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 *AMICI CURIAE* CECILIA POLANCO, STAR WINGATE-BEY, ITZEL LIBERTAD VASQUEZ-RODRIGUEZ, R.J., A.J., G.E., I.G., M.B., K.C., Y.D., AND R.H. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae are minority students attending or seeking to attend Harvard College or the University of North Carolina at Chapel Hill ("UNC"). *Amici curiae* have sought to intervene as defendants in pending federal lawsuits[2] challenging the use of race in undergraduate admissions at the two universities.

Amici curiae are three high-achieving minority students enrolled at UNC or Harvard[3] and eight high-achieving minority high school students who have applied or plan to apply to UNC or Harvard.[4]

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. All parties' letters consenting to the submission of *amicus* briefs have been filed with the Clerk's Office in accordance with this Court's Rule 37.3(a).

[2] *Students for Fair Admissions, Inc. v. The Univ. of N.C. at Chapel Hill, et al.*, No. 1:14-cv-954 (M.D.N.C. filed Nov. 17, 2014) and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (Harvard Corp.)*, No. 1:14-cv-14176 (D. Mass. filed Nov. 17, 2014).

[3] Cecilia Polanco is an undergraduate at UNC who identifies as Hispanic and Star Wingate-Bey is an undergraduate at UNC who identifies as Black and Moorish American. Itzel Libertad Vasquez-Rodriguez is an undergraduate at Harvard who identifies as Native American and Latina.

[4] R.J. is a high school senior who identifies as African American and A.J. is a high school junior who identifies as African American and American Indian. Both high school students seek to enroll in UNC. G.E. is a high school freshman who identifies as Native American. I.G. is a high school freshman who identifies as

Amici college students seek to ensure that their educational experiences at UNC and Harvard continue to be enhanced by a diverse student body and the numerous benefits that flow from that diversity. *Amici* high school students will have highly competitive applications for admission to UNC and Harvard and they have an interest in ensuring that their applications are judged under an admissions process that considers the whole of their applications, including the racial and ethnic diversity they will bring to UNC or Harvard.

The Court's decision in this matter will have an immediate, direct impact on *amici* students' college experience or ability to enroll in either UNC or Harvard. The district court judges considering the challenges to the UNC and Harvard admissions policies have confirmed the anticipated effect of the Court's decision here by staying consideration of whether the UNC and Harvard admissions policies comply with the Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, until this matter is resolved.[5] *Amici curiae*, therefore, as proposed

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Hispanic and Filipino. M.B. is a high school junior who identifies as African American and Caucasian. K.C. is a high school sophomore who identifies as Native American. Y.D. is a high school junior who identifies as Native American. R.H. is a high school junior who identifies as African American. All intend to seek admission at Harvard.

[5] Order, *Students for Fair Admissions v. Univ. of N.C. at Chapel Hill, et al.*, No. 1:14-cv-954 (M.D.N.C. Oct. 1, 2015), ECF No. 65 (granting partial stay of proceedings pending decision by United States Supreme Court in *Fisher v. University of Texas at Austin*, No. 14-981); Order, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (Harvard Corp.)*, No. 1:14-cv-14176

intervenors in the UNC and Harvard cases, have a direct and immediate interest in this Court's ruling in this matter.

SUMMARY OF ARGUMENT

This case is not about Abigail Fisher, her desire to attend the University of Texas, or the alleged injuries she suffered when her application was denied. In most jurisdictions, her remaining damages claims would meet the prerequisites for being heard in small claims court. This case is simply an attempt to obtain a wide-reaching proclamation from this Court that eliminates any consideration of race in university admissions. Among other things, Fisher's counsel want to use such a decision in the cases they have filed challenging the race-conscious admissions policies at Harvard and UNC. The lower courts hearing those challenges have stayed proceedings pending this Court's decision, suggesting that the review of the University of Texas admissions policy will determine the fate of the Harvard and UNC admissions policies. That is precisely Fisher's counsel's goal: receive a broad decision from this Court that makes application of the strict scrutiny standard to any race-conscious admissions policy "fatal in fact."

