No. 14-981

IN THE

# Supreme Court of the United States

ABIGAIL NOEL FISHER,

*Petitioner,*

*v.*

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

*Respondents.*

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

## BRIEF OF LEGAL SCHOLARS DEFENDING DIVERSITY IN HIGHER EDUCATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

SHAKIRA D. PLEASANT
*Counsel of Record*
VINAY HARPALANI
SAVANNAH LAW SCHOOL
516 Drayton Street
Savannah, Georgia 31401
(912) 525-3900
spleasant@savannahlawschool.org

*Counsel for Amici Curiae Legal Scholars Defending Diversity in Higher Education*

262287

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## INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors at Savannah Law School (SLS)[2] in Savannah, Georgia. Based on their expertise in constitutional law and diversity in higher education, amici believe their knowledge and collective experiences can inform this Court's consideration of the pending matter.

Shakira D. Pleasant is an African American female, who was raised in a racially diverse, upper-middle class neighborhood in Sacramento, California. She earned her J.D. from the University of the Pacific, McGeorge School of Law and her B.A. from California State University, Chico. Before joining the faculty at Savannah Law School, Professor Pleasant practiced law in Washington, D.C., with the District of Columbia Office of the Attorney General.

Vinay Harpalani is a South Asian American male who was raised in New Castle County, Delaware, where he attended schools that implemented comprehensive school desegregation under federal court order. He earned his J.D. from New York University (NYU) School of Law; his

1. Pursuant to this Court's Rule 37.3(a), all parties have provided blanket consent to the filing of amicus briefs. Pursuant to Rule 37.6, Amici affirm that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than amici, or their counsel, made a monetary contribution to its preparation or submission.

2. The views expressed by amici in this brief are their own and should not be construed as views of Savannah Law School.

Ph.D. in Education from the University of Pennsylvania; and his B.A. from the University of Delaware. Professor Harpalani has written several law review articles and blog posts that specifically analyze *Fisher v. University of Texas at Austin*.

Although the case at bar concerns undergraduate admissions, amici recognize that each law school's ability to admit a strong and diverse entering class is directly tied to the pool of available college graduates. Both Professors Pleasant and Harpalani have served on the SLS Admissions Committee and thus have direct experience with admissions procedures in higher education. Both also have a long history of involvement in diversity-related initiatives at various educational institutions. Therefore, Professors Pleasant and Harpalani are fully aware that this Court's decision could have larger ramifications for racial diversity in higher education.

Accordingly, amici respectfully request that this Court (1) recognize that reliance on racial isolation in Texas public high schools is a perverse means to attain numerical diversity; (2) affirm the educational benefits of diversity among and within racial groups; (3) acknowledge that universities need to use race to attain these educational benefits because of racial inequality and disparities in American society; and (4) find that less reliance on race in admissions is a constitutional virtue, which indicates university's serious intent to eventually transition to race-neutral admissions policies when feasible.

## SUMMARY OF ARGUMENT

This Court has repeatedly ruled that universities have a compelling interest in the educational benefits of student body diversity. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (Powell, J., concurring); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)). Petitioner alleges that Texas's Top Ten Percent Law alone allows the University of Texas at Austin (UT) to admit a class that is sufficiently diverse to achieve its compelling interest. The Top Ten Percent Law grants automatic admission to the top graduating students (originally the top 10% of graduating class) at each public high school in Texas. Tex. Educ. Code § 51.803 (1997) (amended 1999, 2007, 2009 & 2015). However, UT has determined that this is not the case and that it needs to use a supplemental race-conscious policy to attain the educational benefits of diversity.

The question before this Court is one of great significance for higher education. Can UT employ race as one, flexible factor in evaluating applicants applying via its holistic admissions policy, to achieve its compelling interest in diversity, when UT admits the majority of its entering class via Texas's Top Ten Percent Law? The Court of Appeals for the Fifth Circuit answered yes—rejecting Petitioner's argument and upholding UT's race-conscious admissions policy. This Court should affirm the Fifth Circuit's ruling for four reasons.

