No. 09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABIGAIL FISHER,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
Western District of Texas, Austin Division

SUPPLEMENTAL BRIEF OF AMICI CURIAE THE BLACK STUDENT ALLIANCE AT THE UNIVERSITY OF TEXAS AT AUSTIN, THE BLACK EX-STUDENTS OF TEXAS, INC., AND THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Fisher v. University of Texas at Austin, No. 09-50822

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Those persons and attorneys listed by Appellant, Appellees, and other amici in their respective briefs.
2. NAACP Legal Defense & Educational Fund, Inc.
3. Black Student Alliance at the University of Texas Austin
4. Black Ex-Students of Texas, Inc.
5. Fulbright & Jaworski LLP
6. Sherrilyn Ifill
7. Christina Swarns
8. Joshua Civin
9. Damon T. Hewitt
10. Edward B. Adams, Jr.
11. Theodore Shaw

There are no parent corporations of the entities listed above; nor are there any publicly held companies that own 10 percent or more of their stock.

/s/ Joshua Civin

Dated: November 1, 2013 Joshua Civin

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INTERESTS OF AMICI

Amici are the Black Student Alliance at the University of Texas at Austin (BSA), the NAACP Legal Defense & Educational Fund, Inc. (LDF), and the Black Ex-Students of Texas, Inc. (BEST). Both the BSA and LDF have participated in this litigation from its inception and have presented oral argument to this Court. BEST joined them in the amicus brief they filed in the Supreme Court. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this amicus brief. No counsel for any party had a role in authoring this brief.

The BSA serves as the leadership voice for African-American students at the University of Texas at Austin [hereinafter UT or the University]. BSA members have a strong interest in preserving the University's efforts to promote diversity through the inclusion of race as one factor among many in UT's holistic review process. Although UT's campus is more inclusive than it has been in the past, many BSA members still experience racial isolation in their classes, extracurricular activities, and other informal settings across the campus.

BEST brings together UT alumni to assist in recruiting, retaining, and supporting African-American students at UT. Many BEST participants experienced significant racial isolation when they were UT students between 1997 and 2004 when the University did not consider race in admissions. All too often BEST participants were the only, or one of a very few, African-American students

in their classes. Some experienced overt incidents of racial hostility, which undermined their sense of belonging within the campus community and dampened cross-racial interactions. Accordingly, BEST participants aspire to help create an educational environment at the University in which African-American students no longer bear the crushing burden of tokenism and racial stereotypes, and where they no longer struggle to develop and define themselves as individuals on their own terms.

LDF is a non-profit legal organization that has worked for more than seven decades to dismantle racial segregation and ensure equal educational opportunity for all students. In numerous groundbreaking cases, LDF has represented African-American students and applicants, as parties and amici, seeking to expand access and opportunity—both at UT, *see, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and at other universities throughout the nation, *see, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *United States v. Fordice*, 505 U.S. 717 (1992).

SUMMARY OF THE ARGUMENT

Although the Supreme Court declined to resolve the merits of Abigail Fisher's challenge to UT's admissions policy, it substantially narrowed the constitutional issues that remain open for resolution. *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013). On remand, the key merits question is the last one identified in the Court's supplemental briefing order: "What workable alternatives to the use of race were available to the University that were not being deployed?" Amici agree with UT that there are *no* additional workable race-neutral alternatives beyond those that UT had already implemented in 1997-2004, and continues to use today, that would allow UT to make further progress, at tolerable administrative expense, toward fully achieving the educational benefits of diversity. UT Supp. Br. 31-35.

UT aggressively experimented with race-neutral measures in 1997-2004, when a ban on race-conscious admissions was in place as a result of this Court's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). UT expanded outreach and scholarships, and it took full advantage of a state law guaranteeing admission to all Texas residents ranked in the top of their high school graduating class. *See* Tex. Educ. Code § 51.803 (1997) (amended 1999, 2007 & 2009) [hereinafter the Top Ten Percent Plan]. It also instituted individualized review for applicants not admitted through the Top Ten Percent Plan. *See Fisher v. Univ. of Tex.*, 645 F.

Supp. 2d 587, 591 (W.D. Tex. 2009). That whole-file review included socio-economic status of applicants' families, extracurricular activities, community service, leadership qualities, and multiple other factors—but it did not consider race. *See* JA 347a-381a.[1]

Fisher challenges UT's conclusion that these facially race-neutral measures failed to achieve sufficient diversity, necessarily including a critical mass of underrepresented minority students. But that challenge is beyond the scope of this remand. The Supreme Court remanded for a careful inquiry into narrow tailoring, which assesses the *means* used to achieve the University's goals; the University's determination that it needed to make further progress beyond what it achieved in 1997-2004 is an educational judgment about *ends*, to which courts should defer under the separate "compelling interest" prong of strict scrutiny.

