

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

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**BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR  
MINORITY AFFAIRS AT TEXAS A&M, HISPANIC  
BUSINESS STUDENTS ASSOCIATION AT THE  
UNIVERSITY OF HOUSTON, SOCIETY OF HISPANIC  
PROFESSIONAL ENGINEERS AT THE UNIVERSITY OF  
TEXAS-AUSTIN, UNIVERSITY LEADERSHIP  
INITIATIVE, AND TEXAS COLLEGE STUDENTS FOR  
DIVERSITY ALEJANDRA AGUILAR, *ET AL.***

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## INTEREST OF AMICI CURIAE

The student *Amici* represented here are Latino and Latina students who have attended, are attending, or may attend colleges and universities in Texas and other Texas students who know that a critical mass of Latino students substantially enhances their educational experience. Each of the represented student organizations is an advocate for Texas students of color, and particularly Latino and Latina students, in colleges and universities around the state.

*Amici* have a strong interest in this dispute because their educational environment and the quality of their learning experiences are significantly affected by the diversity of the student body at the University. As students and student organizations in Texas, *Amici* know firsthand the benefits of diverse classrooms for the development of critical thinking and leadership skills. *Amici* students are a mix of Top Ten Percent admits and students admitted at the holistic evaluation stage of the admissions process. Regardless of the specific path that led each individual student to higher education, all *Amici* have benefited from the rich learning environment that diversity can provide and many have suffered the isolation that lack of diversity can bring.<sup>1</sup>

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<sup>1</sup> No counsel for a party authored this brief in whole or in part and none of the parties or their counsel, nor any other person or entity other than *amici*, their members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

The blended admissions process used by the University of Texas was designed after careful study and analysis to admit a group of individual students who will ensure a rich and effective educational environment. Both the Top Ten Percent policy and the holistic, individualized review conducted to fill the remaining seats at the University serve essential educational goals. As students and former students at colleges and universities around Texas, *amici* have seen firsthand the potential successes of this blended admissions policy. Both parts of the University's blended approach to admissions are essential to its mission to serve the citizens and students of Texas as a flagship institution of higher education and to educate future leaders of this diverse state.

The inclusion of race as one factor in the holistic evaluation is not only legally permissible but also important for admitting a well-qualified student body that brings the broadest set of outlooks to the classroom. Considering race among many factors that may have shaped an individual applicant's perspective recognizes the social realities of the continuing impact of racial experiences in America today. Further, the inclusion of race as one of many factors to be considered in a holistic admissions process that gives each applicant individualized consideration has had a significant positive impact on the diversity of the University's entering classes.

Finally, this case is not an appropriate vehicle for the Court's reconsideration of a significant constitutional question. Petitioners have asked the Court to reverse a decision made less than a decade

ago. This fact itself raises serious concerns, and those concerns are exacerbated by the fact that Abigail Fisher's lawsuit does not present the constitutionally required "case" or "controversy." Ms. Fisher, who pursued this case as an individual and not on behalf of a class, is now a college graduate, and therefore no longer able to seek admission to the University of Texas. Moreover, Ms. Fisher never demonstrated that she was in fact harmed by the University's admissions policies in any cognizable way.

## ARGUMENT

### I. THE UNIVERSITY OF TEXAS EMPLOYS A COMPREHENSIVE ADMISSIONS PROCESS THAT CONSIDERS A BROAD RANGE OF INDIVIDUAL APPLICANT QUALITIES ESSENTIAL TO THE SCHOOL'S EDUCATIONAL MISSION

The blended admissions process used by the University of Texas ("UT" or "the University"), which combines the "Top Ten Percent" ("TTP") component with the non-Top Ten Percent ("non-TTP") admit group, was designed after careful study and analysis to achieve a mix of students that ensures a rich and effective educational environment. This blended admissions approach is precisely the type of innovation that this Court urged schools to experiment with just a decade ago. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). It is, moreover, an example of successful innovation in admissions policies.