First, recent data illustrate that the Top Ten Percent Law relies on racial isolation in public schools to achieve numerical racial diversity at UT. *See infra* Part I.B. This Court has recognized a compelling interest in "avoiding

racial isolation." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring). Most recently, the Court noted that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (Kennedy, J., majority opinion). If this Court reverses the Fifth Circuit and eliminates UT's ability to supplement the Top Ten Percent Law with a race-conscious holistic policy, the result would be perverse and insufficient: UT would depend on racial isolation in Texas schools to attain numerical representation of minority and would not achieve its compelling interest in student body diversity.

Second, this Court should defer to UT's finding that it needs to supplement the Top Ten Percent Law with a race-conscious policy to attain the educational benefits of qualitative diversity (i.e., diversity within racial groups). Brief for Respondents at 34, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (Oct. 26, 2015). While UT may attain some numerical representation of minority students via the Top Ten Percent Law, reliance on the Top Ten Percent Law alone will "preclude [UT] from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.* at 41. Additionally, this Court gives deference to a university's expertise and principled reasons for pursuing student body diversity as part of its own educational mission. *Fisher*, 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 328–30).

UT has principled reasons for pursuing qualitative diversity as part of its educational mission. Data indicate that Black and Hispanic students admitted under the Top Ten Percent Law are very likely to have attended racially segregated schools and to be economically disadvantaged. UT needs to enroll Black and Hispanic students from different backgrounds—with a "variety of viewpoints"—to attain the educational benefits of diversity noted by this Court: breaking down racial stereotypes, reducing racial isolation, and facilitating cross-racial understanding. *Grutter*, 539 U.S. at 319–20. Moreover, qualitative diversity helps to enforce this Court's narrow tailoring requirements, because universities must conduct "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id*. at 309. As such, qualitative diversity is the glue that holds *Grutter* and *Fisher*'s compelling interest and narrow tailoring prongs together.

Third, contrary to the discussion at the last oral argument before this Court, the attainment of a critical mass of minority students is not the proper end point for race-conscious admissions. *See* Transcript of Oral Argument at 47–50, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). Because critical mass varies between universities and is difficult to quantify, it does not work well, for narrow tailoring purposes, as the end point of race-conscious admissions policies. Further, if race-conscious policies were necessary to obtain a critical mass, it follows logically that this critical mass would dissipate if universities stopped using them. Universities must maintain critical mass, not simply attain it.

Rather than attainment of critical mass, the proper end point for race-conscious admissions is the elimination of academic disparities by race, which are rooted in America's longstanding racial inequality. While diversity and its educational benefits are the compelling interest that justify use of race in the university admissions process, the need to use race to achieve this compelling interest is predicated heavily on such racial disparities. This Court has recognized that while "race should not matter; the reality is that too often it does." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring). Consequently, it is only when racial disparities have been eliminated that universities will no longer need to use race to achieve their compelling interest in diversity.

Fourth, contrary to Petitioner's argument, race cannot be too small of an admissions factor to be constitutional. *See* Brief for Petitioner at 46–47, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (Sept. 3, 2015). UT's reduced reliance on race in its admissions process is actually a constitutional virtue. Less reliance on race indicates a university's serious intent to eventually transition to race-neutral admissions policies when feasible. This Court has stated that universities should gradually replace race-conscious policies with race-neutral alternatives "as they develop." *Grutter*, 539 U.S. at 342. Universities cannot end race-conscious policies all at once. Rather, they will reach the end point gradually. Consequently, a university's use of race will at some point be small, but still constitutional.

For the reasons set forth above, this Court should affirm the Fifth Circuit's judgment.

## ARGUMENT

### I. RACIAL ISOLATION IN SCHOOLS IS A PERVERSE AND INSUFFICIENT MEANS TO ATTAIN DIVERSITY IN HIGHER EDUCATION.

Texas's Top Ten Percent Law relies on racial isolation in public schools to achieve numerical racial diversity at the University of Texas at Austin (UT). In addition to a university's compelling interest in student body diversity, this Court has recognized a compelling interest in avoiding and eliminating racial isolation. If this Court rules for Petitioner, the result would be perverse: UT would essentially depend on racial isolation in Texas schools to attain diversity. The contradiction in values here should not escape the Court's attention.