If the Court reaches this issue, the existing record amply supports an independent determination by this Court that UT can constitutionally pursue a more diverse student body than it assembled through race-neutral means in 1997-2004. For instance, UT enrolled an average of approximately 7,000 students in each freshman class during this period; yet, at most, there were only 309 African-American freshmen. At no point during this period did African Americans

[1] Record references cite to the Supreme Court Joint Appendix (JA) and the Supreme Court Supplemental Joint Appendix (SJA) because of their ready availability online at http://www.utexas.edu/vp/irla/Fisher-V-Texas.html. The briefs cited herein are also linked on that website.

constitute more than 4.5% of any first-year class. JA 127a. Moreover, as UT's review of its admissions policies revealed, the vast majority of undergraduate classes had zero or only one African-American or Latino students. *See* SJA 66a-150a.[2]

Assuming this issue is necessary to decide, however, this Court should not address it in the first instance; instead, it should remand the case to the District Court, which is best positioned to conduct the sort of fact-based "careful judicial inquiry" that narrow tailoring requires. *Fisher*, 133 S. Ct. at 2420. Amicus briefs submitted at prior stages of this case by LDF, BSA, and BEST—as well as others—point to a wealth of evidence that, if presented to the District Court, would corroborate UT's educational judgment that its efforts to fully obtain the educational benefits of diversity, through the robust use of race-neutral alternatives, were not successful during the post-*Hopwood*, pre-*Grutter* period.

Fisher further argues that the "infinitesimal impact" of UT's addition of race to its individualized review component beginning in 2005 "demonstrates that UT's pre-2005 race-neutral system would have worked about as well and, therefore, UT could have achieved its stated ends through nonracial means." Fisher Supp. Br. 35 (internal citations, quotation marks, and textual alterations omitted). While this

[2] While this brief focuses on the consequences of Fisher's arguments for African Americans, amici believe UT's consideration of race as one factor in its holistic review of all applicants, including other underrepresented minorities, is similarly constitutional.

issue is within the scope of the Supreme Court's remand, Fisher's conclusion is erroneous. As this Court has previously concluded, race-conscious individualized review is a meaningful supplement to the Top Ten Percent Plan. Not only has it increased overall African-American enrollment, but it also provides a flexible means to implement UT's goal of diversity *within* and *among* underrepresented minority groups, which enables students to be treated as individuals rather than as token representatives of a racial group. This is a key precondition for breaking down racial stereotypes and fostering the type of cross-racial understanding that can allow a university to achieve the educational benefits of diversity. UT's recognition that fully achieving those benefits requires some consideration of intra-racial diversity is entitled to deference. Indeed, it is fully consistent with the overriding constitutional requirement that race-conscious policies are sufficiently flexible to treat each applicant as an individual. *See Fisher*, 133 S. Ct. at 2420.

A remand also would be useful to resolve a threshold issue that may render it unnecessary to decide the constitutionality of UT's race-conscious admissions policy in this case. Fisher's standing to continue litigating is severely undermined by strong evidence that she would not have been admitted in Fall 2008, even if UT had not considered race at all in that admissions cycle. Although the existing record is sufficient for this Court to rule in favor of the University on this threshold issue and dispose of Fisher's case outright, considerations of judicial restraint

suggest that the District Court is better positioned to make this determination in the first instance, particularly given the factual dispute that Fisher alleges.

Finally, amici write separately to emphasize the appropriateness of this Court's prior conclusion that it was constitutionally permissible for UT to consider severe disparities between the racial makeup of the student body and the state's increasingly diverse population because they undermine UT's mission, as Texas's flagship university, which includes providing visibly open pathways to civic, political, and economic leadership for all students.

ARGUMENT

I. The narrow constitutional issue left open on remand is whether workable race-neutral alternatives could promote UT's compelling interest in the educational benefits of diversity about as well as race-conscious holistic review and at tolerable administrative expense.

The constitutional issue that the Supreme Court left unresolved is narrow. *See Fisher*, 133 S. Ct. at 2419-22.

As an initial matter, this case can no longer serve as a vehicle for undermining the well-established principle that universities have a compelling interest in pursuing "the educational benefits that flow from a diverse student body." *Id.* at 2417. The Supreme Court embraced "as given" its prior precedents on this issue. *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

Moreover, the Supreme Court agreed with this Court that, under those precedents, it was appropriate to defer to UT's educational judgment that its pursuit of the "goal of achieving the educational benefits of a more diverse student body" is "integral to its mission." *Id.* at 2417, 2419. Accordingly, this Court's holding in favor of UT on the "compelling interest" prong of strict-scrutiny review is the law of this case.