Both TTP and non-TTP components of the blended process serve essential educational goals, and the inclusion of race as one factor in the non-TTP evaluation is not only legally permissible but also important for admitting a well-qualified student body that brings the broadest set of experiences and perspectives to the classroom. Both elements of UT's blended approach to admissions – combining a TTP policy with holistic, individualized review – are essential to its mission to serve the citizens of Texas as a flagship institution of higher education.

As students and former students at colleges and universities around Texas, *amici* have seen firsthand the potential successes of this blended admissions policy. *Amici's* experiences as college students in more and less diverse classrooms have taught them the significant benefits of a broadly diverse learning environment and the importance of seeking a critical mass of Latino students to give voice to the full range of experiences and perspectives that Texas's large Latino community brings to bear.

#### **A. The Top Ten-Percent Policy Rewards Hard-Working Students from Communities Throughout Texas**

UT's blended admissions process for in-state students starts with the admission of all applicants who graduated in the top ten percent of their class at a Texas high school. This step in the process has been required by state law since 1997, Tex. Educ. Code §51.803, and most UT students are admitted at this stage. Today state law caps the number of

students UT is required to accept under the TTP policy at 75 percent of admits. In 2008, the year Abigail Fisher applied to the University, about 90 percent of the admitted in-state students were TTP admits. JA 414a.

The TTP admissions policy has significant benefits as one piece of an admissions process, particularly in a state as geographically, culturally, and economically diverse as Texas. Texas has historically had the largest rural population in the United States, and while urban communities are continuing to grow at a rate much faster than rural communities, rural Texas remains an important part of the state's culture. *See Texas in Focus: A Statewide View of Opportunities*, available at <http://www.window.state.tx.us/specialrpt/tif/population.html>. Rural communities in Texas are not evenly dispersed throughout the state. West Texas is predominantly rural, while East Texas is dominated by urban areas. *See Rural Texas in Transition*, available at <http://www.window.state.tx.us/specialrpt/rural/summary.html>. These geographic differences significantly impact educational opportunities. *See, e.g.,* Dennis L. Poole & Susannah More, *Participation of Rural Youth in Higher Education: Factors, Strategies, and Innovations*, available at [http://www.texasrural.org/docs/rural\\_education\\_report.pdf](http://www.texasrural.org/docs/rural_education_report.pdf).

The state's geographic diversity is matched by extraordinary ethnic and racial diversity. Hispanics are the fastest growing population in Texas, accounting for close to 40 percent of the state's population. *See Texas in Focus, supra.* By 2020, demographers estimate that the Hispanic population

will outnumber the white population in the state. *Id.* And the growth in the number of Latinos in Texas is happening significantly in rural areas and border communities. See, e.g., Rick Jervis, *Hispanics Guide Huge Growth in Texas*, available at [http://www.usatoday.com/news/nation/census/2011-02-17-texas-census\\_N.html](http://www.usatoday.com/news/nation/census/2011-02-17-texas-census_N.html). In a demographic context like this one, a plan that encourages students from high schools in every part of the state to apply to strong institutions of higher education is essential.

By admitting interested students from the top of every high school in the state, UT increases opportunity for students who might otherwise not have a chance to compete for admission. This is particularly true for students who grow up in rural and poor communities throughout the state because they lack access to many of the college preparatory activities, extracurricular opportunities, and networking contact available to other talented students. For Latinos, who comprise 48 percent of the students in K-12 schools in the state, Pew Hispanic Center, *Demographic Profile of Hispanics in Texas 2010*, available at [www.pewhispanic.org/states/state/tx/](http://www.pewhispanic.org/states/state/tx/), this increased opportunity is particularly important. The potential benefit of the TTP plan for Latino students is amplified by the fact that so many high schools are extremely segregated. In a high school that is predominantly Latino, the students in the top ten percent of the class are most likely going to be Latino themselves. See Rebecca Leung, *Is The "Top 10" Plan*

*Unfair?*, available at [http:// www.cbsnews.com/2100-18560\\_162-649704.html](http://www.cbsnews.com/2100-18560_162-649704.html).<sup>2</sup>