#### A. This Court recognizes a compelling interest in eliminating racial isolation and segregation.

Through its past and recent rulings, this Court has long acknowledged that while "race should not matter; the reality is that too often it does." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring). In addition to repeatedly affirming a university's compelling interest in the educational benefits of student body diversity, this Court recognizes that "[a] compelling interest exists in avoiding racial isolation." *Id.* Most recently, this Court stated that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (Kennedy, J., majority opinion). All of these underscore this Court's

view, harking back to *Brown v. Board of Education*, that racial isolation and segregation in schools is abhorrent and must be eliminated. *Brown v. Board of Educ. Of Topeka, Kan.*, 347 U.S. 483 (1954).

If this Court rules for Petitioner and eliminates UT's ability to supplement the Top Ten Percent Law with a race-conscious holistic policy, the result would be perverse and insufficient. UT would have to depend on racial isolation in Texas schools to attain numerical representation of minority students and would not achieve its compelling interest in student body diversity. *See also infra* Part II.

### B. Under Texas's Top Ten Percent Law, UT primarily admits Black and Hispanic students from impoverished, racially isolated high schools.

The Top Ten Percent Law grants automatic admission to the top graduating students (originally the top 10% of graduating class) at each public high school in Texas. Tex. Educ. Code § 51.803 (1997) (amended 1999, 2007, 2009 & 2015). While the Top Ten Percent Law does yield some numerical racial diversity at UT, recent data illustrates that this yield is contingent on de facto racial segregation in Texas public schools. Racially isolated schools are the major reason that UT attains racial diversity via the Top Ten Percent Law, because if a high school's graduating class is almost exclusively Black and Hispanic, it follows that the top students in that class are also predominantly Black and Hispanic. Moreover, the data show that Black and Hispanic students admitted under the Top Ten Percent Law are also very likely to be economically disadvantaged.

In 2012–13, the state of Texas had approximately 5 million students enrolled in all of its public schools. Tex. Educ. Agency, *2014 Comprehensive Biennial Report on Texas Public Schools* 16 (Jan. 2015) http://tea.texas.gov/acctres/Comp_Annual_Biennial_2014.pdf The overall demographic composition of students at Texas public schools was as follows: 12.7% Black; 51.3% Hispanic; and 30.0% White. *Id.* Additionally, 60.4% of these students were "economically disadvantaged" as defined by the Texas Education Agency (TEA). *Id.*

Texas divides its public schools into twenty Educational Service Center (ESC) regions, defined by TEA, *Snapshot 2014 Summary Tables Education Service Center Region*, Texas Educ. Agency, http://ritter.tea.state.tx.us/perfreport/snapshot/2014/region.srch.html (last visited Oct. 30, 2015). Many of these regions themselves illustrate de facto racial segregation and poverty in Texas. For example, in 2014, Region 1 (Edinburgh) was 97.6% Hispanic and 85.9% economically disadvantaged. *See id.* Similarly, Region 2 (Corpus Christi) was 76.8% Black and Hispanic and 62.8% economically disadvantaged. *See id.* Region 19 (El Paso) was 91.8% Black and Hispanic and 75.4% economically disadvantaged; and Region 20 (San Antonio) was 76.2% Black and Hispanic and 64% economically disadvantaged. *See id.*

Even ECS regions that are racially diverse at the regional level rely on pockets of hyper-segregation to yield Black and Hispanic admits under the Top Ten Percent Law. For example, Region 4 (Houston) yields the most Top Ten Percent Law admits of all twenty ECS regions. Univ. of Tex. at Austin, *Report to the Governor, the Lieutenant Governor and the Speaker of the House*

*of Representatives on the Implementation of SB 175, 81st Legislature: For the Period Ending Fall 2013*, at 6 (Dec. 2013) http://www.utexas.edu/student/admissions/research/admission_reports.html.While Region 4 is racially diverse overall, demographics from the Houston Independent School District show staggering levels of de facto racial segregation and concentrated poverty within its individual schools.

For example, in 2014–15:

- At Stephen F. Austin High School, 99% of the student body was Black or Hispanic and 84% was economically disadvantaged (as defined by TEA). *Stephen F. Austin High Schoo*l, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/Austin_HS.pdf (last visited Oct. 27, 2015).

- At Jack Yates High School, 99% of the student body was Black or Hispanic and 73% was economically disadvantaged. *Jack Yates High School*, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/Yates_HS.pdf (last visited Oct. 27, 2015).

- At Phyllis Wheatley High School, 98% of the student body was Black or Hispanic and 85% was economically disadvantaged. *Phillis Wheatley High School*, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/Wheatley_HS.pdf (last visited Oct. 27, 2015).