The Supreme Court's sole disagreement with this Court concerned its analysis of whether UT's race-conscious admissions policy was a narrowly tailored means to meet its compelling interest in the educational benefits of diversity. In the Supreme Court's view, this Court relied too heavily on UT's "assertion that its admissions process uses race in a permissible way without . . . giving close analysis to the evidence of how the process actually works in practice." *Id.* at 2421. Although the Supreme Court clarified that this "degree of deference" in the narrow-tailoring inquiry (in contrast to the compelling interest analysis) is "at odds with *Grutter*'s command," *id.* at 2420-21, it made clear that it was not heightening the legal standard beyond what is required by *Grutter*.

For the purposes of these remand proceedings, the focal point of the narrow-tailoring analysis is the workability of race-neutral alternatives. Applying its prior case law, the Supreme Court explained:

> The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of

> diversity. If "a non-racial approach . . . could promote the substantial interest about as well and at tolerable administrative expense," then the university may not consider race.

Id. at 2420 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (additional citation and quotation marks omitted).

In so holding, the Supreme Court stressed that the University's educational judgment is still relevant to narrow tailoring. The Court also emphasized that "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes." *Id.* And it reiterated *Grutter*'s admonition that "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative." *Id*. (quoting *Grutter*, 539 U.S. at 339-340) (emphasis in *Fisher*).

Because the only open question concerns narrow tailoring, this Court should rebuff any efforts by Fisher and her amici to open inquiries beyond that mandated by the Supreme Court—especially whether UT had a compelling interest in continuing to make progress toward fully achieving the educational benefits of diversity beyond the results of its race-neutral efforts in 1997-2004. The *means* used to achieve a compelling interest are the focus of narrow-tailoring, not the *end* itself.

Significantly, the Supreme Court declined to adopt Fisher's arguments, revived in her supplemental brief, that universities should be compelled to satisfy a

"strong basis in evidence" standard to demonstrate the need for promoting diversity. Fisher Supp. Br. 25. For reasons previously articulated by this Court, that standard, derived from the context of reviewing laws to remedy past or present discrimination, is inapplicable to the diversity interest here. *Fisher*, 631 F.3d 213, 233-34 (5th Cir. 2011); UT Supp. Br. 25-26.

II. The existing record provides a firm basis for this Court to reaffirm summary judgment for UT, but a remand may be prudent.

A. As a threshold matter, Fisher's continued pursuit of her claim is no longer viable.

The record firmly establishes that Fisher would not have been admitted to the Fall 2008 freshman class, even if UT had utilized an entirely race-neutral admissions policy. As the University explains, *see* UT Supp. Br. 6-19, this fact is fatal to Fisher's claim under *Texas v. Lesage*, 528 U.S. 18 (1999) (per curiam).

In UT's highly competitive individualized review for applicants who, like Fisher, do not qualify under the Top Ten Percent Plan, admission is determined based upon an Academic Index (AI) and a Personal Achievement Index (PAI). JA 369a-375a. Grades and standardized test scores are the sole factors in the AI; race is considered in a contextualized fashion only in the PAI. *Id.* Fisher's claim rests upon the false assumption that her PAI was lower because of her race—a contention the University and amici dispute. *See* UT Supp. Br. 11. Yet, the record reveals that even if Fisher had a "perfect" PAI, she still would have failed to earn

admission in Fall 2008. Not a single Fall 2008 applicant with Fisher's AI of 3.1 out of 6 possible points was admitted to the particular UT programs to which she applied, even those with the highest possible PAI. JA 415a-16a.

Under *Lesage*, these facts are sufficient to affirm summary judgment in favor of the University. *Lesage* is variously characterized as limiting either standing or liability for constitutional clams. *See* UT Supp. Br. 8-9 (collecting cases). Either way, *Lesage* prohibits challenges to affirmative action policies where the applicant would have been denied admission regardless of her race, and her claim is limited to damages, rather than forward-looking injunctive or class-wide relief. 528 U.S. at 20-21. At this point, Fisher can seek only money damages because she did not assert class claims, and her graduation from Louisiana State University in May 2012—after this Court's prior decision—mooted the forward-looking injunctive relief that she pressed up to that point. Thus, *Lesage* bars continued litigation.

If the Court concludes that the record on this threshold issue is inconclusive—which it is not—it should remand to the District Court for further fact-development or fact-finding as appropriate. In either case, the extant record precludes summary judgment for Fisher. Her unsubstantiated allegations, *see* Fisher Supp. Br. 15-16, should not trump UT's credible evidence; at most her contentions create a genuine issue of material fact that would require remand to the

District Court for resolution.