One of the primary benefits of the TTP policy is that it reduces UT's over-reliance on SAT scores in the admissions process. SAT scores may be reasonable predictors of a student's GPA in the first year of college. *See, e.g.*, John L. Hoffman and Katie E. Lowitzki, *Predicting College Success with High School Grades and Test Scores: Limitations for Minority Students*, 28 *Rev. Higher Ed.* 455, 456 (2005) (noting substantial literature suggesting that SAT scores are "general strong predictors" of academic achievement). *But see* Jesse M. Rothstein, *College Performance Predictions and the SAT*, 121 *J. Econometrics* 297, 316 (2004) (demonstrating that claims about the SAT's predictive power are backed by flawed validity studies). But a student's first-year GPA is an entirely separate matter from overall college contributions or success or, more broadly, contributions or success in a career or as a community leader. *Cf.* Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 *Law & Soc. Inquiry* 395 (2006) (study finding that LSAT scores may predict law school grades, but do not accurately predict career success or satisfaction).

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<sup>2</sup> It certainly bears mentioning that the TTP policy is only effective for those students who choose to apply to UT. The increased opportunity for Latino students graduating at the top of their classes would be greater if incentives to apply were more readily available. *See* Angel L. Harris and Marta Tienda, *Hispanics in Higher Education and the Texas Top 10% Law*, 4 *Race & Social Problems* 57 (2012).

Moreover, “[t]he SAT simply recapitulates . . . all of the class advantages, all of the access advantages . . . in the K-12 experiences of the student.” Christopher Edley, quoted in Daren Bakst, ed., *Hopwood, Bakke, and Beyond: Diversity on Our Nation’s Campuses* 81 (Washington, D.C.: American Association of Collegiate Registrars and Admissions Officers, 1998). For students in rural communities and in poorer urban neighborhoods, prep classes for the SAT and other standardized tests are not easily available. When universities put excessive weight on these test scores, students who lack access to preparatory resources are significantly disadvantaged. The TTP policy takes a step toward leveling the playing field for these top students. For many Latino students in Texas, the TTP plan has therefore increased educational opportunities. These successes, however, do not support the assertion that the TTP has accomplished UT’s pursuit of diversity or of including a critical mass of Latino students. That this is a positive step does not mean that there is not important need for additional efforts.

The TTP policy also has the virtue of rewarding the hard work and focus it takes to graduate at the top of your high school class. Like over-reliance on the SAT, however, a narrow focus on the numbers reflected in a high school GPA misses fundamental aspects of the myriad forms of “merit” that make great college students and that together make a great college class. A TTP policy does not capture students who were leaders in their class or community, but may have been late bloomers academically. It does not capture the Latino student for whom English was a second language, and whose

hard work mastering the language and other substantive classes make him well-qualified for a UT education even though he didn't make it into the top ten percent of his class. It may not capture the athletes, the musicians, the community activists, the artists, the poets, or the many other significant contributors to an intellectual community whose skills may not show up in a purely numerical analysis. And it does not cover those young students who have overcome remarkable barriers to reach a level of success that may be outside the 10 percent cutoff, but that speaks of potential well beyond those numbers. For these students, the more holistic approach, which recognizes merit beyond simple grades, is an essential component of the system.

**B. The Holistic, Individualized Approach to Selecting the Remaining Admits is Essential to UT's Core Educational Mission and Values, Among Them the Goal of Including a Critical Mass of Latino Students**

For the remaining available seats in UT's freshman class, students are selected through a "highly individualized, holistic review," *Grutter*, 539 U.S. at 334-37, which balances academic, leadership, and service potential with the individual qualities a student would bring to the University. At this stage of the admissions process, UT seeks students from different cultural, linguistic, geographic, educational, racial and socio-economic backgrounds. The school also looks at an individual applicant's diversity of experience with work, volunteerism, and

internships.<sup>3</sup> The goals of this stage of the admissions process, together with the TTP cohort, are to matriculate qualified, diverse individuals; to enhance the educational experience of all students; and to identify and train leaders for the next generation.

