No. 09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABIGAIL NOEL FISHER; RACHEL MULTER MICHALEWICZ,

Plaintiffs-Appellants

v.

UNIVERSITY OF TEXAS AT AUSTIN,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

Whether the consideration of race in undergraduate admissions by the University of Texas is narrowly tailored to further a compelling governmental interest.

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, which prohibits discrimination on the basis of race and national origin by recipients of federal financial assistance, including institutions of higher education. The United States thus has an interest in the orderly development of the law regarding the use of race in the university setting.

STATEMENT OF THE CASE

Plaintiffs Abigail Fisher and Rachel Michalewicz (plaintiffs), who are white, unsuccessfully applied for admission as undergraduates to the University of Texas at Austin (University) in 2008. R.E. 34-35.[1] Plaintiffs brought this action in April 2008, alleging that the University's undergraduate admissions policies violate the Equal Protection Clause and federal civil rights statutes, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. R.E. 34-35. On August 17, 2009, the district court issued an Order granting summary judgment to the University. R.E. 34-53. Plaintiffs appealed. R.E. 29-30.

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[1] Citations to "R.E. __" refer to pages in the Appellants' Record Excerpts in this appeal. Citations to "R. __" refer to documents in the district court record, as numbered on the district court's docket sheet. "Def. Statement of Facts ¶ __" refers to paragraphs in the Defendants' Statement of Facts, which is reproduced in Appellees' Record Excerpts.

A. Facts

The University of Texas at Austin is the flagship institution of Texas's public university system. R.E. 35. It is "a highly selective university, receiving applications from approximately four times more students each year than it can enroll in its freshman class." *Ibid*. In order to enroll a "meritorious and diverse" student body, the University continuously develops internal admissions procedures designed to identify the applicants who will bring to the campus the attributes that the University values. *Ibid.* In the past two decades, these admissions procedures have evolved in response to both judicial decisions and legislative mandates.

1. Until 1996, the University selected undergraduate students based upon an Academic Index, which is a computation of the student's projected freshman grade point average based upon his or her high school class rank and standardized test scores. R.E. 35-36. Because exclusive reliance upon the Academic Index would have resulted in a class with "unacceptably low diversity levels," the University also took students' race into account. R.E. 36. In *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996), this Court held that the use of race in admissions by the University's Law School was unconstitutional. R.E. 36.

2. To comply with *Hopwood*, beginning in 1997, the University admitted students without regard to race. The University also began to use a Personal Achievement Index, in addition to the Academic Index, in the admissions process. R.E. 36. The Personal Achievement Index is based upon a "holistic review of applications intended to identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores." *Ibid*. It includes the following factors: scores on two essays, leadership, extracurricular activities, work experience, service to school or community, and "special circumstances," which include socio-economic status, whether the applicant is from a single parent home, language spoken at home, family responsibilities, socio-economic status of the school attended, and average SAT or ACT score of the school attended in relation to the student's test score. R. 96, Def. Cross Motion for S.J., Tab 11, Walker Affidavit (Walker Aff.) ¶ 6. While "facially race-neutral," the special circumstances component of the Personal Achievement Index crafted after *Hopwood* was "partially designed to increase minority enrollment." R.E. 36. At the same time, the University also implemented additional race-neutral policies and practices designed to increase racial diversity, including scholarship programs and outreach and recruitment efforts. *Ibid*.

In 1997, the Texas legislature enacted House Bill 588, Tex. Educ. Code 51.803 (1997), also known as the "Top Ten Percent" law. R.E. 36. This statute grants admission to any Texas state university to Texas high school seniors who are in the top ten percent of their class at the time of application. R.E. 37. While race-neutral, the purpose of the Top Ten Percent law was both "to ensure a highly qualified pool of" applicants and to promote racial diversity in the State's public universities. *Ibid*. (quoting HB 588, House Research Organization Digest (1997) at 4-5). The University implemented this provision in 1998.

3. In 2003, in *Grutter* v. *Bollinger*, 539 U.S. 306, the Supreme Court upheld the affirmative action policy used by the University of Michigan Law School. Shortly thereafter, the University of Texas Board of Regents authorized the institutions within the University of Texas system to determine "whether to consider an applicant's race and ethnicity" in admissions "in accordance with the standards enunciated in" *Grutter*. R.E. 37; R. 94, Pltff. Motion for S.J., Exh. 19, Exh. A at 6.

