in a candid manner.

This Court, in *Grutter*, formulated a sound method for taking account of an applicant's race (or ethnicity or gender) as part of a lawful effort to achieve diversity. This method forbids the use of quotas but permits diversity goals based on "a good-faith effort ... to come within a range demarcated by the goal itself." 539 U.S. at 335 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part). It requires each applicant to be evaluated as an individual and compared with all other candidates for the position(s). The method allows race to be considered as a "plus" factor as part of a holistic review of each applicant's file that does not make race determinative or give it a predetermined weight, and which gives substantial weight to other diversity factors as well. *See id.* at 335-38. In other words, "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a

predominant factor in the admissions decisionmaking." *Id.* at 392-93 (Kennedy, J., dissenting).

The *Grutter* methodology is straightforward and readily understood. It establishes constraints that are capable of judicial review and enforcement. This method can be applied to other situations in which there is a need to consider diversity along lines of race, ethnicity or gender in selecting among a group of candidates.

Moreover, there often is not a workable race-neutral alternative to the *Grutter* approach. Where only one candidate or a small group of candidates is to be chosen, there seldom will be a race-neutral selection method that will foster diversity. When larger groups are to be selected, it sometimes may be possible to devise a race-neutral methodology that will produce a diverse result, but such methodologies may create problems of their own by giving short shrift to other factors that the decision-maker properly wishes to take into account.

III. THE UT ADMISSIONS PROGRAM COMPLIES WITH *GRUTTER*

A. UT Has Chosen Appropriate Diversity Benchmarks And Used Them In A Limited Manner

Establishing an appropriate benchmark or benchmarks is integral to any government effort to achieve (greater) diversity that includes consideration of applicants' race, ethnicity, or gender. A benchmark is essential to determining whether a particular group is underrepresented and to what extent, and whether progress is being made toward reducing its underrepresentation.

The use of a benchmark presents two distinct issues to a court reviewing a diversity program. One is whether the chosen benchmark is appropriate under the circumstances of the case. The second is whether the benchmark is being used properly. Is it an impermissible quota that must be met or, instead, a "reasonable aspiration" (either long-term or short-term) for correcting the existing underrepresentation? *See Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 635 (1987).

In *Grutter*, the University of Michigan Law School sought to enroll a "critical mass" of underrepresented minority students to ensure their ability to make unique contributions to the character of the Law School. 539 U.S. at 316. The Law School did not quantify critical mass in terms of numbers or percentages, but instead described it as "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 319. But it was unclear how this goal was

developed or measured. The Law School tied critical mass to avoiding isolation of minority students or turning them into "spokespersons for their race," but this is not illuminating. The avoidance of tokenism does not provide a useful benchmark for measuring and achieving diversity.

In practice, the Law School apparently benchmarked diversity with reference to its overall pool of applicants, as the *Grutter* dissenters argued.[3] The majority and dissents diverged on whether the critical mass concept, as utilized by the Law School, operated as an appropriate goal or an unlawful quota. But they did not discuss whether the pool of applicants furnished the correct (or one correct) reference point for measuring diversity.

The overall applicant pool may well be an appropriate reference point for measuring diversity in some cases, but it is not the only possibility. The Court discussed the establishment of diversity benchmarks in *Johnson v. Transportation Agency*. It approved benchmarks that distinguished between

---

[3] The dissent of Chief Justice Rehnquist demonstrated a close correlation between the percentage of the Law School's pool of applicants who were members of the minority groups at issue and the corresponding percentage of the admitted applicants. 539 U.S. at 383-85. Both the Chief Justice and Justice Kennedy found this correlation to be evidence of forbidden racial balancing. *Id.* at 385-86, 390-91.

long-term and short-term goals for measuring progress in eliminating underrepresentation of women. The long-term goal was a work force that reflected in its major job classifications the percentage of women in the area labor market. But, for positions requiring specialized training and experience, less ambitious annual short-term goals were formulated based on the available labor force with the requisite qualifications. These goals were not quotas that must be met, but "reasonable aspirations" for correcting the existing underrepresentation. *See* 480 U.S. at 635.

In this case, UT has not established any specific target or other quantitative objective for the admission of minority students. UT compared its student-body demographics to state demographics and concluded that African-Americans and Hispanics are underrepresented in its student body. Accordingly, students in those groups may have their race considered as a diversity "plus" factor when their applications are evaluated.[4] But admissions officers do not monitor the racial composition of the class.

---

[4] The diversity plus factor is not restricted to candidates who are members of underrepresented groups. As the Fifth Circuit noted, a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may obtain a greater score than a similarly situated Hispanic student from the same school. App. 46a.