Remand to the District Court would be proper for another reason. Fisher complains that anything short of immediate resolution "would subject additional UT admissions classes to constitutional infringement." Fisher Supp. Br. 3. Yet, as this Court has recognized, Fisher did not—and could not—independently challenge any admissions cycle after her application was denied in 2008. *Fisher*, 631 F.3d at 217. It defies principles of judicial restraint to address questions of significant constitutional dimension without assurance that the plaintiff has a sufficiently concrete interest to dispute the continued operation of a policy that will have tangible educational benefits for thousands of current and future students. *Cf. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) ("[I]t is not enough that a party invoking the power of the court have a keen interest in the issue."). Under these circumstances, Fisher should not be permitted to take short-cuts to compel judicial review—much less appellate review—of a constitutional issue that ultimately may not provide her with any tangible relief. *Cf. id*. at 2661 (resisting the "natural urge to proceed directly to the merits of [an] important dispute and to settle it for the sake of convenience and efficiency") (citation and internal quotation marks omitted; alteration in original).

B. A wealth of additional evidence confirms that UT's race-conscious admissions are narrowly tailored.

Because it is beyond the scope of this remand, this Court need not address

Fisher's contention that UT's adoption of race-conscious admissions beginning in 2005 was unnecessary because it had already achieved a critical mass of underrepresented minority students during the post-*Hopwood*, pre-*Grutter* years. Fisher Supp. Br. 22-25. If this Court nonetheless decides to reach this issue, the existing record contains plentiful evidence for this Court to affirm summary judgment in UT's favor. *See* UT Supp. Br. 35.

But amici respectfully request that, if the Court reaches this issue, it should exercise its discretion and remand this matter to the District Court to conduct, in the first instance, the "careful judicial inquiry" that narrow tailoring requires. *Fisher*, 133 S. Ct. at 2420. Modest, additional fact development should dispel any doubt about the deleterious impact of the substantial racial isolation that was an unavoidable aspect of campus life for those who attended UT in the post-*Hopwood*, pre-*Grutter* period (1997-2004). *Cf. Fisher*, 133 S. Ct. at 2421 ("Unlike *Grutter*, which was decided after trial, this case arises from cross-motions for summary judgment.").

In prior briefs, BSA, LDF and BEST have drawn attention to reports of a number of racially charged incidents that occurred on campus during the same 2003-04 period when UT was undergoing a thorough review of its admissions policies. For instance, a complaint was lodged alleging racial profiling by campus police; one majority-white fraternity was suspended and another was sanctioned

for sponsoring parties where attendees dressed in "blackface" and derided African Americans; and vandals egged the campus's statue of Martin Luther King, Jr. on the national holiday celebrating his birth. *See* Todd Ackerman, *UT Task Force Calls for Greater Racial Sensitivity*, Hous. Chron., Jan. 21, 2004, at A17.[3] It is difficult to underestimate the pronounced chilling effect that such incidents may have on minority students' willingness to apply, matriculate, and fully engage as active stakeholders in the campus community.

These incidents were not the first, or the last, episodes of racial hostility on campus; but in combination, they sparked student protests and prompted the University to convene a Task Force on Racial Respect and Fairness in March 2003. *Id.*. After ten months of study and meetings, the Task Force issued a report in January 2004, while the University's post-*Grutter* review of its admissions policies was still pending. *See* Univ. of Tex. at Austin, *Report of the Task Force on Racial Respect and Fairness*, at 3 (2004) [hereinafter the Task Force Report]. The Task Force proposed a variety of interventions, recommending that UT:

- "emphasize often and unequivocally the University's commitment

[3] At the time, this statue was the only monument commemorating a person of color on a campus that had several statues of Confederate generals, and even a building named after a Ku Klux Klan leader. That building was subsequently renamed after significant advocacy. *See* Thomas D. Russell, *"Keep Negroes Out of Most Classes Where There Are a Large Number of Girls": The Unseen Power of the Ku Klux Klan and Standardized Testing at the University of Texas, 1899-1999*, 52 S. Tex. L. Rev. 1, 35 (2010); Destinee Hodge, *Simkins Hall Renamed in Unanimous Decision*, Daily Texan, July 15, 2010.

to serve all Texas residents, particularly those who have been historically excluded from higher education in the state of Texas," *id.* at 6;

- "[i]nstitute a photo roster privacy policy that would protect students of color who are the only members of their racial/ethnic group in classes" and permit them to "request that their photo not be included" in order to avoid being "repeatedly called on by well-intentioned instructors hoping to be inclusive often resulting in discomfort for the students who felt as if they were under a microscope, *id*. at 12, or treated as "spokespersons for their race"—a concern underscored bythe Supreme Court just months earlier in *Grutter*, 539 U.S. at 319; and

- increase the recruitment, retention, and advancement of underrepresented minority students, Task Force Report at 5, 15-17.