No such result is justified or appropriate. The premise of Fisher's argument is that the University of Texas has failed to produce evidence of its compelling interest in enhancing diversity on the school's campus and failed to produce evidence why consideration of

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(D. Mass. Oct. 9, 2015), ECF No. 110 (granting partial stay of proceedings until United States Supreme Court resolves *Fisher v. University of Texas, et al.,* No. 14-981).

race is necessary to achieve that interest. Fisher's argument is baseless. The University of Texas produced sufficient evidence to uphold, as a matter of law, its admissions policy under the applicable strict scrutiny standard. Furthermore, Fisher's critiques are hypocritical, and should be rejected, in light of the fact that Fisher opposed the remand of this matter after this Court's *Fisher I* decision. If the University of Texas had not adduced sufficient evidence for the matter to be resolved on the parties' cross-motions for summary judgment under the Court's *Fisher I* standard, remand to the District Court would have allowed further development of the record, a district court-level analysis of the entire existing record, or a trial to resolve any remaining factual disputes.

While Fisher seeks to limit and conceal the factual record, *amici* and the schools they attend or want to attend—UNC and Harvard—seek to ensure that they are permitted to present all of the relevant evidence in defense of the schools' admissions policies. *Amici* and universities with race-conscious admissions policies do not shy away from the facts, but instead recognize that their admissions policies are complex, intricate processes that are the products of long experience evaluating applicants and significant research, review, and study. The evidence of the efforts that culminated in race-conscious admissions policies can meet the *Grutter*/*Fisher I* strict scrutiny standard, but only if universities, students, and other interested parties are permitted to present that evidence to the trial courts hearing challenges to those policies.

Amici do not seek the "feeble in fact" strict scrutiny standard condemned in *Fisher I*, but instead simply

seek a fair opportunity to present all of the relevant facts. The University of Texas should not have its admissions process invalidated based on the fact that a certain number of racial minorities can be admitted to the school through an admissions system that does not consider race, but should have its process examined through the lens of the evidence regarding the school's compelling interest and the evidence of narrow tailoring.

A numbers-only analysis that is viewed in isolation from a school's compelling interest in ensuring many forms of diversity—including racial and ethnic diversity—on its campus violates this Court's teachings that students bring many unique characteristics and perspectives to college campuses and that their applications must be reviewed holistically. Fisher and her counsel believe that the race-conscious admissions processes at the University of Texas, UNC, and Harvard must fall if they can identify a way to reach a certain quota of minorities without considering race. That is the very definition of the fatal-in-fact standard this Court has rejected.

Amici are in the crosshairs as Fisher's counsel aim their misguided sights at UNC and Harvard. The admissions policies at their schools can be justified under the *Fisher I* standard, but only if the Court acknowledges that universities and the beneficiaries of their education must be permitted to present all of the facts supporting their well-considered decisions to include race and ethnicity as part of their admissions process.

ARGUMENT

I. Colleges and Universities Must Be Provided a Full Opportunity to Develop the Factual Record Justifying Their Use of Race in the Admissions Process

It is a given that "student body diversity is a compelling state interest that can justify the use of race in university admissions" where it is narrowly tailored to achieve that interest. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *see also Fisher v. Univ. of Tex. at Austin, et al.*, 133 S. Ct. 2411, 2418 (2013) ("*Fisher I*"). Judicial review of whether a school's consideration of race in the admissions process can meet the applicable strict scrutiny standard requires review of two broad questions. First, giving appropriate deference to the school, is the university's basis for asserting diversity as a compelling interest supported by a "reasoned, principled explanation"? *Fisher I* at 2419. Second, are the means chosen to achieve diversity narrowly tailored to achieve the school's goal? *See id.* at 2420.

Both questions are fact-specific and require the development of a comprehensive record that is subject to a "searching examination" by the reviewing court. *Id.* at 2420. As this Court has observed, courts must "giv[e] close analysis to the evidence of how the process works in practice." *Id.* at 2421 (noting that *Grutter* was decided after full trial on the merits). This ensures that admissions policies are not rejected based on assumptions or conjecture. Only by allowing the development of a thorough evidentiary record can courts achieve the promise that strict scrutiny not be "'strict in theory, but fatal in fact.'" *Id.* at 2421.