As part of its decisionmaking process, the University conducted assessments of whether the benefits of diversity identified in *Grutter* were being achieved. For example, it created a study to measure the extent of racial diversity in individual undergraduate classes, focusing on classes having 24 or fewer students. R. 96,

Def. Cross Motion for S.J., Tab 8, Lavergne Affidavit, Exh. B (Diversity Study). The University concentrated on classes of this size because they represented a majority of the undergraduate classes, and because such classes foster the most classroom discussion. Diversity Study 5 & Appendix 7, Figure 1. The study revealed that, in 2002, 90% of classes with from 5 to 24 students had only one or zero African-American students; 43% had one or zero Hispanic students; and 46% had one or zero Asian-American students. Walker Aff. ¶ 11. Diversity levels were similar in classes with between 10 and 24 students. R. 96, Def. Reply Mem. In Support of Cross Motion for S.J. 7 n.2 & Tab B. The Diversity Study noted that the number of individual class sections had increased since 1996 and suggested that the "[l]imited numbers of minority students appeared to be 'spread out' in more classes, leaving many sections with little or no representation." Diversity Study 5. In addition, the University collected anecdotal information from students, who opined that there was "insufficient minority representation" in classrooms for "the full benefits of diversity to occur." Walker Aff. ¶ 12.

On June 24, 2004, the University issued a *Proposal To Consider Race and Ethnicity In Admissions*. Walker Aff., Exh. A (*Proposal*). The *Proposal* identified several educational benefits of diversity that the University wished to foster in its classrooms. *Proposal* 1, 24. A diverse student enrollment, the

Proposal stated, “breaks down stereotypes” and “promotes cross-racial understanding.” *Proposal* 1 (quoting *Grutter*, 539 U.S. at 330). Citing the results of the Diversity Study, the *Proposal* at one point also stated that the University did not yet have a sufficient critical mass of underrepresented minority students, mentioning African Americans and Hispanics specifically, to obtain the educational benefits of diversity. *Proposal* 24-25 (citing *Grutter*). The *Proposal* also stated that diversity better “prepares students * * * [for] an increasingly diverse workforce and society,” *Proposal* 25 – an objective that the University viewed as particularly important, *Proposal* 1, 24. The *Proposal* ultimately recommended that, with respect to undergraduate admissions, race and ethnicity be considered as one factor within the Personalized Achievement Index. *Proposal* 23-32.

4. The University adopted its current undergraduate admissions policy, which follows the recommendations in the *Proposal*, in August 2004, and first applied it to the selection of the 2005 freshman class. Walker Aff. ¶ 14. Applicants are divided into two groups: Texas residents who have graduated in the top ten percent of their class (Top Ten Percent applicants) and all other applicants, including non-Texas residents and those Texas residents who have not graduated in the top ten percent (Non-Top Ten Percent applicants). See R.E. 39.

Top Ten Percent applicants are guaranteed admission to the university, but not necessarily to the individual school or program of their choice. *Ibid*. In 2008, 81% of all freshmen, and 92% of all Texas residents admitted as freshmen, were Top Ten Percent applicants, leaving only 841 slots to be filled by Non-Top Ten Percent applicants. *Ibid*. Thus, the vast majority of freshmen were selected without any consideration of race.

For all Non-Top Ten Percent applicants and those Top Ten Percent applicants who were not admitted to the program of their choice, admissions decisions are made on the basis of Academic Index and Personal Achievement Index. R.E. 39. The Academic Index, which predicts freshman grades, is computed based upon the applicant's high school class rank, high school curriculum and SAT or ACT scores. R.E. 39-40.

The Personal Achievement Index is based on scores on two essays, and a personal achievement score based upon a review of the applicant's entire file. R.E. 40. The factors considered in assigning the personal achievement score are the same as those adopted in 1997 (described at p. 4, *supra*), with the addition of race. *Proposal* 27-28. Race, by itself, is not given any numerical value. The University's Director of Admissions explained how race is considered in this process:

> Race, like any other factor, is by itself never determinative of an admissions decision and like every other factor is never considered in isolation or out of the context of other aspects of the student's application file. Race is considered as part of the larger holistic review of every applicant regardless of race. No applicant is reviewed separately or differently because of their race or any other factor. An applicant's race, standing alone, is neither a benefit nor detriment to any applicant. Instead, race provides – like language, whether or not someone is the first in their family to attend college, and family responsibilities – important context in which to evaluate applicants, and is only one aspect of the diversity that the University seeks to attain.