- At Kashmere High School, 98% of the student body was Black or Hispanic and 69% was economically disadvantaged. *Kashmere High School*, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/Kashmere_HS.pdf (last visited Oct. 27, 2015).

- At Evan Worthing High School, 99% of the student body was Black or Hispanic and 73% was economically disadvantaged. *Evan Worthing High School*, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/Worthing_HS.pdf (last visited Oct. 27, 2015).

- At James Madison High School, 99% of the student body was Black or Hispanic and 74% was economically disadvantaged. *James Madison High School*, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/Madison_HS.pdf (last visited Oct. 27, 2015).

- At Ross Sterling High School, 98% of the student body was Black or Hispanic and 65% was economically disadvantaged. *Ross Sterling High School*, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/Sterling_HS.pdf (last visited Oct. 27, 2015).

- At Ebbert Furr High School, 97% of the student body was Black or Hispanic and 95% was

economically disadvantaged. *Ebbert Furr High School*, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/Furr_HS.pdf (last visited Oct. 27, 2015).

- At North Forest High School, 98% of the student body was Black or Hispanic and 67% was economically disadvantaged. *North Forest High School*, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/NorthForest_HS.pdf (last visited Oct. 27, 2015).

- At Westbury High School, 92% of the student body was Black or Hispanic and 72% was economically disadvantaged. *Westbury High School*, Hous. Indep. Sch. Dist., http://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/21231/school_profiles/Westbury_HS.pdf (last visited Oct. 27, 2015).

Similarly, ECS Region 11 (Fort Worth) is also racially diverse overall but hyper-segregated at the individual school level. Region 11 is one of the top five of the 20 regions in yielding Top Ten Percent Law admits. Univ. of Tex. at Austin, *Report to the Governor, the Lieutenant Governor and the Speaker of the House of Representatives on the Implementation of SB 175, 81st Legislature: For the Period Ending Fall 2013*, at 6 (Dec. 2013) http://www.utexas.edu/student/admissions/research/admission_reports.html). And as with Houston, a close examination of the Fort Worth Independent School District reveals staggering levels of de facto racial segregation and

concentrated poverty within its individual schools. For example, in 2013–14:

- At North Side High School, 97.1% of the student body was Black or Hispanic and 82.2% was economically disadvantaged. *North Side High School*, Fort Worth Indep. Sch. Dist., http://northside.fwisd.org/files/_AIDKV_/62fb8f0c96d061633745a49013852ec4/hs_northside_13-14rc.pdf (last visited Oct. 27, 2015).

- At Trimble Technical High School, 97.0% of the student body was Black or Hispanic and 74.2% was economically disadvantaged. *Trimble Technical High School*, Forth Worth Indep. Sch. Dist., http://trimbletech.fwisd.org/files/_AIDNF_/20917eb2712546e33745a49013852ec4/hs_tech_13-14rc.pdf (last visited Oct. 27, 2015).

- At Diamond Hill-Jarvis High School, 96.6% of the student body was Black or Hispanic and 81.3% was economically disadvantaged. *Diamond Hill-Jarvis High School*, Fort Worth Indep. Sch. Dist., http://diamondhilljarvis.fwisd.org/files/_AIDIV_/5df4287074c545623745a49013852ec4/hs_diamondhill_13-14rc.pdf (last visited Oct. 27, 2015).

- At Paul Laurence Dunbar High School, 96.2% of the student body was Black or Hispanic and 75.2% was economically disadvantaged. *Dunbar High School*, Fort Worth Indep. Sch. Dist., http://dunbar.fwisd.org/files/_AIDI6_/f8acda4fa4e646fa3745a49013852ec4/hs_dunbar_13-14rc.pdf (last visited Oct. 27, 2015).

- At Polytechnic High School, 94.1% of the student body was Black or Hispanic and 83.7% was economically disadvantaged. *Polytechnic High School*, Forth Worth Indep. Sch. Dist., http://polytechnic.fwisd.org/files/_AIDLg_/33a042cc26494f1a3745a49013852ec4/hs_polytechnic_13-14rc.pdf (last visited Oct. 27, 2015).