It is crucial that this Court reject attempts like Fisher's to limit the factual record and instead emphasize that universities must be permitted every opportunity to develop the evidence in support of their race-conscious programs. Denying universities or interested parties the ability to create a record of all of the benefits of diversity and justifications for admissions policies can have far-reaching and long-lasting effects. For example, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Supreme Court rejected the University of California's proffered compelling interest in remediating the effects of past segregation, noting that no evidence had been put on record of any "judicial, legislative, or administrative findings of constitutional or statutory violations." *Bakke*, 438 U.S. at 307 (Powell, J.). Earlier in that case, the trial court had denied the NAACP's motion to intervene to submit evidence on that precise issue. Pet. of NAACP for Leave to File as *Amicus Curiae* on Pet. for Rehearing at 6, *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152 (Cal. 1976). The limitation on the development of the factual record by denying the NAACP's motion to intervene led to a decision that continues to shape a central tenet in the jurisprudence regarding race-conscious admissions policies at colleges and universities.

When the entirety of the record supporting both the reasons for ensuring diversity and the need to consider race and ethnicity to achieve diversity at the University of Texas is examined, the Court will find that the university demonstrated that its admissions policy satisfies strict scrutiny. UNC and Harvard face similar challenges to their admissions policies and if the district courts appropriately consider all of the

evidence supporting the schools' consideration of race, their policies will also be upheld.

A. Types of Evidence That Establish the Benefits of Diversity

To define and establish the benefits of diversity, universities may introduce evidence regarding a host of unique factors, including, among other things, the school's geography, its ranking, the history of the institution, and the specific benefits of various aspects of the educational experience at the institution.

For example, as UNC has previously articulated to this Court[6] and as *amici* seek to present in the current challenge to the UNC admission policy, evidence of UNC's history is relevant to its current interests in creating and maintaining a diverse student body. UNC admitted its first undergraduate student in 1795.[7] For 160 years, African-American and American Indian students were precluded from attending UNC regardless of their qualifications.[8]

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[6] Br. of *Amicus Curiae* The Univ. of N.C. at Chapel Hill Supp. Resps. at 19-23, *Fisher v. Univ. of Tex. at Austin, et al.*, 133 S. Ct. 2411 (2013) (No. 11-345) ("UNC *Fisher I* Amicus Br.").

[7] The University was authorized by the North Carolina Constitution of 1776 and chartered in 1789. It first opened its doors to students in 1795. William S. Powell, *The First State University* 4-10 (3d ed. 1992).

[8] A post-Reconstruction era amendment to the North Carolina Constitution of 1868, art. 9, § 2, provided: "And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race." *See* John V. Orth, *The North Carolina State Constitution: A Reference Guide* 145 (1993).

The first African American at UNC enrolled in the School of Law in 1951, but only after prevailing in an Equal Protection challenge heard by the Fourth Circuit. *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951), *cert. denied,* 341 U.S. 951 (1951). The Fourth Circuit granted Mr. McKissick and his fellow plaintiffs relief under the principle announced by this Court in *Sweatt v. Painter*, 339 U.S. 629 (1950), which found that the educational opportunities offered by the state of Texas to white and African-American law students were not substantially equal. In 1955, after the *Brown v. Board of Education* decision, the first African Americans (Leroy Frasier, John Lewis Brandon, and Ralph Frasier) were admitted to the college. But further progress was slow. There were only eighteen total African-American freshmen at UNC in 1963, which was the first year an African-American woman was admitted. UNC *Fisher I* Amicus Br. at 13; The Carolina Story: A Virtual Museum of University History, African Americans & Integration, Exhibit 3, *available at* http://www.museum.unc.edu/exhibits/integration/leroy-frasier-john-lewis-brandon-and-ralph-frasi-1/ (last visited Oct. 29, 2015).