Walker Aff. ¶ 15.

Because the University's conception of diversity, as reflected in the Personal Achievement Index, includes a broad range of experiences and attributes, the University has explicitly stated that race may be a positive factor for applicants of any race, including whites. R.E. 41. For example, both a white applicant who is president of a predominantly African-American high school and an African-American applicant who is president of a predominantly white high school "bring an additional aspect of diversity when one considers the relative rarity of being a student leader who can reach across racial lines." Walker Aff. ¶ 16. And similarly, a "white student who was the president of a white majority high school," just like a "Hispanic student [who] was president of a Hispanic majority high school" would be recognized "for taking leadership roles," but their race "would

not be of particular moment in terms of overall diversity." *Ibid.* Race is therefore viewed as a factor taken in the context of a whole person.

Those who review the files of Non-Top Ten Percent applicants are aware of an applicant's race (just as they are aware of other factors that give rise to diversity – geographic, lingual, musical, etc.), but race is never given a numerical value and the racial composition of the admitted applicant pool is not monitored during the process. R.E. 41.

B. The District Court's Decision

Applying the standard set forth in *Grutter*, the district court upheld the University's use of race in its admissions policy. R.E. 42-53.

The district court first held that the University has "a compelling interest in attaining a diverse student body." R.E. 42 (quoting *Grutter*, 539 U.S. at 328). After reviewing the process by which the University decided to use race in undergraduate admissions, the district court concluded that the University's "underlying interest in its decision to consider race as one of the factors in its admissions process closely mirrors the justification provided for the Michigan Law School's use of race and approved by the Supreme Court." R.E. 45. The court rejected plaintiffs' contention that the University had already achieved critical mass through the Top Ten Percent plan, R.E. 45, noting that although

African Americans and Hispanics together constituted approximately 20% of the University's student body in 2004, the University had determined through a detailed study that its classrooms lacked diversity, R.E. 48-49. The Court further concluded that *Grutter* did not suggest that all minority groups must be counted together for purposes of critical mass or that critical mass was capped at 20%. R.E. 45-49. The court also rejected plaintiffs' other arguments, including their critique of the Diversity Study's focus on small classes, R.E. 48.

The district court also concluded that the University's use of race in undergraduate admissions was narrowly tailored to serve its interest in diversity. R.E. 49-52. The court emphasized the limited extent to which the University uses race, observing that "UT considers race in its admissions process as a factor of a factor of a factor of a factor."[2] R.E. 49. Race, the district court found, is not "considered individually or given a numerical value." *Ibid*. Rather, as in *Grutter*, race is considered as part of a "'highly individualized, holistic review' of every applicant" that "considers multiple factors that contribute to 'diversity' aside from

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[2] Specifically, "race is one of seven 'special circumstances,' which is in turn one of six factors that make up an applicant's personal achievement score. The personal achievement score is one of three factors, along with two essays, that together make up the Personal Achievement Index * * * [which] is one of two elements that make up the applicant's ultimate * * * score." R.E. 49 (internal citations omitted).

race or ethnicity." R.E. 50 (citation omitted). Thus, "based on the obvious similarities between UT's program and the Supreme Court-approved program in *Grutter*, UT's admissions policy on its face appears to be narrowly tailored." *Ibid*.

ARGUMENT

In the view of the United States, the University's limited use of race in its admissions program falls within the constitutional bounds delineated by the Supreme Court in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). The University has a compelling interest in attaining the level of student diversity necessary to fulfill its educational mission. Before instituting its policy, the University undertook a careful study of diversity in its undergraduate enrollment, including the relative absence of minority students in the small classes that permit the highest level of student interaction and therefore benefit most from students with a range of experiences and viewpoints. See *id.* at 330. Finding that it lacked adequate student diversity, the University instituted a narrowly tailored policy that considers race as one among many contextual elements that can indicate that the applicant will bring to the University experiences and attributes that increase the diversity of the student body. Notably, in keeping with the University's broad conception of diversity, an individual of any race can benefit from having his or her race considered. And critically, the policy benefits the entire University community,

and each individual within it, by helping to bring students of all races together into an educational environment where they can learn from and share experiences with one another.

