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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE* [1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that has participated in the litigation of this case from the outset, including twice presenting oral argument in the court of appeals. JA 7a, 16a; Pet. App. 262a, 264a. For more than seven decades, LDF has worked to dismantle racial segregation and ensure equal educational opportunity for all students. LDF has represented African-American students and applicants, as parties and *amici curiae*, in groundbreaking cases that seek to expand educational access and opportunity in higher education—both at UT, *see*, *e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and at other universities throughout the nation, *see, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *United States v. Fordice*, 505 U.S. 717 (1992); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Sipuel v. Bd. of Regents of Univ. of Okla.,* 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983); *Geier v. Bredesen*, 453 F. Supp. 2d 1017 (M.D. Tenn. 2006). In addition, LDF's sixth President and Director-Counsel, the late John Payton, served as counsel to the University of Michigan in *Grutter* and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Gratz and argued the latter case before this Court when he was in private practice prior to joining LDF.

LDF represents the Black Student Alliance (BSA) at the University of Texas at Austin (UT), as well as the Black Ex-Students of Texas, Inc. (BEST), many of whose members were undergraduates during the period at issue in this case. Founded in 1980, the BSA serves as the leadership voice for African-American students at UT. BSA members have a strong interest in preserving UT's efforts to promote diversity through the inclusion of race as one of the many factors in UT's holistic review process. Although BSA recognizes that the campus is more inclusive than in the past, many of its members still experience racial isolation in their classes, extracurricular activities, and other university settings because of the relatively few African-American students on campus.

BEST, which was founded in 1998, brings together UT alumni to assist in recruiting, retaining, and supporting African-American students at UT. BEST also aims to increase awareness of the issues facing African-American students, faculty, and staff at UT, and provides networking opportunities for its alumni members. Many BEST members were students at UT between 1997 and 2004, the period when UT did not consider race in its admissions policies, and experienced significant racial isolation. All too often they were the only African-American student, or one of a very few, in their classes. Professors and fellow students frequently looked to BEST members to give the "Black perspective" on particular issues. Some also experienced acute incidents of racial hostility, which undermined their sense of belonging within the campus community. Accordingly, BEST members seek to promote an educational environment at UT in

which African-American students no longer bear the crushing burden of tokenism and racial stereotype. LDF has represented BSA and BEST as *amici curiae* in this litigation since 2008 and 2012, respectively, and *amici* have a continued interest in protecting this Court's precedents affirming the importance of diversity in education.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The 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 in part and concurring in the judgment). When, in 2012, this Court last heard this case, an increasingly popular misbelief that the United States was approaching, or had achieved, a colorblind society where race no longer had a meaningful impact on American life, had taken hold in this country. Since then, our nation has been confronted by a series of tragedies and upheavals that have put the stubborn persistence of racial bias, stereotype, and discrimination—as affirmed by the lived realities of many African-Americans—in stark relief.

As our nation grapples with its long history of racial subordination and the continuing manifestations of racial bias in contemporary institutions, this Court once again faces the question of whether UT, the flagship university of this country's largest southern state, may—in its judgment—use race as one of several factors to achieve its overall goal of diversity.

The legal issues at stake have been substantially narrowed since the last time this case was before this Court, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct.

2411 (2013) ("*Fisher I*"). In *Fisher I*, the Court reaffirmed the principle that a diverse student body yields numerous educational benefits and is a compelling governmental interest. Thus, the sole question on remand to the Fifth Circuit was whether UT's use of race-conscious admissions is sufficiently narrowly tailored to further compelling governmental interests. As detailed in Respondents' Brief and the Fifth Circuit's decision, UT's admissions plan squarely satisfies these constitutional requirements.

Amici curiae write separately to emphasize three important and determinative points. First, because Petitioner has acknowledged that she is not challenging *Grutter* and its progeny, she and her attorneys cannot use this case as a vehicle to fundamentally undermine this Court's longstanding precedents affirming the value of diversity in higher education. Furthermore, Petitioner faces significant, unresolved questions about her Article III standing. Under these circumstances, any effort by Petitioner to reexamine, recalibrate, or recast these precedents is particularly inappropriate given her highly-questionable Article III standing.