In his response to the Task Force Report, Larry Faulkner, then President of UT, recognized the connection between improving campus climate and achieving a critical mass of underrepresented minority students. Univ. of Tex. at Austin, Office of the President, *Comments on the Report of the Task Force on Racial Respect and Fairness* ¶ 41, May 10, 2004. Reinforcing the pressing need to implement these proposals, additional incidents of racial hostility occurred in the months after the Task Force issued its report, including further vandalism targeting UT's Martin Luther King, Jr. statue. *See* David Kassabian, *Officials Talk Camera Upgrades: New Technology Would Detect Suspicious Acts Around MLK Statue*, Daily Texan, Aug. 27, 2004.

This series of events belies Fisher's claim that UT rushed to judgment when President Faulkner issued a statement, on the day *Grutter* was decided, expressing

his view that race-conscious admissions were a necessary supplement to race-neutral alternatives. *Cf.* Fisher Supp. Br. 26. To the contrary, his suggestion was grounded in the context of the Task Force's proceedings, as well as UT's prior, multi-year experience with race-neutral admissions after *Hopwood*.

On remand, the District Court could take into account the extensive array of contemporaneous evidence regarding the Task Force, as well as the incidents of racial hostility that prompted it, as relevant "[c]ontext" that "matters," *Grutter*, 539 U.S. at 327, for the University's decision to consider race as a factor in its holistic admissions program. Alternatively, the District Court (or this Court if it declines to remand) could take judicial notice of this material. *See, e.g.*, *id.* at 330-31 (relying on material presented by amici); *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) ("Some amicus briefs collect background or factual references that merit judicial notice.") (citation omitted); *cf. Tennessee v. Lane*, 541 U.S. 509, 524-25 (2004) (taking into account the historical "backdrop" for challenged government action).

Furthermore, BEST participants and former BSA members could provide useful testimony regarding the campus climate during the post-*Hopwood*, pre-*Grutter* years. African Americans and other underrepresented minority students have a particular stake in the outcome that is not always fully aired when unsuccessful applicants square off against university officials in affirmative-action

litigation. *See* Emma Coleman Jones (Jordan), *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 Harv. C.R.-C.L.L. Rev. 31, 33 n.9 (1979) (describing the failure by the California Supreme Court to act on a motion by representatives of African-American students to present evidence); *Fisher*, 645 F. Supp. 2d at 590 (noting that motions to intervene by amici and others were denied in this case). Moreover, because all students benefit from a diverse student environment, white students and others also may have important contributions to make to this inquiry.

As the Supreme Court has recognized, testimony about "personal experiences" can supplement statistical evidence—such as the admissions data in the existing record—by bringing "the cold numbers convincingly to life." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The potency of such anecdotes is well-illustrated by an amicus brief filed in the Supreme Court by a racially diverse group of former UT student body presidents, many of whom attended UT during the 1997-2004 period. *See* S. Ct. Amicus Brief for Former UT Student Body Presidents.

In addition to contemporaneous UT-specific evidence, UT's educational judgment is supported by research finding that more diverse colleges typically

have more racially inclusive and less hostile campus climates.[4] And ample research regarding schools across the nation further demonstrates the unworkability of the sorts of race-neutral alternatives proposed by Fisher and her amici. *See, e.g.*, S. Ct. Amicus Br. for 444 Am. Soc. Sci. Researchers. Again, this Court could take judicial notice of such research, or it could remand for development of evidence, including expert testimony, on this point.

III. Consideration of race in UT's holistic admissions process is vital to create a broadly diverse student body.

Regardless of whether this Court remands, it should reject Fisher's contention that UT's race-conscious, individualized review cannot be narrowly tailored because it has "had an infinitesimal impact" on underrepresented minority enrollment. Fisher Supp. Br. 35 (quoting *Fisher*, 631 F.3d at 263 (Garza, J.)). While this component of UT's admissions program is "modest" in its approach, *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting), it has meaningfully advanced the educational benefits of diversity that UT seeks to obtain.

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[4] *See, e.g.*, Rebecca L. Stotzer & Emily Hossellman, *Hate Crimes on Campus: Racial/Ethnic Diversity and Campus Safety*, 27 J. of Interpersonal Violence 644, 654-55 (2012) (finding that reported hate crimes are lower on campuses with higher percentages of African-American and Latino students); Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1199 (2010) ("Underrepresented minority students in states that permit affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states.").