Given the prominent position of the University in the State of Texas, its admissions policy is a crucial means of ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332. As the Supreme Court emphasized in *Grutter*, "[e]ffective participation 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." *Ibid.* The challenged admissions policy is an important means of promoting that goal. That is particularly so because the University's admissions policy considers race in an extremely limited way. In 2008, the year plaintiffs applied for admission, fully 80% of entering freshmen were selected through the Top Ten Percent program–an entirely race-neutral process. Race comes into play only when selecting the non-Top Ten Percent admittees, and then only as "a factor of a factor of a factor of a factor." R.E. 49.

The University's effort to promote diversity is a paramount government objective. See *Grutter*, 539 U.S. at 330-331. In view of the importance of diversity in educational institutions, the United States, through the Departments of

Education and Justice, supports the efforts of school systems and post-secondary educational institutions that wish to develop admissions policies that endeavor to achieve the educational benefits of diversity in accordance with *Grutter*.

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

A. In *Grutter*, the Supreme Court established that a public university may constitutionally consider race as a factor in its admissions policy. Because the use of applicants' race in admissions – like other race-based actions – is subject to strict scrutiny, "such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." 539 U.S. at 326. The Court emphasized, however, that "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.* at 327.

Grutter held that a university may determine that "diversity is essential to its educational mission." 539 U.S. at 328. An institution of higher education possesses "expansive freedoms of speech and thought" when making "complex educational judgments" about the nature of its educational mission and the best

way to achieve that mission. *Id*. at 329. The Supreme Court in *Grutter* held that once a university has determined that diversity is crucial to its mission, achieving the degree of student body diversity necessary to further that mission – for example, a "critical mass" of minorities in university classrooms – is "a compelling state interest that can justify the use of race in university admissions," *id*. at 325, 329-330.

Diversity in the classroom, the *Grutter* Court explained, serves many critical educational interests. It "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'" 539 U.S. at 330 (citation omitted). "These benefits are 'important and laudable,'" the Court wrote, "because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting.'" *Ibid.* (citation omitted). In addition, minority students in diverse classrooms are less likely to feel isolated, and other students learn that there is no "characteristic minority viewpoint." *Id.* at 330, 333. Importantly, these classroom benefits do not simply improve students' learning experiences, the Court explained; rather, they directly ensure that students are prepared "for work and citizenship." *Id.* at 331. In "an increasingly diverse workforce and society," students who have reaped the educational benefits of diversity will be better equipped to succeed, and to assume

leadership roles in commerce, the military, civic society and government. *Id.* at 330-331. *Grutter* also emphasized "the overriding importance of preparing students for work and leadership," *id.* at 331, and recognized the university's role as "a training ground for" leaders, *id.* at 332.

B. The University has a compelling interest in securing the educational benefits of diversity. It is undisputed that the University's educational mission is to prepare its students to "become future leaders of [Texas], in government, industry, and public service," and that the University wishes to provide classroom settings that help "break[] down * * * racial, ethnic, and geographic stereotypes." Walker Aff. ¶ 4; see also *Proposal* 23. The population of Texas is uniquely diverse: "in the near future, Texas will have no majority race." *Proposal* 24. Because the University is the flagship public institution of higher education in Texas, it determined that preparing students to be "able to lead a multicultural workforce and to communicate policy to a diverse electorate" is critical to its mission. *Proposal* 24; see *Grutter*, 539 U.S. at 330.

In determining whether it had attained the educational benefits of diversity through race-neutral measures alone, the University appropriately focused on the need to promote "*classroom* contact with peers of differing racial, ethnic, and cultural backgrounds." *Proposal* 24. The University examined the classes that

involve the most interaction between students – those that have 24 students or less – to determine whether minority students in these classes felt isolated, Diversity Study 4-5, and whether other students were able to gain the benefits of exposure to varying "minority or majority view[s]," *Proposal* 25.[3] See *Grutter*, 539 U.S. at 333. In addition, the University collected anecdotal information from students, who informed the University that they did not believe that the University's classes were providing them with the opportunity to interact with students from a diverse array of backgrounds. Walker Aff. ¶ 12. These investigations revealed that a high proportion of classes had one or no African Americans; one or no Hispanics; and one or no Asian Americans. Walker Aff. ¶ 11. In addition, many students felt that there was "insufficient minority representation [in classrooms] for the full benefits of diversity to occur." Walker Aff. ¶ 12. These results were particularly concerning because of the importance of diversity in the classroom at a sprawling institution like the University, which enrolls nearly 7,000 freshmen annually and cannot ensure that students will experience diversity except in the classroom itself. Appellees' Br. 49.