Similarly, the broader context of North Carolina's treatment of minorities through its history is relevant to the current need for a diverse student body at the state's flagship university. African-American and American Indian residents in North Carolina faced extreme forms of discrimination for much of the state's history. North Carolina, like many other states, adopted "Black Codes" in the 1800s that restricted the activities of African Americans. *See* James B. Browning, *The North Carolina Black Code*, 15 Journal of Negro History 461 (1930). They were followed by Jim

Crow laws, including amendments to the state constitution in 1875 that established separate public schools for African Americans and whites and banned interracial marriage. N.C. Const. Amends. of 1875, §§ XXVI, XXX. Race-based voting limitations, including poll taxes, literacy tests, and other discriminatory limitations followed. *See* Frank Charles Smith, et al., *The American Lawyer Vol.* 7 464 (1899).

This history of racial exclusion and discrimination affected, and continues to affect, the lives of North Carolinians and UNC students, including by creating and maintaining segregated residential and schooling patterns. Demographic data shows that North Carolina continues to be highly segregated along both racial and economic lines.[9] Representation of students from these racially and ethnically identifiable communities on UNC's campus helps foster exposure to a wide variety of individuals from diverse backgrounds, which, in turn, enhances the educational experience.

Moreover, as a state university, UNC has an interest in the continued success of the state. The influence of UNC in all aspects of the lives of North Carolinians cannot be overstated. For North Carolina high school students, there is no comparable school that provides a top-tier education for the comparably small cost of in-state tuition. UNC's alumni network is unparalleled and an important path to economic and political success in the state. UNC's alumni fill the

[9] The dissimilarity index for measuring levels of segregation shows that the largest of North Carolina's cities still have "high" rates of segregation. US 2010 Residential Segregation Data, *available at* http://www.s4.brown.edu/us2010/segregation2010/Default.aspx?msa=10180 (last visited Oct. 29, 2015).

ranks of North Carolina's professionals. *See Sweatt*, 339 U.S. at 633-35 (observing that flagship state university may offer benefits, including resources, faculty, alumni networks, and prestige). UNC's departure from policies of segregation and exclusion has produced concrete results: the first African-American Associate Justice and first African-American Chief Justice on the North Carolina Supreme Court, the first African-American federal district judge, and the first American Indian state judge are all from UNC. UNC *Fisher I* Amicus Br. at 24 (citing Charles E. Daye, *African-American and Other Minority Students and Alumni*, 73 N.C. L. Rev. 675, 681-704 (1995)).

It is critically important to the vitality of the state that members of all communities have access to the school that produces many of the state's doctors, attorneys, teachers, business leaders, community leaders, and other professionals essential to the health of those communities. In a state that continues to exhibit patterns of segregation, the appropriate consideration of race in the UNC admissions process helps ensure that there will be UNC graduates returning home to all of North Carolina's communities. Such a result benefits North Carolina and its leading public university.

Some colleges and universities, like UNC, will also seek to rely on the growing body of evidence establishing that students of all backgrounds benefit from being educated in a racially-diverse environment. *See, e.g.*, Samuel R. Sommers, et al., *Cognitive effects of racial diversity: White individuals' information processing in heterogeneous groups*, 44 J. Experimental Soc. Psychol. 1129 (2008) (whites expecting to discuss

a race-relevant topic with a racially diverse group exhibited better comprehension of topical background readings than whites assigned to all-white groups).

UNC cited and discussed at length in its *amicus* brief to this Court an empirical study conducted by Professors Charles E. Daye and A.T. Panter (UNC), Walter R. Allen (UCLA), and Linda F. Wightman (UNC-Greensboro) of the Educational Diversity Project ("the EDP Study"),[10] which demonstrates a clear positive relationship between racial diversity and educational benefit. UNC *Fisher I* Amicus Br. at 19-23. The findings of the EDP Study support UNC's conclusion that racial diversity can be a compelling interest in the higher educational setting and that UNC and other universities need to consider race during the admissions process to achieve that interest.

Harvard College, along with other Ivy League colleges, relied on similar evidence in their *amici curiae* brief to the Court supporting the University of Michigan's consideration of race. Br. of Harvard Univ., et al. as *Amici Curiae* Supp. Resps. at 8, *Grutter v. Bollinger, et al./Gratz & Hamacher v. Bollinger, et al.*, Nos. 02-241 & 02-516 (Feb. 18, 2003) ("Harvard *Grutter* Amicus Br.") (discussing study wherein 69 percent of Harvard Law School students and 73.5 percent of

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[10] *See* Charles Daye, et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. 75-S (2012). The study used a random sample of 6,100 students from a random sample of 50 ABA-approved law schools, with high minority student representation, followed over three years. The study's findings regarding the educational benefits of diverse student bodies have direct implications for undergraduates and other post-graduate educational institutions.