The holistic, individualized evaluation at this stage of the admissions process, and its inclusion of race as one of the many factors to be considered in the individualized assessment process, is essential to the University's overarching educational goals. At this stage in the admissions process, the University can consider the elements of merit that may be excluded from the TTP admissions policy. It is at this stage that students who bring unique non-academic talents, who have conquered unique and challenging personal hardships, and who have

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<sup>3</sup> As explained in detail in Respondent's Brief, the holistic review undertaken at this second stage of UT's admissions process involves a weighing of an Academic Index ("AI") and a Personal Achievement Index ("PAI") for each applicant. The PAI ranks each applicant on a scale of 1-6 based on the applicant's average score on two required essays, together with the applicant's "personal achievement score"—which takes into account leadership, extracurricular activities, honors and awards, work experience, community service, and special circumstances. The "special circumstances" that UT considers include the applicant's socioeconomic background; whether the applicant is from a single-parent home; the socioeconomic status of the applicant's high school; the language primarily spoken in the applicant's home; any special family responsibilities the applicant may have had; the average SAT/ACT scores at the student's high school compared to the student's own score; and the applicant's race or ethnicity. Each component of the personal achievement score is considered in the context of the applicant's entire file. See Resp. Br. at 12-15.

demonstrated initiative and leadership in their communities, their families, and their avocations may be considered for admission. Without this step in the admissions process, UT would not be able to admit many students whose inclusion in a broadly diverse class maximizes critical thinking, civic participation, and training for leadership in our diverse workplaces and in our democratic society.

As UT recognized in implementing its current admissions policy, “[a] comprehensive college education requires a robust exchange of ideas, exposure to different cultures, preparation for the challenges of an increasingly diverse workforce and acquisition of competencies required of future leaders.” SJA 23a. Before implementing the policy, UT conducted a thorough evaluation of whether including race in its holistic admissions review was a necessary step toward the University’s goal of “provid[ing] an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.” *Id.* at 25a.

What the University found in this evaluation was that its pre-2004 policy was not successful in promoting the kind of full, broad diversity needed to maximize educational benefits. “In short, from a racial, ethnic, and cultural standpoint, students at the University are currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow.” *Id.* at 25a-26a.

This failure manifested itself both in a lack of overall diversity, reflected in student dissatisfaction

with the level of diversity in their classrooms, and also in a sense of classroom isolation among UT's Latino students and other students of color. JA 432a. UT also undertook a classroom study in 2002 that showed that 90 percent of undergraduate classes of participatory size (defined as a class of 5-24 students) had only one or no African-American students, and 43 percent of these classes had one or no Hispanic students. SJA 26a, Table 8. Even in the larger lecture classes, the number of students of color was extremely low. Looking at all UT classes, the study found that 79 percent had one or no African-American and 30 percent one or no Hispanic students. *Id.*

As this Court has recognized, diversity in education is a compelling state interest for several distinct reasons, *Grutter*, 539 U.S. at 328-333, each of which was considered by the University in its decision to make race one of the many factors it included in its individualized, holistic review process. First, the University found that there were real consequences of the lack of diversity in classrooms for the college experience confronted by Latinos and other students of color at UT. SJA 25a-26a. Students of color consistently report "isolation, alienation, and stereotyping" on college campuses. Shaun R. Harper & Sylvia Hurtado, *Nine Themes in Campus Racial Climates and Implications for Institutional Transformation*, *New Directions for Student Services*, Winter 2007, at 7, 12. As one Latina student from UT recently explained, "[S]ometimes it's still hard for me to speak up in class when it's almost all white students around me." Tamar Lewin, *At University of Texas, Admissions as a Mystery*,

April 1, 2012, *available at* <http://www.nytimes.com/2012/04/02/education/university-of-texas-mysterious-admissions-process.html>. This experience is not at all unique.<sup>4</sup> Diversity in the classroom is important to ensure that “underrepresented minority students do not feel isolated or like spokespersons for their race,” *Grutter*, 539 U.S. at 319, and to break down “racial stereotypes,” which “lose their force [when] nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students,” *id.* at 320.