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[3] Although plaintiffs have argued that the University chose unreasonably small classes in conducting its study, classes with between 5 and 24 students constitute the majority of the classes at the University. Diversity Study 5.

Based on this information, the University determined that "the educational benefits of a diverse student body were not being provided to all the University's undergraduate students." Walker Aff. ¶ 11; see also *Proposal* 25. Plaintiffs criticize the Diversity Study's methodology by pointing out that classes with only five students cannot accommodate two students of each minority group. Appellants' Br. 45. But that point about the very smallest of the University's classes says nothing about the great bulk of classes covered in the study, which have up to 24 students. These classes represent the majority of the University's classes, and are settings where the educational benefits of diversity are greatest because of the significant amount of student interaction. Moreover, the University's decision to ascertain whether the diversity integral to its educational mission was being achieved by focusing on these kinds of classrooms is precisely the type of complex educational judgment that *Grutter* recognizes institutions of higher learning are well-qualified to make. 539 U.S. at 328. The district court therefore correctly held that the University has a compelling interest in achieving the educational benefits of diversity.

C. Plaintiffs contend that the University cannot demonstrate a compelling interest because the Supreme Court somehow has capped critical mass at "20% minority enrollment." Appellants' Br. 43. But *Grutter* does not suggest any such

numerical limitation. See 539 U.S. at 336 (noting that total minority enrollment varied from "13.5 to 20.1 percent" and that the Law School did not believe that it had yet attained critical mass). Neither do the other decisions on which plaintiffs rely. *United States* v. *Virginia*, 518 U.S. 515, 523, 541 (1996), recited a district court finding that the Virginia Military Institution (VMI) "could 'achieve at least 10% female enrollment' – 'a sufficient critical mass' to provide the female cadets with a positive experience" in order to rebut the argument that VMI could constitutionally *exclude* women entirely because virtually no women would want to, or be able to, attend VMI. The Court did not consider the proportion of any minority group needed to attain critical mass to achieve the benefits of diversity in an institution of higher education. And in *Comfort ex rel. Neumyer* v. *Lynn School Committee*, 283 F. Supp. 2d 328, 357 (D. Mass. 2003), a case involving a student assignment plan designed to reduce racial isolation in elementary and secondary schools, the court simply noted expert testimony that anything below 20% representation would be ineffective in preventing members of a minority group from feeling racially isolated. The court's focus on the representation of "a minority group," moreover, refutes plaintiffs' argument (Appellants' Br. 41) that critical mass is determined by combining all minority groups into an undifferentiated whole.

At bottom, plaintiffs are incorrect that the degree of representation that constitutes a critical mass is susceptible to a uniform rule across institutions. *Grutter* emphasized that "critical mass is defined by reference to the educational benefits that diversity is designed to produce." 539 U.S. at 330. Thus, a university's determination whether it has obtained a critical mass will presumably be based on the university's goals in seeking diversity, its teaching methods, its size, and other factors particular to the institution and the population it serves. A uniform cap of critical mass at 20% – or any other number – would be inconsistent with *Grutter*'s attention to the specific circumstances surrounding the policy at issue there. See *Smith* v. *University of Washington*, 392 F.3d 367, 379 (9th Cir. 2004) (*Grutter* "cited testimony that 'there is no number, percentage, or range of numbers or percentages that constitute critical mass,'" and "explicitly refrained from setting a cap on what could constitute a critical mass"), cert. denied, 546 U.S. 813 (2005).[4]

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[4] Appellants contend that the University applies the policy in a manner that suggests the University is pursuing an interest in proportional representation *per se*, rather than a compelling interest in the educational benefits of diversity. Appellants' Br. 35-36. The district court below questioned this characterization of the policy, see R.E. 47 ("Plaintiffs cite no evidence to show racial groups other than African-Americans and Hispanics are *excluded* from benefitting from UT's consideration of race in admissions.") (internal quotation marks omitted). And there is no evidence in the record establishing that the University is pursuing

(continued...)

II. The University's Policy Is Narrowly Tailored To Serve Its Compelling Interest

The district court correctly concluded that the University's admissions policy is narrowly tailored to serve the University's compelling interest in the educational benefits of diversity. Far from acting as an impermissible quota, the policy utilizes race in a limited manner, as one factor among many that the University deems important to diversity in its classrooms. And it treats race not as a matter that defines each student, but as a factor that can place in context, and thus offer a deeper understanding of, a person's experiences and accomplishments and her potential to contribute to the university community.