Michigan Law School students reported that having "students of different races and ethnicities" was a "clearly positive element of their educational experience") (citing Gary Orfield & Dean Whitla, *Diversity in Legal Education* 16 (1999)).

More recently, Dean Martha Minow of Harvard Law School, joined by the Dean of Yale Law School, cited several similar studies in the brief they submitted to this Court in support of the consideration of race in *Fisher I*. Br. of Dean Robert Post & Dean Martha Minow as *Amici Curiae* in Supp. of Resps. at 16-17, *Fisher v. Univ. of Tex. at Austin, et al.*, No. 11-345 (Aug. 13, 2012) ("Minow *Fisher I* Amicus Br."). They cited two studies supporting the conclusion that students "will inevitably interact with increasingly diverse clients, managers, and colleagues," and, thus, that there was a need to "create the educational environment best suited to prepare our students to succeed in this new world." Minow *Fisher I* Amicus Br. at 16-17 (citing Bos. Consulting Grp., *The New Agenda for Minority Business Development* 7 (June 2005), *available at* http://www.kauffman.org/uploadedfiles/minority_entrep_62805_report.pdf and Thomas Barta, et al., *Is there a payoff from top-team diversity?*, McKinsey Quarterly (Apr. 2012), https://www.mckinseyquarterly.com/Is_there_a_payoff_from_top-team_diversity_2954. 11). After research, review, and consideration, Deans Minow and Post concluded simply: "diversity is associated with better educational outcomes." Minow *Fisher I* Amicus Br. at 17 (citations omitted).

The forms of evidence a university might submit to demonstrate the specific benefits of diversity at the school are numerous. A university may identify the

experiences and perspectives of minority students, as shaped by a history of discrimination and ongoing residential and educational segregation. A public university may demonstrate how ensuring minority student access to the institution benefits the state the university serves. Or, a college may introduce the growing body of evidence showing that all students benefit from the presence of students from various backgrounds in the classroom.

All of these forms of evidence, and many more, are relevant to the compelling interest inquiry. The Court must ensure that lower courts, like the ones reviewing the UNC and Harvard admissions policies, are instructed on the importance of allowing universities, students, and others associated with the universities to create a complete evidentiary record regarding the university's basis for asserting a compelling interest in student body diversity.

B. Types of Evidence That Establish the Need for Consideration of Race to Achieve the Benefits of Diversity

Under the second element of the strict scrutiny test as articulated in *Grutter* and explicated by *Fisher I*, a university defending its race-conscious admissions policy must also introduce evidence showing why the consideration of race is necessary to achieve the benefits of the diversity it seeks. Such evidence might include, among other things, facts regarding its particular applicant pool, the make-up of its student body, the effectiveness of its current admissions policy at achieving a diverse student body, and the ineffectiveness of race-neutral alternatives that merely increase numerical diversity. *See, e.g.*, *Grutter*, 539

U.S. at 340 (determining that race-neutral alternatives, including a student lottery, were unworkable in part because the "academic quality of all admitted students"—a purely factual question—would have suffered dramatically).

Again, the evidence that a university may present to support its consideration of race will vary depending on its particular circumstances and its definition of the compelling interest it seeks to achieve. For example, UNC has identified specific research that its admissions policy, which includes consideration of race where applicants note it, has been proven to be effective at identifying applicants who will be successful college students. UNC *Fisher I* Amicus Br. at 18. UNC discussed William Bowen's nationwide analysis of admissions and graduation rates at colleges and universities, which found that students who had been admitted to UNC but enrolled elsewhere graduated at higher rates than students with similar high school test scores and grade-point averages who had not been admitted. *Id.* For example, students admitted to UNC graduated at a rate fifteen percent higher than those denied admission but who enrolled in another research university. *Id.* These results supported UNC's conclusion that "a holistic admissions process in which race plays some modest role remains the most effective, if not indeed the only realistic and workable, way to achieve the full measure of meaningful diversity that will serve UNC's compelling interests to educate, train and best serve the people of North Carolina." *Id.* at 23.