- At South Hills High School, 91.9% of the student body was Black or Hispanic and 72.8% was economically disadvantaged. *South Hills High School*, Fort Worth Indep. Sch. Dist., http://southhills.fwisd.org/files/_AIDMC_/0ab6e00f2b182a263745a49013852ec4/hs_southhills_13-14rc.pdf (last visited Oct. 27, 2015).

- At Eastern Hills High School, 90.9% of the student body was Black or Hispanic and 68.9% was economically disadvantaged. *Eastern Hills High School*, Fort Worth Indep. Sch. Dist., http://easternhills.fwisd.org/files/_JMJf1_/fb4f563f0b5776fb3745a49013852ec4/hs_easternhills_13-14rc.pdf (last visited Oct. 27, 2015).

There are many similar examples from across Texas (data available from individual school websites). Ample evidence exists of racial isolation and inequality in American schools. *See, e.g.*, Gary Orfield & Eric Frankenberg, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future* (2014). This Court should not require UT or any other university to depend on racial isolation and segregation to achieve numerical diversity.

## II. UNIVERSITIES NEED TO USE HOLISTIC, RACE-CONSCIOUS ADMISSIONS POLICIES TO PURSUE QUALITATIVE DIVERSITY AS PART OF THEIR EDUCATIONAL MISSIONS.

This Court has repeatedly ruled that the educational benefits of student body diversity are a compelling state interest which can justify a university's use of race in admissions. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (Powell, J., concurring); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)). Qualitative diversity (i.e., diversity within racial groups) inherently promotes the educational benefits articulated by this Court, as it serves to break down racial stereotypes, reduce racial isolation, and facilitate cross-racial understanding. *Grutter*, 539 U.S. at 319–20.

Additionally, this Court gives deference to universities' expertise in determining how student body diversity relates to their own educational missions. *Fisher*, 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 328–30). A university's educational mission can incorporate qualitative diversity, because "failing to account for the differences between people of the same race" undermines our nation's aims towards equality and engaged citizenship. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 434 (2006). As such, this Court should uphold UT's finding that it needs to supplement the Top Ten Percent Law with a holistic, race-conscious policy, to attain qualitative diversity and support its educational mission. Brief for Respondents at 34, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (Oct. 26, 2015).

### A. Universities need to make individualized assessments to attain qualitative diversity.

UT cannot attain qualitative diversity in its student body via the Top Ten Percent Law. The Top Percent Law admits students based solely on class rank and does not allow UT to assess other important qualities that it seeks in its student body. Although it attains some numerical representation of minority students by this means, reliance on the Top Ten Percent Law alone will "preclude [UT] 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." *Grutter*, 539 U.S. at 340.

Justice Powell's opinion in *Bakke* vividly illustrates the importance of individualized review of applicants, in relation to qualitative diversity:

> [An] Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. *Bakke*, 438 U.S. at 324 (Powell, J., concurring).

*Grutter* also embraced this relationship between individualized review and qualitative diversity. 539 U.S. at 337, 340. Also, at oral argument before this Court two years ago, the United States articulated this same principle: "universities . . . are looking . . . to make individualized decisions about applicants who will directly further the educational mission . . . [f]or example, they will look for individuals who will play against racial stereotypes . . . [t]he African American fencer; the Hispanic who has . . . mastered classical Greek. Transcript of Oral Argument at 61, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

Such individuals can make a "unique contribution to diversity" that can only be identified through individualized review, not through an automatic admissions plan such as the Top Ten Percent Law. Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. Pa. J. Const. L. 463, 525–26 (2012). Qualitative diversity thus connects a university's compelling interest in the educational benefits of diversity with individualized review of applicants—which is the hallmark feature of a narrowly-tailored race-conscious admissions policy. *Grutter*, 539 U.S. at 337.

### B. Qualitative diversity has educational benefits.

This Court has held that universities receive deference in determining their own diversity-related educational goals if "there is a reasoned, principled explanation for the academic decision." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2413–14 (2013). UT has principled reasons for pursuing qualitative diversity as part of its educational mission. In fact, these reasons parallel the educational

benefits of diversity as articulated by this Court in *Grutter* and *Fisher*.