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[4](...continued)
proportional representation to the State's current population within each class of students. Indeed, as the district court also noted, if this is the University's goal, it is "doing a particularly bad job of it, since Hispanic enrollment is less than two-thirds of the Hispanic percentage of Texas' population and African-American enrollment is only half of the African-American percentage of Texas' population, whereas Asian-American enrollment is more than five times the Asian-American percentage of Texas' population." R.E. 48 n.11.

In any event, there is a distinct difference between a University that makes admissions decisions to ensure proportional representation and one that takes account of general population statistics to determine whether race should be a "factor of a factor of a factor of a factor" in a policy that only applies to a fraction of the students admitted to the University. At most, the plaintiffs' assertion might raise a disputed issue of fact for resolution at trial; these abstract and factually untested claims are not amenable for summary judgment at this juncture.

A. In *Grutter*, the Court explained that a university admissions program that considers race is narrowly tailored if it "affords * * * individualized consideration to applicants of all races." 539 U.S. at 337. The program "cannot use a quota system – it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Id.* at 334 (quoting *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 315 (1978)). The policy must ensure that race is not the "defining feature" of any student's application by considering race in "a flexible, nonmechanical way" that allows the consideration of "all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid*. In line with this understanding, the *Grutter* Court held, a university admissions policy is more likely to be narrowly tailored if it contemplates that a range of factors beyond race – such as the ability to speak several languages, or a history of overcoming personal adversity – "may be considered valuable contributions to student body diversity," and it gives weight to these non-race factors. *Id.* at 338. The use of race must also be "limited in time," a requirement that may be met by incorporating periodic reviews to determine whether consideration of race is still necessary. *Id.* at 342. Finally, the university must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.* at 338.

B. The undisputed evidence demonstrates that the University's policy is narrowly tailored under *Grutter*. First, race plays a limited role in the admissions process and never functions as an independent criterion. For the vast majority of the freshman class – those admitted as Top Ten Percent applicants or on the basis of Academic Index – race is not a factor in admissions at all. For the remainder of the class, the inquiry into race is entirely contextual in nature: The question is not whether an individual belongs to a racial group, but rather how an individual's membership in any group may provide deeper understanding of the person's record and experiences, as well as the contribution she can make to the school. R.E. 68. In the University's "larger holistic review," "[a]n applicant's race, standing alone, is neither a benefit nor detriment to any applicant." Walker Aff. ¶ 15; R.E. 81. That is because an applicant's race is viewed not as a factor with independent significance, but instead as a factor that provides context to an individual's experiences and achievements: "[W]hen a file is being evaluated, whether that file is of a minority applicant or a majority applicant, the context of that student's cultural awareness, racial experiences, the context in which they may have placed themselves in or out of their * * * own environment[,] could benefit any student." R.E. 81.

Thus, while "[a]dding race to the other factors that [the University] consider[s] * * * increases the chance that an underrepresented minority student will be sufficiently meritorious and diverse in all the ways that [the University] consider[s] educationally relevant," Walker Aff. ¶ 16, the University's policy emphasizes not race by itself, but race in the context of an individual application and the potential for diversity that an applicant might bring to the school, R.E. 81-82. Far from a "classification that tells each student he or she is to be defined by race," *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment), the University's policy treats race as a factor that may assist in providing a fuller understanding of an individual applicant and what she can offer to the school. See *Grutter*, 539 U.S. at 337.

Second, the policy is "flexible enough" to ensure that race is not the dispositive feature of any individual's application. *Grutter*, 539 U.S. at 337. Like the policy at issue in *Grutter*, race does not provide a basis for "automatic acceptance" or an automatic bump in the University's admissions matrix. No element of an application, including race, is given determinative weight at the outset or at any other stage of the University's consideration of the application; the inquiry considers a multiplicity of factors in conjunction with each other in the

manner appropriate for an individual application. "No one factor can get a student admitted, and no one factor will get a student denied. * * * Race counts, everything else counts." R.E. 92; see *Grutter*, 539 U.S. at 338-339. At bottom, as the district court concluded, race is simply "a factor of a factor of a factor of a factor." R.E. 49 (footnotes and citations omitted).