A. Race-conscious holistic review meaningfully supplements the Top Ten Percent Plan.

UT's "consideration of race in admissions does increase the level of minority enrollment." *Fisher*, 645 F. Supp. 2d at 610 n.14. During UT's multi-year experiment solely with race-neutral admissions (1997-2004), the percentage of Texas high school students *not* admitted through the Top Ten Percent Plan who were African Americans stagnated at 3-4%. SJA 157a. But after UT reintroduced race as a factor in its individualized review, African-American enrollment as a percentage of non-Top Ten Percent enrollees increased between 2005 and 2008, even as the slots available for such students declined due to the popularity of the Top Ten Percent Plan. *Id.* Overall, in the first four entering classes after UT's 2004 decision to use race-conscious admissions, 435 out of 1,544 African-American students—a full 28%—were admitted through the holistic admissions program. *See id.* at 156a-157a.

Moreover, comparing the incoming freshman class for the 2004-05 school year (the last class admitted exclusively through race-neutral admissions) with the incoming freshman class for the 2008-09 year (the class to which Fisher applied), total African-American enrollment increased by 21.4%. *Id.* While at least some of this increase was through Top Ten Percent admissions, UT's adoption of race-conscious admissions likely affected matriculation rates among eligible African Americans by signaling that the University would be a more welcoming

environment. *Cf.* Kimberly A. Griffin et al., *The Influence of Campus Racial Climate on Diversity in Graduate Education*, 35 Rev. Higher Educ. 535, 557 (2012) ("Broad efforts to increase the presence of people of color across campus appear to influence favorably prospective students' perceptions of the institution's commitment to diversity and signal an appreciation of the voices, needs, and experiences of individuals from a variety of backgrounds.").

These raw numbers only begin to tell the story. Research confirms that an increase in the enrollment of African-American students as small as "a one percentage point increase in the share of [ ]students [of color] in the entering freshman cohort is associated with a 3 or 4 percent increase in the odds of interacting with students of different racial backgrounds." Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 199 (2009); *see also* Sylvia Hurtado, *Benefits and Barriers: Racial Dynamics of the Undergraduate Experience*, *in The Next Twenty-Five Years: Affirmative Action in Higher Education in the United States and South Africa* 196, 197 (David L. Featherman et al. eds., 2010) (finding that "white students from predominately white environments who attended universities with relatively higher percentages of students of color tended to report frequent positive cross-race interactions").

Even if this Court were to agree with Fisher that the numerical impact of

race-conscious admissions has been limited, that conclusion would not support her contention that UT flunks narrow-tailoring. While UT has taken strides to promote a more welcoming and inclusive campus climate, it concedes that it has not yet achieved a critical mass of underrepresented minorities. UT Supp. Br. 49. African-American students are still represented at mere token levels in too many classrooms and other settings on campus. Moreover, racial hostility directed towards African-American students has not entirely abated.[5]

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[5] *See, e.g.*, Channing Holman, *Taking Strides to Make the World Change*, Daily Texan, May 1, 2012 ("I was automatically labeled as an athlete because I was black. I have been the only black in a class of 100 . . . I've been overlooked during office hours . . . and I've been called "the n-word" [racial epithet] while walking on . . . campus."); Jared Dawson, *Another Face of Affirmative Action*, Horn, Oct. 9, 2012 ("Everything isn't perfect here, of course. I can still walk around campus all day and never see someone who looks like me. I can still be crossing the street and have someone drive by and call out to me using a racist slur—unfortunately it has happened."); Ahsika Sanders, *Racial Conflicts Tarnish History of Roundup*, Daily Texan, Apr. 13, 2011 (connecting a recent incident of hostility to the history of racial tensions between fraternity members and African-American students at annual spring fraternity parties); Ralph K.M. Haurwitz, *UT Student Paper Issues Apology for Cartoon*, Austin Am.-Statesman, Mar. 28, 2012 (discussing apology issued by Daily Texan for racialized editorial cartoon about the fatal shooting of Trayvon Martin); Andrew Freidenthal, *Shameful Graffiti Paints Larger Picture*, Daily Texan, Sept. 22, 2008 (reporting on a drawing posted in a campus bathroom depicting President Obama lynched and hanging from a tree).

Even after the Supreme Court's remand, allegations of "bleach-bombings" and an "affirmative action bake sale" have rocked the UT campus. *See, e.g.*, Alberto Long, *Bleach or No Bleach, Balloon Attacks in West Campus Cause Controversy*, Daily Texan, Sept. 14, 2013 (detailing reports that minority students were targeted by balloons, allegedly filled with bleach, thrown from upper floors of student apartment buildings); *see also* Kolten Parker, *'Affirmative Action Bake Sale' Hits Sour Note with University of Texas Officials*, Hous. Chron., Oct. 3, 2013

In the face of these challenges, BSA members and other current African-American students, along with alumni participants in BEST, are committed to improving the campus community. Amici firmly believe that—consistent with *Grutter* and *Fisher*—UT can and should do *more*, not less, to ensure that all students fully attain the educational benefits of diversity.[6]

B. Race-conscious holistic review permits consideration of diversity *within* and *among* underrepresented racial minorities.