Harvard has considered race-neutral alternatives but has concluded that "[a] race-neutral preference for

economically disadvantaged students, for example, would admit many more whites than non-whites, because of sheer demographic realities." Harvard *Grutter* Amicus Br. at 22 (citing *Statistical Abstract of the United States* 2001, at 442-43, Tables 679, 682; Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *The Black-White Test Score Gap* 448 (Christopher Jencks & Meredith Phillips, eds., 1998)).

There are many types of evidence that a university might admit to justify its need to consider race and ethnicity in order to obtain the benefits of diversity. An appropriate and comprehensive judicial review of the basis and justifications for a university's race-conscious admissions policy requires allowing a school to put such evidence in the record.

C. Fisher's Proposed Numbers-Only Analysis May Not Substitute for the Comprehensive Development and Searching Examination of the Evidentiary Record

While the University of Texas, UNC, Harvard, their students, applicants, and other interested parties have developed and stand ready to present the evidentiary records necessary to defend race-conscious admissions under the appropriate standard, Fisher seeks to limit the record and the analysis to a simple measurement of numbers. Fisher argues that the University of Texas can achieve racial diversity by increasing its reliance on the Top 10% Plan, which requires the university to admit any Texas high school student who graduates in the top ten percent of his or her class. Br. for Pet'r at 24, *Fisher v. Univ. of Tex. at Austin, et al.*, No. 14-981 (Sept. 3, 2015) ("Br. for Pet'r"); *see also Fisher v. Univ.*

of Tex. at Austin, 758 F.3d 633, 656 (5th Cir. 2014) ("In sum, Fisher points to the numbers and nothing more in arguing that race-conscious admissions were no longer necessary because a 'critical mass' of minority students had been achieved by the time Fisher applied for admission—a head count by skin color or surname that is not the diversity envisioned by *Bakke* and a measure it rejected."), *cert. granted*, 135 S. Ct. 2888 (Mem.) (2015); *see also* Tex. Educ. Code § 51.803 (1997). Fisher argues that the Top 10% Plan led to "[t]he dramatic increase in African-American and Hispanic enrollment at UT," and, thus, that a purely numbers-driven plan achieves all of the benefits of diversity. Br. for Pet'r at 10.

Plaintiff in *Students for Fair Admissions v. The University of North Carolina at Chapel Hill, et al.*, No. 1:14-cv-954 (M.D.N.C.), who is also represented by Ms. Fisher's counsel,[11] suggests that UNC should similarly adopt some form of the Top 10% Plan to increase or maintain racial diversity. Compl. at ¶¶ 74-75, *Students for Fair Admissions, Inc. v. The Univ. of N.C. at Chapel Hill, et al.*, No. 1:14-cv-954 (M.D.N.C. Nov. 17, 2014), ECF No. 1; *see also* Compl. at ¶ 314, *Students for Fair*

[11] Br. for Pet'r at 49 (identifying William S. Consovoy, Thomas R. McCarthy, and J. Michael Connolly as attorneys for Petitioner); Compl. at 65, *Students for Fair Admissions, Inc. v. The Univ. of N.C. at Chapel Hill, et al.*, No. 1:14-cv-954 (M.D.N.C. Nov. 17, 2014), ECF No. 1 (identifying William S. Consovoy, Thomas R. McCarthy, and J. Michael Connolly as attorneys for Plaintiff); *see also* Compl. at 120, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (Harvard Corp.)*, No. 14-14176 (D. Mass. Nov. 17. 2014), ECF No. 1 (identifying William S. Consovoy, Thomas R. McCarthy, and J. Michael Connolly as attorneys for Plaintiff).

Admissions, Inc. v. President and Fellows of Harvard Coll. (Harvard Corp.), No. 14-14176 (D. Mass. Nov. 17. 2014), ECF No. 1 (making similar argument about Harvard College).