Accordingly, the policy is not anything like an impermissible quota. Individuals of different races are not insulated from competing with individuals of other races; rather, all applicants are given individualized consideration in the context of the entire applicant pool. *Grutter*, 539 U.S. at 334. In addition, the University does not maintain numerical goals for the admission of various minority groups, or give race "any more or less weight" based on admission decisions previously made. *Id.* at 336. These features of the University policy make it quite different from the wooden classifications that the Supreme Court has criticized in the past. *E.g.*, *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.) (rejecting a policy that would "insulate the individual from comparison with all other candidates for the available seats"). Every applicant to the University may compete for every available seat, and the University does not make individual admissions decisions in the shadow of strict numeric targets.

Third, the University's policy recognizes the ways in which a "broad range of qualities and experiences" unrelated to race "may be considered valuable contributions to student body diversity." *Grutter*, 539 U.S. at 338. Aside from race, the University considers numerous other aspects of a student's background and the attributes that he or she will bring to the campus, including family socio-economic status; language spoken at home; family responsibilities; and the extent to which applicants "have maximized the opportunities presented by their circumstances and made a meaningful difference, whether through volunteering or other community involvement, family commitments, or working." Def. Statement of Facts ¶ 47; see also Walker Aff. ¶ 14. The University gives substantial weight to these factors, and with respect to any particular application, they can play a significant role in admission. R.E. 83; see *Grutter*, 539 U.S. at 338-339. And like the admissions program in *Grutter*, the University's policy gives applicants "the opportunity to highlight their own potential diversity contributions through the submission of" personal essays, *Grutter*, 538 U.S. at 338, including an optional essay directed toward the "ways in which you might contribute to an institution committed to creating a diverse learning environment." Def. Statement of Facts ¶ 34; see ¶¶ 30-33.

Fourth, the policy is "limited in time." *Grutter*, 539 U.S. at 342. It provides for a review every five years in order to determine whether consideration of race is still necessary. The first such review was scheduled to begin in late 2009. Def. Statement of Facts ¶ 110. The district court correctly held that such a review satisfies *Grutter*'s prescription that race-conscious policies not be perpetual in nature. R.E. 52.

Finally, before adopting its policy, the University gave "serious, good-faith consideration [to] workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. Those alternatives include the Top Ten Percent plan as well as outreach and scholarship efforts – all measures that the University has used over the past decade, and that it continues to use. *Proposal* 30-31. Although plaintiffs argue that these measures were in themselves sufficient to obtain diversity, Appellants' Br. 55-56, that is simply a reiteration of their contentions that the University did not have a compelling interest because it had already attained what they believe to be a critical mass. Based on their extensive study and deliberation, the professional educators at the University made a different, and constitutionally permissible, choice. See *Grutter*, 534 U.S. at 328 (noting that "taking into account complex educational judgments in an area that lies primarily within the expertise of the university * * *

is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits").

After experiencing the lack of diversity in classrooms under the University's Top Ten Percent and other race-neutral measures, the University determined that it needed to supplement those programs with a flexible consideration of race in order to achieve its educational mission – to benefit all students, minority and nonminority alike. And that racial diversity policy was part of the University's broader commitment to diversity along other dimensions as well. Like the policy at issue in *Grutter*, the policy that the University implemented furthers the University's educational mission by permitting the University "to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the University." 539 U.S. at 340.

C. Plaintiffs also argue that the policy is not narrowly tailored because it has had only a "minimal effect" on minority enrollment. Appellants' Br. 51 (citing *Parents Involved*, 551 U.S. at 733-735). But that fact is irrelevant, except if it is to show that the harm plaintiffs allege is not substantial. *Grutter* did not suggest that a policy's effect must reach a certain magnitude to be permissible. As plaintiffs note, *Parents Involved* questioned the necessity of the school districts' use of rigid racial classifications in student assignments because they had a minimal overall

effect, which suggested that the benefit of such small changes was outweighed by the cost of classifying students solely based on their race, and that other race-neutral means might have been sufficient to achieve the districts' goals. 551 U.S. at 734. Here, in contrast, the University has implemented a "factor of a factor of a factor of a factor" policy that is designed to be used after the bulk of the freshman slots are given to Top Ten Percent applicants, and that considers the race of all applicants holistically and individually, as *Grutter* requires. It is therefore unsurprising, as plaintiffs point out, Appellants' Br. 53, that the individuals who may have been admitted based in part on consideration of their race constitute a small proportion of the entire freshman class. That is a byproduct of the care the University has taken in constructing the policy; but application of the policy continues to make a meaningful contribution to the University's goal of ensuring the educational benefits of diversity.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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