Fisher's challenge to the efficacy of UT's race-conscious review is flawed for a more fundamental reason. Her narrow focus on the bottom-line numeric impact on minority enrollment, *see, e.g.*, Fisher Supp. Br. 23, inappropriately treats all minority students as fungible. In addition to creating an inappropriate white vs. non-white binary, *see Parents Involved in Community Schools v. Seattle School*

(describing "affirmative action bake sale" that one university official characterized as "inflammatory and demeaning" and "creat[ing] an environment of exclusion and disrespect among . . . students, faculty and staff.").

[6] Fisher's continued reliance on *Parents Involved* is inapposite. *Cf.* Fisher Supp. Br. 33-34. Although *Parents Involved* questioned the necessity of a K-12 student assignment plan that had minimal statistical impact, the Supreme Court noted that this plan involved rigid binary racial classifications that could be "determinative standing alone." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 723 (2007); *Fisher*, 645 F. Supp. 2d at 610. In *Parents Involved*, the Court distinguished the type of individualized review, at issue in *Grutter* and here, where race is considered "as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'" 551 U.S. at 723 (quoting *Grutter*, 539 U.S. at 330); *see also id.* at 793 (Kennedy, J., concurring in part and concurring in the judgment) (distinguishing Seattle's "rigid criteria" from the University of Michigan Law School's holistic review).

District No. 1, 551 U.S. 701, 786 (2007), Fisher fails to acknowledge that constitutionally sound, race-conscious admissions policies "must be sensitive to important distinctions *within* these broad groups" of students of different races, including underrepresented Latino and African-American students. *Fisher*, 631 F.3d at 245 (emphasis added). In past cases, the Supreme Court criticized Texas for ignoring the fact that Latino populations in different parts of the state have "divergent needs and interests." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006). Similarly, Justice Powell recognized in *Bakke* that university admissions could consider "the variety of points of view, backgrounds and experiences of blacks in the United States." 438 U.S. at 323 (appendix to opinion of Powell, J.).

The University's holistic admissions process is designed to provide the flexibility to admit exceptional students who bring a set of talents and leadership skills that are important to realizing the benefits of diversity, even if they are not in the top ten percent of their high school class. For example, one current African-American UT student who was admitted through individualized review—and is now thriving as a chemistry major—attended a small high school in Tyler, Texas, where she "was a member of the debate team and student government, played five sports, won medals in statewide track competitions and received academic honors." Jennifer Renee Johnson, *Sunday Dialogue, Using Race in Admissions*,

N.Y. Times, Oct. 6, 2012. "As the sixth-best student in a class of 45," however, she "just missed out" on the cut-off for the Top Ten Percent Plan. *Id.*

Students admitted through the holistic review process contribute to the vibrancy and diversity of the UT community. For instance, students who come from integrated high schools and neighborhoods are often particularly successful in bridging racial barriers and navigating complex environments. *See* UT Supp. Br. 48. The Top Ten Percent Plan may overlook such applicants, especially insofar as it draws minority students primarily from predominantly segregated schools and neighborhoods.

Fisher mocks UT's concept of diversity within diversity, alleging that UT is simply seeking the particular type of students it prefers, especially affluent ones from integrated, suburban schools. Fisher Supp. Br. 47-48. Nothing could be further from the truth. UT has engaged in aggressive efforts to recruit students of all races from disadvantaged socio-economic backgrounds, and several variables in UT's holistic review take into account socio-economic status. JA 112a-13a, 147a-48a. Indeed, individualized review permits admissions officers to recognize applicants who need to work part-time or care for a relative and, thus, struggle to match the class rank of wealthier students without these time commitments. *See* S. Ct. Amicus Br. for Ass'n of Am. Law Schs. 29-33. UT's admissions process does not include a preference for students from particular backgrounds, racial or

otherwise; instead, it promotes diversity by using individualized holistic review to admit students with multiple different backgrounds.

Fisher's proposed race-neutral approaches might not erode racial diversity among Top Ten Percent Plan admittees, but they would certainly limit racial diversity among holistic review admissions—with significant adverse consequences for UT's educational mission. It is especially critical for UT to ensure meaningful representation of African Americans among these non-Top Ten Percent students, as well as among Top Ten Percent students. The multi-faceted holistic admissions process is designed to ensure certain students are not overlooked—applicants such as budding leaders who divert time and energy from studying to spearhead extracurricular activities or civic activism; intellectually adventurous students who enroll in demanding classes outside their comfort zone rather than playing it safe to preserve their class rank; prodigies who achieve excellence as Olympic medalists, novelists, or backyard entrepreneurs but have comparatively less academic success overall; or late bloomers who mature into their academic potential over time. *See id.* If this group of admitted students contained few African American or Latino students, racial stereotypes would be reinforced rather than diminished.