This lack of classroom diversity is harmful for students of color, but, as UT concluded in determining whether and how to implement its

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<sup>4</sup> In affidavits filed in the district court in this case, for example, many Latino students expressed their feelings of isolation in the classroom. See Motion of Lawrence Longoria, Jr., Nathan Bunch, & Texas League of United Latin American Citizens (LULAC) for Leave to File *Amicus Curiae* Brief in Support of Defendants, *Fisher v. Univ. of Texas at Austin* (No. 1:08-cv-00263-SS), Exhibits A-C (Declaration of Erwin Cuellar (“I sometimes feel like I am the only Latino in my classes... [T]his does change the classroom dynamics because my opinions and method of thinking, which are tied to my Latino culture and experiences, might be ostracized. If there are no other Latinos in the room, then it seems my opinions will not be taken into as much consideration. As a result, I feel underrepresented and sometimes uncomfortable.”); Declaration of Ashley Nicole Perez (“I very often found myself the only Latina. When there were other Latinos/as, it seemed like we were so few...In these circumstances, I feel like I should not express certain concerns or opinions because no one will understand where I am coming from.”); Declaration of Alexis Fernandez (“I believe my education would benefit if UT were more diverse than it is now so minorities, including myself, would not feel as isolated in our classes. I feel this way in classes where I am often the only, or one of the few, Latino students.”)).

current policy, lack of diversity is also harmful for all students, as it diminishes the quality of the learning experience. SJA at 25a-26a. “Students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.” Patricia Y. Gurin, *Expert Report of Patricia Gurin, in The Compelling Need for Diversity in Higher Education* (1999). As set out in greater detail in briefs filed in this case by the American Educational Research Association and the American Sociological Association, more recent studies have similarly found that diversity in the classroom has a positive influence on critical thinking skills. See, e.g., Chad Loes, Ernest Pascarella & Paul Umbach, *Effects of Diversity Experiences on Critical Thinking Skills: Who Benefits?*, 83 J. Higher Ed. 1 (2012). And studies have found that the positive effects of exposure to a diverse peer group during college continue into adulthood. See, e.g., Nicholas A. Bowman, Jay W. Brandenberger, Patrick L. Hill & Daniel K. Lapsley, *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J. College Student Development 729 (2011); Gurin Report, *supra*.

Of course, the fact that diversity in an educational setting yields significant educational benefits does not mean that every approach to increasing diversity is constitutionally appropriate. As Justice Kennedy explained in his separate opinion in *Grutter*, “[t]o be constitutional, a university’s

compelling interest in a diverse student body must be achieved by a system where individualized assessment is safeguarded through the entire process.” 539 U.S. at 392 (Kennedy, J., dissenting). UT’s individualized, holistic review is just such a system. The University takes enormous care to ensure that each student admitted at this holistic review stage is considered through a thorough, individualized assessment. As the lower court explained, the UT system for holistic review is carefully monitored to ensure that every element of an individual applicant’s file is being evaluated and that race, like any other factor, is considered only in the complete context of the individual file. *See Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 228 (5<sup>th</sup> Cir. 2011).

**C. Racial Diversity and the Experiences of People of Color Have Independent Value that Increases the Effectiveness of an Educational Community**

Race still matters in American society today. Individuals continue to be treated differently on the basis of their race in many contexts, and that reality shapes the experiences of many young people applying to and attending UT and other colleges and universities. As Justice Kennedy has observed, “[t]he enduring hope is that race should not matter; the reality is that too often it does.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring). Promoting a diverse educational environment by taking into account the many real differences among individuals is not discrimination and it has real educational

benefits. In a holistic, individualized admissions process like that employed by UT, taking race into account as one of many factors that may have shaped the life experiences of applicants is acknowledging the fact that certain applicants will add to the classroom unique experiences and perspectives because of the basic reality that race is still relevant and racism still exists.