*Grutter* noted that when a university's student body includes sufficient numbers of minority students with different perspectives and experiences, "racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Grutter*, 539 U.S. at 319–20. By emphasizing the "variety of viewpoints" within each minority group, *Grutter* recognized qualitative diversity as part of a university's compelling interest in the educational benefits of diversity. Harpalani, *Diversity Within Racial Groups, supra*, at 477–78 (2012). *Fisher* reiterated these principles, emphasizing "enhanced classroom dialogue and the lessening of racial isolation and stereotypes" as educational benefits related to a university's compelling interest in diversity. *Fisher*, 133 S. Ct. at 2418. Thus, this Court has repeatedly underscored the educational benefits that UT seeks through its pursuit of qualitative diversity.

Moreover, these benefits are particularly applicable for UT's race-conscious admissions policy. UT seeks to break down racial stereotypes by admitting more Black and Hispanic students "from a diversity of backgrounds, with a diversity of experiences," who have "demonstrated an ability to cross racial barriers . . . ." Brief for Respondents at 30, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (Oct. 26, 2015). Most Black and Hispanic students admitted under the Top Ten Percent Law have attended highly segregated schools in impoverished neighborhoods. *Id*. at 33; *see also supra* Part I.B. Conversely, their counterparts admitted under the holistic, race-conscious

policy have different perspectives and experiences. UT's race-conscious admissions policy helps to dispel the common stereotype that all Black and Hispanic students come from impoverished, segregated communities. The policy helps attain the goal of enrolling students of the same racial group with a "variety of viewpoints." *Grutter*, 539 U.S. at 319–20.

Moreover, in addition to breaking down racial stereotypes, qualitative diversity provides social support for minority students by reducing their feelings of isolation on campus. Black and Hispanic students from affluent schools help their peers from impoverished schools adjust to elite universities. Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After* Fisher, 45 Seton Hall L. Rev 761, 822 (2015). These students have gained experience navigating elite educational environments—a process that requires not only academic merit, but also social skills and cultural knowledge. Student peers may also provide support at social events and in residence halls, when other university services may not be readily available. *Id.* Thus, in both academic and social settings on campus, minority students from more privileged schools can guide their less privileged minority peers in gaining relevant social knowledge and negotiating the challenges of a novel, elite educational environment.

### C. Qualitative diversity ensures that universities will consider non-racial diversity factors along with race.

A university's pursuit of qualitative diversity also helps to ensure that its race-conscious admissions policy

is narrowly tailored to its compelling interest. This Court has repeatedly held that the compelling interest that justifies a university's use of race in admissions is not "simple ethnic diversity" but rather the educational benefits accrued from "student body diversity" which "encompass[ ] a . . . broad[ ] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Grutter*, 539 U.S. at 325 (quoting *Bakke*, 438 U.S. at 315); *Fisher*, 133 S. Ct. at 2421 (quoting *Bakke*, 438 U.S. at 315). Universities must "adequately ensure [] that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." *Grutter*, 539 U.S. at 337.

By its very nature, the pursuit of qualitative diversity ensures that universities meet this requirement. The only way to attain qualitative diversity is to look at "factors that . . . contribute to student body diversity . . . alongside race." *Id*. Unlike a racial quota or a mechanical point system, qualitative diversity cannot be attained by merely identifying the race of applicants and mechanically applying that information. Harpalani, *Diversity Within Racial Groups*, *supra*, at 495. Rather, universities must use a holistic admissions process with individualized review, and, in the pursuit of qualitative diversity, ensure that "admissions committees [] consider factors besides race and [] treat applicants of the same race differently based on non-racial factors." *Id.* (citing *Grutter*, 539 U.S. at 309).

Qualitative diversity is more than just the racial balancing. *Fisher*, 133 S. Ct. at 2413–14. The very purpose of qualitative diversity is to achieve diversity within racial

groups, rather than simply obtaining particular numbers or percentages of each racial group. In fact, there is no particular number or percentage of a racial group that can ensure qualitative diversity, and thus no concern regarding the racial quotas proscribed by this Court. *Grutter*, 539 U.S. at 334; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

In these ways, qualitative diversity as a goal actually helps to enforce this Court's narrow tailoring requirements, because it necessitates that universities conduct "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 309. As such, qualitative diversity is the glue that holds *Grutter* and *Fisher*'s compelling interest and narrow tailoring prongs together. Harpalani, *Diversity Within Racial Groups*, *supra*, at 494–95.