Petitioner challenges UT's use of state demographics in formulating its admissions methodology. The logic of this benchmark seems self-evident for a state university that serves the entire state; it clearly constitutes a "reasonable aspiration." *Johnson*, 480 U.S. at 635. In comparison, the U.S. Military Academy sets goals for minorities based upon their representation in the national population and in the national pool of college bound people, and their representation in the Army. M*ilitary Academy: Gender and Race Disparities* 13 (Mar. 17, 1994). Moreover, "First Amendment interests give universities particular latitude in defining diversity." *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring).

Petitioner also challenges UT's assertion of a need for greater classroom diversity, arguing that diversity must be measured against the student body as a whole, not on a more granular level. But the Court has previously recognized the need to develop "refined measures" of underrepresentation, such as on a job category by job category basis rather than with reference to the overall workforce. *See Johnson*, 480 U.S. at 635. In *Grutter*, for example, the Court was advised that the service academies measure diversity within the officer corps separately from diversity within the service as a whole, and that they consider both measures in establishing their race-conscious recruiting and admissions policies to increase minority representation. *See*

Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5-7.

In sum, "context matters" when selecting a diversity benchmark(s). *See Grutter*, 539 U.S. at 327. There is no single benchmark that is always appropriate. And there may be more than one benchmark that might reasonably be chosen in a given case. While a court should satisfy itself that the benchmark(s) used in a diversity program is reasonable, the more searching inquiry should focus on how the benchmark is employed, whether it is treated as an appropriate goal or as a forbidden quota.

B. UT's Use Of Race-Neutral Selection Criteria That Produce Some Diversity Should Not Preclude It From Also Making Use Of A Race-Conscious Method

In the wake of the *Grutter* decision, UT and the Texas legislature made the judgment to modify the admissions process so that it was not governed entirely by the Top Ten Percent Law ("Top 10% Law"), which required the admission of all Texas high school seniors ranking in the top 10% of their classes. UT decided to admit approximately 70% to 80% of its in-state students pursuant to the race-neutral Top 10% Law and implement a race-conscious methodology with respect to selecting the final 20-30% of the incoming class. (The race-

conscious methodology is also used with respect to placement of all incoming students into particular programs of study). Several years after petitioner applied for admission in 2008, the legislature ultimately amended the Top 10% Law so that it covers 75% of the freshman class.

Petitioner asks the Court to second-guess the judgment of UT and the Texas legislature and rule, in essence, that the Top 10% Law produces "enough diversity" so that it precludes UT from using any race-conscious component as part of its admissions process. This argument contravenes this Court's tradition of giving a degree of deference to a university's academic decisions, including the selection of its student body. *See Grutter*, 539 U.S. at 328-29. Furthermore, acceptance of this argument would undercut the "narrow tailoring" of race-conscious admissions approaches.

Grutter ruled that, before implementing a race-conscious admissions program, a university must give serious, good faith consideration to workable race-neutral alternatives that will achieve the diversity it seeks. 539 U.S. at 339. But the Court rejected the argument that a race-neutral "percentage plan," if feasible, must be used to achieve diversity instead of race-conscious plan. The Court explained that such percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a

student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 340.

Thus, UT (with the concurrence of the Texas legislature) could have scrapped the Top 10% approach altogether and utilized a race-conscious methodology for all of its admissions without violating the Equal Protection Clause. Instead, it chose to limit its use of a race-conscious process to only 20-30% of its admissions. Petitioner contends that this far more limited approach violates equal protection (although a full-fledged race-conscious method would not) because it is "gratuitous" and allegedly has a minimal effect on promoting diversity. But acceptance of this argument would discourage other universities from developing and using race-neutral admissions approaches in combination with race-conscious approaches -- a result at odds with the "narrow tailoring" of race-conscious programs.

UT faithfully followed *Grutter* by not only considering a race-neutral admissions approach, but adopting that approach to the maximum extent that it deemed workable as part of a process to achieve its various admissions goals, including but not limited to diversity. *See* 539 U.S. at 342 ("Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop."). UT combined this race-neutral

approach with a limited, race-conscious policy component that operates in accordance with *Grutter*. It would be perverse if UT's effort to maximize the use of race-neutral criteria in its admissions process were held to preclude any use of race-conscious criteria, thereby invalidating the carefully measured approach that UT developed. The lesson drawn by other universities would be to employ an entirely race-conscious methodology if they want to preserve some leeway to conduct individualized assessments to assemble a well-rounded, diverse student body.

CONCLUSION

Diversity has become even more important in the years since *Grutter* was decided. This Court, in *Grutter*, formulated a sound method for taking account of an applicant's race (or ethnicity or gender) as part of a lawful effort to achieve diversity. There is no reason for the Court to revisit its decision in *Grutter*. Nor is there any reason to conclude that UT has violated the standards established by *Grutter* for lawfully considering diversity as part of the university admissions process. Accordingly, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

STEVEN D. GORDON
Counsel of Record
HOLLAND & KNIGHT LLP

800 17th Street NW, Suite 1100
Washington, D.C. 20006
202-955-3000
steven.gordon@hklaw.com

Counsel for Amici Curiae

AUGUST 2012