Ignoring this reality is itself part of the problem. As psychologist John Dovidio has explained, in order to address persistent race discrimination and stereotyping, "it is essential that race be recognized." Test. of John Francis Dovidio, *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328 (D. Mass. 2003) (No. 03-2415). Refusing to acknowledge race in admissions does not make race irrelevant in the educational experience. Instead, it makes it more difficult to address, in an educationally effective way, the very real individual experiences that people have as a result of their many individual characteristics, including their race. The denial that race matters "leads to distrust, [leads] to segregation, [leads] to inefficiencies, [leads] to stress." *Id.*

*Amici* for the Petitioner argue that racial classifications are largely meaningless and therefore UT's consideration of race in its holistic evaluation is inappropriate. These arguments try to shift focus from the experiences that people of color have because of the ways that race affects social, cultural, and economic interactions in today's America. They seek instead to focus attention on the lack of biological basis for racial classifications. See, e.g., *Amicus* Brief of The American Center for Law and Justice in Support of Petitioner, *Fisher v. University*

*of Texas at Austin, et al.* (No. 11-345), 3-4; Brief of *Amici Curiae* Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioner, *Fisher v. University of Texas at Austin, et al* (No. 11-345), 6-9. But the reason that diversity is so important in an educational environment is because education must confront not only biological fictions, but also sociopolitical realities. As this Court recognized less than a decade ago, “[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.” *Grutter*, 539 U.S. at 333.

As Latino students who are attending or have attended institutions of higher education in Texas, *Amici* have direct experience with the continuing importance of race and ethnicity in today’s America. Our experiences growing up as Latinos has not been uniform, nor are our opinions or perspectives uniform. But for each of us, being Latino is a relevant aspect of what she or he brings to the classroom and to the educational environment outside of the classroom. Similarly, each of us has learned from the perspectives offered by our African-American, Asian-American, American Indian and White classmates. Just as our perspectives have been shaped in some part by our racial and ethnic experiences, so have the views of those students. Our learning environment has been richer and our education more valuable when we have had the opportunity to learn in classrooms that include racial diversity.

## **II. THE TEXAS ADMISSIONS PROCESS HAS SERVED THE STATE'S COMPELLING INTEREST IN A MEANINGFULLY MORE DIVERSE AND THUS MORE EFFECTIVE LEARNING ENVIRONMENT**

The inclusion of race as one of many factors to be considered in a holistic admissions process that gives each applicant individualized consideration has had a significant positive impact on the diversity of UT's entering classes. Petitioner asserts that considering race and ethnicity has led to minimal gain in UT's diversity, and therefore that the University cannot demonstrate that its admissions policies are narrowly tailored to meet its compelling interest in educational diversity. Pet. Br. at 38-43. This argument puts inappropriate emphasis on percentages and repeatedly mischaracterizes UT's admissions numbers.

Importantly, even a modest increase in class diversity can make a significant difference in the educational goals UT legitimately pursues through its admissions policies. The University's mission is to ensure a class of qualified individuals with a diverse range of backgrounds and experiences because learning in a diverse environment helps students develop critical thinking and the skills necessary to succeed in a diverse global workplace. An essential component of this educational interest is offering students the opportunity to interact with others of different backgrounds and experiences. The likelihood of cross-racial and other cross-cultural interactions is not a one-to-one correlation with the

percentage of students of a particular race in a class. Instead, as a recent study of selective universities' admissions programs demonstrated, even "a one percentage point increase in the share of nonwhite students 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). Thus, Petitioner's focus solely on the percentage of students of color admitted to UT misses the mark.

Furthermore, Petitioner uses statistics in a highly misleading way to suggest that UT's policy has had a minimal impact. For example, petitioner compares percentages across inconsistent groups and admission years. *See, e.g.*, Pet. Br. at 39 (comparing non-TTP enrollees in 2004 with *all* enrollees in 2008). A more appropriate comparison would be the enrollment of African American and Hispanic students in 2004 – the last year that Texas excluded race entirely from consideration – with enrollment in the year Ms. Fisher applied for admission. Looking at those numbers, the increase in underrepresented enrollment was significant: the number of African American students enrolled increased from 275 to 335 and the number of Latino students from 1,024 to 1,228. *See Fisher*, 631 F.3d at 226. This is an increase of about 18 percent in both Latino and African-American student representation.