## III. ELIMINATION OF RACIAL DISPARITIES, NOT CRITICAL MASS, PROVIDES AN END POINT FOR RACE-CONSCIOUS ADMISSIONS

According to *Grutter*, "race-conscious policies must be limited in time." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). The Court has never explicitly required universities to articulate an end point when they will no longer use race in the admissions process, and to have a plan for reaching that end point. Nevertheless, the end point of race-conscious admissions policies came up in oral argument before this Court. Transcript of Oral Argument at 47, 80, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). The discussion then focused on

the attainment of a critical mass of minority students—a point when minority students no longer feel isolated or like spokespersons for their race. *Id.* at 47–50. However, rather than attainment of critical mass, the proper end point for race-conscious admissions is the elimination of academic disparities by race. Harpalani, *Broadly Compelling*, *supra*, at 811–12.

### A. Critical mass is part of the compelling interest in student body diversity, not the narrow tailoring test.

Properly understood, critical mass is part of the compelling interest in student body diversity: the educational goal that justifies race-conscious admissions. *Grutter* directly tied the notion of critical mass to the educational benefits of diversity, noting that by enrolling a critical mass of underrepresented minority students, universities can "promote[ ] 'cross-racial understanding,' break down racial stereotypes, and 'enable[ ] [students] to better understand persons of different races." *Grutter*, 539 U.S. at 330. To attain these goals, universities must also ensure that minority students "do not feel isolated or like spokesperson for their race." *Id.* at 319.

As such, critical mass is not just the enrollment of a particular number of minority students (although such numbers are certainly relevant), but rather the creation of a campus climate where universities can attain the educational benefits of student body diversity. Harpalani, *Broadly Compelling*, *supra*, at 782. Critical mass can vary between universities based on local demographics and the given institution's history and educational mission. Harpalani, *Diversity Within Racial Groups*,

*supra,* at 484. Because critical mass varies and is difficult to quantify, it is not the measurable end point of race-conscious admissions policies for narrow tailoring purposes. Harpalani, *Broadly Compelling*, *supra*, at 782–87.

Even if critical mass could be reliably assessed by courts, universities cannot eliminate race-conscious policies all at once, when some magic "critical mass" is obtained. If race-conscious policies were necessary to obtain a critical mass, it follows logically that such a critical mass would dissipate if universities stopped using them, and minority students would once again feel isolated. *Id.* at 784–85. Race-conscious policies would then be necessary once again.

Universities must maintain critical mass, not simply attain it. For narrow tailoring purposes, the proper end point for race-conscious admissions is not the attainment of critical mass and the educational benefits of student body diversity. Rather, the end point derives from the need to use race to attain this goal—which is predicated on racial inequality and academic disparities between minority and non-minority applicants. *Id.* at 811–12. When such disparities have been eliminated, universities can attain a critical mass of minority students and the educational benefits of diversity without needing to use race-conscious admissions policies.

### B. Elimination of racial disparities provides a measurable end point for narrow tailoring.

The most logical end point for race-conscious admissions policies goes to the underlying reason that

such policies are necessary: academic disparities between minority and non-minority applicants on academic criteria such as grades and standardized test scores. Harpalani, *Broadly Compelling*, *supra*, at 811–12. While diversity and its educational benefits are the compelling interest that justify use of race in the university admissions process, the need to use race in order to achieve this compelling interest is predicated heavily on racial disparities on such academic criteria. Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 92–93 (2009). Academic disparities between minority and non-minority applicants are the main reason that it is necessary for universities to use race as a "plus" factor in admissions. Harpalani, *Broadly Compelling*, *supra*, at 809–12. It is only when such disparities have been eliminated that universities will no longer need to use race.

In *Grutter*, this Court held that narrow tailoring does not require universities to compromise academic selectivity for all students to attain the educational benefits of student body diversity. *Grutter*, 539 U.S. at 340. Implicit in this holding is the recognition that while "race should not matter; the reality is that too often it does." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring). Racial inequality persists in education today. *See* Gary Orfield & Eric Frankenberg, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future* (2014). Racial disparities on academic admissions criteria are one consequence of this inequality, and the elimination of such disparities and inequality is the only logical end point of race-conscious admissions.