The purely numbers-driven analyses Fisher and her counsel advocate for the University of Texas, UNC, and Harvard have been soundly rejected by this Court. *Grutter*, 539 U.S. at 329-30 (emphasizing that a goal of assuring "within its student body some specified percentage of a particular group merely because of its race or ethnic origin" would amount to "patently unconstitutional" racial balancing) (quoting *Bakke*, 438 U.S. at 307). One cannot assume that all racial minorities contribute to student diversity in the same way. Fisher's approach ignores the reality that minorities cannot be classified with simple demarcations. Fisher's insistence that universities be limited to the consideration of the number or percentage of underrepresented racial or ethnic minorities is the precise type of argument this Court has forbidden—a valuation of a student or applicant solely on the basis of their race.

Furthermore, the only reason that percentage plans produce some predictable measure of racial diversity is because of the entrenched, continuing segregation of secondary education in many states.[12] As the Fifth Circuit found, "[t]he sad truth is that the Top Ten Percent Plan gains diversity from a fundamental

[12] North Carolina schools, for example, continue to be affected by the adoption of the Pearsall Plan, which allowed families opposed to integration to use public dollars to send their children to segregated private schools. N.C. Gen. Stat. § 115-275 (enacted 1956).

weakness in the Texas secondary education system. The de facto segregation of schools in Texas enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions to diversity beyond race." 758 F.3d at 650-51.

Only by permitting a university to develop a comprehensive record of the many different types of diversity that define all students, including students that come from racial and ethnic minority backgrounds, can the benefits of race-conscious admissions be determined and measured against the compelling interest standard. For example, in North Carolina, American Indians comprise nearly forty percent of the population of Robeson County and nearly thirty percent of the population of Swain County. United States Census Bureau, 2010 Demographic Profiles, Counties of North Carolina, *available at* www.census.gov. At the same time, American Indians make up one percent or less of the populations of Mecklenburg, Wake, Durham, Guilford, and Forsyth counties where the state's five largest cities—Charlotte, Raleigh, Durham, Greensboro, and Winston-Salem—are located. *Id.* Accordingly, the admissions system promoted by Fisher, which selects a certain percentage of top students from each public high school, would likely lead to a large number of American Indians coming from small, rural counties, where they constitute substantial portions of the population, and virtually none from urban areas, where American Indians comprise a much smaller percentage of the population. Such an outcome would limit a university's ability to foster a broad-range of cross-racial interactions and obtain the full benefits of diversity UNC seeks.

This Court must look past Fisher's simplistic argument that *any* admissions system that leads to a certain number of minority students, without explicitly considering race, is, by definition, superior to *any* race-conscious system. Instead, the Court must look at the entire factual basis for the race-conscious admissions policy, which in this context, will demonstrate that the University of Texas has, in fact, adduced sufficient evidence to establish, as a matter of law, that its admissions procedure meets the Court's *Grutter* / *Fisher I* strict scrutiny standard.

II. Any Perceived Inadequacies in the Factual Record Could Be Remedied by Remand of the Case to the District Court

When this Court remanded the matter in *Fisher I*, Respondent University of Texas argued that "the most appropriate course" was for the Fifth Circuit to "remand the case to the District Court to reconsider the case in the first instance." Appellees' Statement Concerning Future Proceedings on Remand at 2, *Fisher v. Univ. of Tex. at Austin, et al.*, No. 09-50822 (5th Cir. July 23, 2013), Doc. No. 00512318306. Fisher opposed any remand, arguing that "[t]here are no further factual issues to address." Prop. Schedule for Supp. Briefing & Resp. to Appellees' Statement Concerning Further Proceeding on Remand at 2-4, 6, *Fisher v. Univ. of Tex. at Austin, et al.*, No. 09-50822 (5th Cir. July 24, 2013), Doc. No. 00512320049.

The Court of Appeals denied the University's request to remand, even though it recognized the potential insufficiency of the evidentiary record. 758 F.3d at 641 (recognizing that "evidence offered by live witnesses is far more likely to surface and resolve fact

issues than summary judgment evidence crafted by advocates"). In doing so, the Court of Appeals frustrated the Supreme Court's directive that remand was necessary to ensure fairness to both the litigants and the courts. Failure to remand was unfair to the University because it deprived the University of the opportunity to supplement the record in defense of its holistic-review admissions policy under the standard articulated in *Fisher I*.