The significance of even a small increase in diversity for student experience can be seen by comparing UT with the state's other flagship

institution, Texas A&M. Texas A&M does not consider race as a factor in any way in its admissions process. The class entering in the fall of 2008 at Texas A&M was 16 percent Latino. *See Texas A&M, Enrollment Profile 2008, available at <http://www.tamu.edu/customers/oisp/student-reports/enrollment-profile-fall-2008-certified.pdf>*. Meanwhile, at the much more selective UT, the class entering in the fall of 2008 was nearly 20 percent Latino. *See University of Texas at Austin Office of Information Management, Undergraduate Profile Fall 2008, available at <http://www.utexas.edu/academic/ima/sites/default/files/Fall%202008%20IMA-UT%20Undergrad%20Profile.pdf>*. The importance of those differences can be seen in a “campus climate” study recently conducted by Texas A&M. Of Latino students, 42 percent strongly agreed that discrimination is a problem at the school. More than one in four Latino respondents felt that they were not part of the “Aggie family.” Texas A&M, *Campus Climate 2008, Texas A&M – How’s it Working for You?*, at 3, *available at <http://studentlifestudies.tamu.edu/sites/studentlifestudies.tamu.edu/files/results/full/142-full.pdf>*.

The gains that have been made toward enrolling a critical mass of Latino students at UT through the blended admissions process are of fundamental importance to the learning experience and the campus environment. They are also essential for maintaining a visible pathway to leadership for Latino and other students of color. As this Court has recognized, that is a compelling state interest, and is especially so for Latinos in Texas, given the reality that a majority of Texas residents is likely to be

Latino by 2020. *See Texas in Focus, supra.* The University's interest in maintaining visible pathways to leadership is served each time even a single Latino student succeeds and can offer a model for those who follow.

### **III. ABIGAIL FISHER LACKS STANDING TO PURSUE THIS CLAIM**

This case is not an appropriate vehicle for the Court's reconsideration of a significant constitutional question. Petitioners have asked the Court to reverse a decision made less than a decade ago. This raises serious concerns, and those concerns are exacerbated by the fact that Abigail Fisher's case does not present the constitutionally required "case" or "controversy." U.S. Const. Art. III. In addition to the fact that she is a college graduate, and therefore no longer able to seek the relief she requested in her complaint, Fisher never demonstrated that she was in fact harmed by UT's admissions policies in any cognizable way.

In order to pursue a case in federal court, a plaintiff must have standing and the case must not be moot. The constitutional requirements of standing and mootness derive from Article III's admonition that federal court jurisdiction is limited to "cases" or "controversies." U.S. Const., Art. III. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Simon v Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 27 (1976). The standing analysis assists courts in assuring that they are not issuing advisory opinions, but are instead addressing cognizable

claims of injury. *See, e.g., St. Pierre v. United States*, 319 U.S. 41, 42 (1943). As this Court has observed:

[t]he “personal stake” aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as ‘the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).’

*U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980) (citing Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)).<sup>5</sup>

Fisher’s case is moot because she has graduated from college. Unlike other challenges to school admissions policies, *see e.g. Grutter*, 539 U.S. at 317; *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003), this case was not pursued as a class action. Accordingly, the fact that Fisher can no longer be a freshman at UT renders this case moot, and the Court should dismiss it as improvidently granted for this reason.

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<sup>5</sup> Because both standing and mootness are jurisdictional issues, this Court should consider them even when not raised by the parties. *See, e.g. St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978) (noting that mootness is jurisdictional); *Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996) (standing is jurisdictional).

Furthermore, Ms. Fisher has failed to demonstrate that she has standing to pursue this challenge to the Texas admissions policy. The record in this case contains next to no information about Abigail Fisher. Other than a few brief paragraphs in her Amended Complaint, Ms. Fisher herself is simply not part of this case. The statement of facts at summary judgment, for example, mentioned the plaintiff's name only as it related to identification of her as a plaintiff and of her attorneys as representing her. JA 103a-151a. This is surprising, unless one recognizes this case for what it is: not a true "case or controversy" but simply a vehicle for a political effort to get a recent decision of this Court overturned in light of changes in the Court's composition.