## IV. LESS RELIANCE ON RACE IS A CONSTITUTIONAL VIRTUE, NOT A VICE.

Petitioner incorrectly asserts that race can be too small of an admissions factor to be constitutional. Brief for Petitioner at 46–47, *Fisher v. Univ. of Tex. at Austin*, No. 14-981 (Sept. 3, 2015). However, contrary to this assertion, UT's "nuanced and modest" role for race in its admissions process is a "constitutional virtue, not a vice." Brief for Respondents at 36, *Fisher*, 133 S. Ct. 2411 (No. 11-345). The Fifth Circuit was correct in finding this modest use of race in UT's holistic review to be "its strength, not its weakness." *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 656 (5th Cir. 2014). In fact, less reliance on race indicates a university's serious intent to eventually transition to race-neutral admissions policies, as racial disparities are gradually reduced and universities identify race-neutral alternatives to generate student body diversity.

### A. Universities can gradually phase out use of race.

This Court has also stated that universities should gradually replace race-conscious policies with race-neutral alternatives "as they develop." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). *Grutter* recognized that universities cannot end race-conscious policies all at once, when some magic critical mass is obtained. Rather, they will reach the end point gradually, through elimination of racial disparities on academic criteria, and through experimentation with race-neutral alternatives. *Id.* A logical consequence of this gradual process "is that at some point, a university's use of race will be very small but still constitutional." Harpalani, *Broadly Compelling*, *supra*, at 797–98.

Race is already merely "a factor of a factor" in UT's admissions process. *Fisher*, 758 F.3d at 659. UT also conducts "periodic review" to determine if and how much it needs to use race. *Id.* at 667. This process is entirely consistent with this Court's narrow tailoring requirements for race-conscious admissions policies.

### B. Statistically negligible use of race is impossible to "smoke out."

Finally, there are other practical problems with Petitioner's contention that a race-conscious admissions policy can have too small of an impact. Absent a university's disclosure that it uses race or some other conclusive evidence, it is the impact of race that ultimately must be detected to enforce any proscription on the use of race. If the impact is too small to be detected, then there can be no enforcement of such a proscription: it makes no sense to "smoke out" statistically negligible use of race. *See* Harpalani, *Broadly Compelling*, *supra*, 798–807.

If a court cannot determine the difference between a race-conscious policy and a race-neutral one, then a constitutional challenge to the policy becomes meaningless. This cannot be a proper reading of this Court's precedents in *Bakke*, *Grutter*, and *Fisher*, and it is not a prudent direction to take for purposes of strict scrutiny. The Fifth Circuit correctly found that Petitioner's claim that UT's race-conscious policy is unconstitutionally small "turns narrow tailoring upside." *Fisher*, 758 F.3d at 656.

### C. Even a small increase in the number of minority students can create unique educational benefits.

A relatively small number of minority students can meaningfully impact diversity on campus. Brief of the NAACP Legal Defense & Educational Fund, Inc., et al. as Amici Curiae in Support of Respondents at 27–28, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (pointing to research that confirms that a relatively small increase in the enrollment of minorities has a significant impact because of a multiplier effect). These students may form student organizations, sponsor events related to diversity, and increase representation in majors and programs where minority students are especially underrepresented. *See* Harpalani, *Broadly Compelling*, *supra*, at 798.

Moreover, "the whole point of a holistic admissions policy with individualized review is to identify applicants who will have a significant individual impact on the educational benefits of diversity." *Id.* That is why this Court has repeatedly emphasized that a narrowly tailored race-conscious admissions policy must "ensure that each applicant is evaluated as an individual[.]" *Grutter*, 539 U.S. at 337; *Fisher*, 133 S. Ct. at 2418. *Grutter* and *Fisher* emphasize individuals over groups precisely because they recognize that some individuals can make a "unique contribution to diversity." Harpalani, *Diversity Within Racial Groups*, *supra*, at 503 n.171, 525–26, 532–33 (2012). And even if race matters for just a limited number of individuals, race-conscious admissions policies can still promote a university's compelling interest in the educational benefits of student body diversity.

## CONCLUSION

For the reasons set forth above, the Fifth Circuit's judgment should be affirmed.

Respectfully submitted,

Shakira D. Pleasant
*Counsel of Record*
Vinay Harpalani
Savannah Law School
516 Drayton Street
Savannah, Georgia 31401
(912) 525-3900
spleasant@savannahlawschool.org

*Counsel for Amici Curiae Legal Scholars Defending Diversity in Higher Education*

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