Of course, consideration of race as one factor among many in UT's holistic review process may also benefit students who are not underrepresented minorities.

Fisher, 631 F.3d at 236. The holistic admissions process allows UT to decide, for instance, that a non-Top Ten Percent "white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective." *Id.* Such individuals—along with African Americans and Latinos who are, for example, talented debaters or musicians—are precisely the type of students who can help the University promote its goals of increasing cross-racial understanding, breaking down racial stereotypes and, ultimately, creating an educational environment where students feel free to develop their individuality. *Cf.* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 360 (2002) ("Diversity enables students to perceive differences both within groups and between groups. . . .").

Requiring UT to exclude consideration of race from its holistic review would force it "to become a much different institution and sacrifice a vital component of its educational mission." *Grutter*, 539 U.S. at 340; *see Fisher*, 133 S. Ct. at 2434 n.3 (Ginsburg, J., dissenting) (noting that the Court did not call into question this aspect of *Grutter*). As this Court previously recognized, percentage plans, by themselves,

> may be a race-neutral means of increasing minority enrollment [but] they are not a workable alternative—at least in a constitutionally significant sense—because "they 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."

Fisher, 631 F.3d at 239 (quoting *Grutter*, 539 U.S. at 340); UT Supp. Br. 31-34. This is not a "tolerable administrative expense" that any university should be compelled to bear. *Fisher*, 133 S. Ct. at 2420 (internal citations and quotation marks omitted). Thus, while the Top Ten Percent Plan did achieve some progress, it should not limit UT's ability to do more to expand opportunities for students of all races.

IV. Open paths to leadership and opportunity are mission-critical for UT.

As part of its justification for considering race in its holistic review process, UT expressed concern that the "*significant differences* between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." SJA 24a (emphasis added). This legitimate concern does not suggest—as Fisher claims—that UT's pursuit of critical mass was designed to achieve "demographic parity." Fisher Supp. Br. 42. At UT, as this Court previously recognized, "[t]he need for a state's leading educational institution to foster civic engagement and maintain visibly open paths to leadership . . . requires a degree of attention to the surrounding community." *Fisher*, 631 F.3d at 237. Indeed, "[a] university presenting itself as open to all may be challenged when the state's minority population grows steadily but minority enrollment does not," as has been the case

in Texas over the past decade. *Id*.

Opening pathways to leadership and opportunity is particularly critical for African-American students because they were excluded from UT for much of its history—first by law and then in effect. *See Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994) ("Discrimination against blacks in the state system of higher education is well documented in history books, case law, and the State's legislative history."), *rev'd on other grounds*, 78 F.3d 932; *Sweatt v. Painter*, 339 U.S. 629, 634 (1950); *see generally* Dwonna Goldstone, *Integrating the 40 Acres: The Fifty—Year Struggle for Racial Equality at the University of Texas* (2006) (charting halting progress towards integration from *Sweatt* through *Hopwood*). As UT candidly concedes, it is "painfully aware" that "vestiges of *de jure* segregation" have persisted in the decades after this Court's decision in *Sweatt*. UT S. Ct. Br. 4 (citing SJA 14a and *Sweatt*, 339 U.S. 629); UT Supp. Br. 31.[7]

This history has a continuing corrosive impact on the way in which African-American students and their families perceive the University today, as BSA and BEST participants can attest. Accordingly, UT has a strong imperative "to go beyond present achievements, however significant, and to recognize and confront

[7] After the Supreme Court compelled UT Austin to open its law school to African Americans, change occurred slowly. Beginning in the 1970s, the federal government undertook a court-ordered investigation and found that Texas had failed to eliminate vestiges of its formerly segregated higher education system. *See Hopwood*, 861 F. Supp. at 555-57. To date, the federal government has yet to announce that Texas has satisfied its federal civil rights law obligations.

the flaws and injustices that remain" in order to ensure "that opportunity is not denied on account of race." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment).

CONCLUSION

For the reasons stated above, amici urge this Court to either reaffirm summary judgment in favor of UT or remand for the District Court to address the remaining open issues in the first instance.

Respectfully submitted,

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November 1, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **6,943** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word 2010 using Times New Roman font in the text and footnotes.

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Dated: November 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2013, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of the Court on the ECF system and transmitted to counsel registered to receive electronic service. I also caused true and correct copies of the foregoing to be delivered via FedEx next business day delivery and email to the following counsel of record not registered to receive electronic service:

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