What limited information there is in the record about Ms. Fisher does not raise any inference that her race was the reason she was not admitted to UT. According to the Amended Complaint, Ms. Fisher was ranked 82/674 in her graduating class and had an SAT of 1180. JA 65a-66a. Based on these numerical qualifications, Ms. Fisher alleges that she would have gotten into UT were race not "a factor of a factor of a factor." *Fisher v. University of Texas at Austin, et al.*, 645 F.Supp.2d 587, 608 (W.D. Tex. 2009). But the available information about how UT's admissions process actually works and how it worked the year she applied contradicts that assertion entirely.

Fisher was not among the 9253 students admitted to UT because they were in the top ten percent of their high school classes. As a result, she was one of 16,000 applicants competing for 1,216

remaining in-state spots. Of the 3590 non-TTP admits in 2008 (which included out-of-state applicants in addition to the 1,216 Texas residents), 60 percent were white, 16 percent Asian-American, 4 percent Black, 11 percent Hispanic, and 8 percent Foreign. Univ. of Texas at Austin Office of Admissions, *Student Profile Admitted Freshman Class of 2008*, available at <http://www.utexas.edu/vp/irla/Documents/AdmittedFreshmenProfile-2008.pdf>.

There is simply no way to determine that race played a role in the fact that Fisher was not among this selective group of admitted students. Fisher is not similarly situated to the plaintiff in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) because she was in fact permitted to compete for all available openings at UT. *See* 438 U.S. at 280, n. 14 (observing that Mr. Bakke had suffered a constitutional injury because of “the University’s decision not to permit Bakke to compete for all 100 places in the class, simply because of his race”). Under UT’s holistic consideration of each individual applicant, race is one of many factors that can help *any* applicant, regardless of that student’s particular race, when viewed in the full context of the application. *See supra*, note 3. The facts at UT are fundamentally different from other race-conscious admissions cases, in which there was a quota or minority applicants were given a certain number of points based on their race. *See, e.g., Bakke*, 438 U.S. at 274-75; *Gratz*, 539 U.S. at 244. Petitioner should not be held to a lesser standing requirement absent factors such as there.

The information in the record about Ms. Fisher does not create even a reasonable inference that she would have been in this small group of admits had race not been any factor in UT's holistic admissions process. Ms. Fisher's 1180 SAT score was well below the average SAT score for students admitted to UT through holistic review in 2008. Indeed only 7 non-TTP students admitted that year at SAT scores at or below 1190. *2008 Student Profile, supra*, at 3. In part because of this SAT score, Ms. Fisher's AI—the academic factor in the holistic analysis—was 3.1. The minimum AI needed for fall admission to the Liberal Arts, undeclared major (to which Ms. Fisher also applied) in 2008 was 3.5. JA 410a.

Given these facts, there is absolutely no evidence that Ms. Fisher's race played any role in her failure to gain admission to UT. Since Ms. Fisher has already graduated from another college, and has failed to demonstrate that she suffered any cognizable harm from any UT policy, this case presents a deeply flawed vehicle for resolution of the issues it raises.

**CONCLUSION**

For the foregoing reasons, this case should be dismissed as improvidently granted or, alternatively, the decision of the Fifth Circuit should be affirmed.

Dated: August 13, 2012

Respectfully Submitted,

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## **APPENDIX**

**APPENDIX**  
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Caleb Bonitz, UT Austin, 2013  
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Carlos Carrasco, UT Austin, May 2014  
Carlos Castaneda, UT Austin, 2013  
Lucero Castillo, Southwestern University, 2014  
Serena Chang, UT Austin, 2014  
Jonathan Chapman, UT Austin, 2012  
Armand Chauvin, UT Austin, 2015  
Tania Chavez, UT Pan American, 2007  
Ana B. Coca, University of North Texas, 2016  
Adriana Corral, UT Law, 2013  
Kenera Colley, UT Austin, 2015  
Chris Crawford, UT Austin, 2015  
Cristina Cruz, Texas A&M, 2015  
Johana De Leon, San Antonio College, 2015

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Ye Wang, UT Austin, 2017  
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