When the matter was first before this Court, the parties developed, and the District Court and Court of Appeals analyzed, the evidentiary record under a standard that this Court would ultimately reject. *See Fisher I* at 2421 ("The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way. . . . [F]airness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis."). In clarifying the University's burden, Justice Kennedy made plain that the University must demonstrate that no "workable race-neutral alternatives" that could promote the educational benefits at a "tolerable administrative expense" are available. *Id.* at 2420 (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986)) (internal quotation omitted). This guidance emphasized the fact-dependent nature of the applicable standard and the importance of facts that are unique to the circumstances of individual institutions. *See Fisher I* at 2420.

The failure to remand also deprived the District Court of the opportunity to apply the standard clarified by the Supreme Court, a practice which is squarely at

odds with precedent even when this Court has explicitly remanded the case to the "court of appeals." *See, e.g., Spector v. Norwegian Cruise Line, Ltd.*, 427 F.3d 285 (Mem.) (5th Cir. 2005) (remanding to district court based on Supreme Court's holding in *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 132 (2005), that "[o]n remand, the *Court of Appeals* may need to consider [certain issues]") (emphasis added); *FW/PBS, Inc. v. City of Dallas*, 896 F.2d 864, 865 (5th Cir. 1990) (remanding to district court "for further proceedings consistent with the ruling of the United States Supreme Court" where Supreme Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990), "remand[ed] to *the Court of Appeals* for further determination whether and to what extent the licensing scheme is severable") (emphasis added); *see also, e.g.*, *Craft v. United States*, 61 F. App'x 185, 185 (6th Cir. 2003) (remanding the case to district court where Supreme Court in *United States v. Craft*, 535 U.S. 274, 289 (2002), "express[ed] no view as to the proper valuation of respondent's husband's interest in the entireties property, *leaving this for the Sixth Circuit to determine on remand*") (emphasis added); *Vigil v. Rhoades*, 2 F.3d 1161 (table) (10th Cir. 1993) (remanding to district court based on Supreme Court's holding in *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993), that "the record at this stage does not allow mature consideration of constitutional issues, which we leave for *the Court of Appeals* on remand") (emphasis added).

Accordingly, if the Court determines that the record is insufficient to establish that the University of Texas admissions policy does not meet the narrow tailoring standard as a matter of law because factual issues remain or insufficient facts have been adduced, the

proper action is to remand the matter to the District Court to consider reopening discovery, conducting further analysis of the existing record, and/or allowing the matter to proceed to trial.

The Court should not countenance Fisher's attempt to take advantage of the Fifth Circuit's decision, made at her request, not to remand to the District Court. Fisher asserts that the University of Texas admissions plan must fail because "UT has no evidence to support its intra-diversity rationale." Br. for Pet'r at 21. She even critiques the Fifth Circuit for its "factfinding." *Id.* at 34. But, any gaps in the factual record that Fisher perceives are a result of her argument to the Fifth Circuit that "[t]here are no further factual issues to address." Prop. Schedule for Supp. Briefing & Resp. to Appellees' Statement Concerning Further Proceeding on Remand at 6, *Fisher v. Univ. of Tex. at Austin, et al.*, No. 09-50822 (July 24, 2013), Doc. No. 00512320049.

Fisher successfully helped preclude further development or analysis of the evidentiary record below and should not now be heard to argue that the University of Texas has adduced insufficient evidence to satisfy strict scrutiny. Instead, if the Court concludes that there are missing facts, disputed facts, or missing judicial analysis of the clarified standard, the remedy is remand, not the broad statement that Fisher seeks regarding the viability of all race-conscious admissions policies.

Given the importance of the evidentiary record in these types of cases, it is imperative that the Court, if it concludes that the record is insufficient, remand the case to the District Court rather than making a decision on an incomplete record.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be affirmed. Alternatively, if the Court determines that the record is insufficient to find that the University of Texas admissions policy meets the applicable strict scrutiny test as a matter of law, the matter should be remanded to the District Court.

Respectfully submitted,

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