Second, UT's present hybrid system of admissions is fully compliant with the letter and spirit of this Court's precedents. From 1997 to 2004, UT utilized a state law guaranteeing admission to all Texas residents ranked at the top of their high school graduating class as part of a "race-neutral" admissions system. *See* Tex. Educ. Code Ann. § 51.803 (West 1997) (amended 2015) (hereinafter the "Top Ten Percent Plan"). The shortfalls of this race-neutral experiment demonstrate why this Court should defer to UT's judgment that some measure of race-consciousness is necessary for it to attain a critical mass of students of color and to maintain

flexibility in defining the dimensions of the diversity that furthers its educational mission. Moreover, individual applicants' expression of race in the application process through personal essays affords due respect to their experiences, aspirations, and identity, as defined by the individual applicants themselves, that contribute to the diversity of the student body.

Third, Petitioner, having failed to secure relief, now seeks to reverse course and challenge settled questions about the meaning and merits of diversity. *Amici* are therefore compelled to reassert what the Court has long agreed is a compelling state interest: the myriad and essential benefits of a diverse student body for all students. The admission of a critical mass of diverse underrepresented students is crucial to combating bias, dispelling stereotypes, and enhancing mutual respect. Moreover, graduating a diverse class of students propagates the integration and inclusiveness of the broader community and fosters pathways to leadership in public life and other sectors of society for diverse individuals.

ARGUMENT

I. PETITIONER'S CASE OFFERS NO BASIS TO CHALLENGE THIS COURT'S PRECEDENTS AFFIRMING DIVERSITY IN HIGHER EDUCATION AS A COMPELLING GOVERNMENTAL INTEREST.

Petitioner's case does not—and should not—provide any basis for reexamining this Court's longstanding and clearly established precedents recognizing the numerous educational benefits of diversity in higher education as a compelling governmental interest. In *Fisher I*, this Court reaffirmed the principle that

universities have a compelling interest in pursuing "the educational benefits that flow from a diverse student body." 133 S. Ct. at 2417. The Court rightly embraced "as given" its prior precedent on this point. *Id*. (citing to *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; and *Bakke*, 438 U.S. 265).

Importantly, this Court's recognition of the educational benefits of diversity arose from a particular historical context in which UT played a distinctly significant and unfortunate role—namely, the *de jure* segregation of UT that affirmative action policies were originally created to remedy. The racial integration of UT Austin occurred slowly, even after this Court, in 1950, forced its law school to admit African-American students. *See Sweatt*, 339 U.S. 629. In the 1970s, the federal government undertook a court-ordered investigation of Texas's higher education system and found that the state had failed to eliminate vestiges of its formerly segregated system. *See Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994) (chronicling this investigation and Texas's subsequent efforts to come into compliance), *rev'd on other grounds*, 78 F.3d 932 (5th Cir. 1996). In 2000, Texas and the federal government entered into an ongoing agreement designed to address the persistence of racial segregation in Texas's higher education system.[2] Thus, "[d]iscrimination against blacks in the state system of higher education is well

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[2] *See* Priority Plan to Strengthen Education at Prairie View A&M University and at Texas Southern University (2000), http://sacs.pvamu.edu/assets/library/OCRpriority.pdf; Letter from Russlyn Ali, Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., to Rick Perry, Governor of Texas, Apr. 29, 2011, http://static.texastribune.org/media/documents/3061_001.pdf. *See generally* Dwonna Goldstone, *Integrating the 40 Acres: The Fifty–Year Struggle for Racial Equality at the University of Texas* (2006) (charting Texas's halting progress).

documented in history books, case law, and the State's legislative history." *Hopwood*, 861 F. Supp. at 554. And UT has admitted that it is "painfully aware" that, notwithstanding these efforts, in the six decades following this Court's decision in *Sweatt,* "vestiges of *de jure* segregation" persist. Resp. Br. 4 (citing SJA 14a and *Sweatt*, 339 U.S. 629).[3]

In light of this history, this Court has repeatedly reaffirmed the validity of the government's compelling interest in student diversity for good reason: "[N]othing less than the 'nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.'" *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313).

States and universities across the nation have also repeatedly acknowledged that critical educational benefits flow from diverse campuses and classrooms. *See generally* Amicus Br. of Massachusetts et al.; Amicus Br. of Leading Public Research Universities. These benefits are as pertinent today as they were when Justice Powell cast the deciding vote in *Bakke* more than three decades ago, when this Court decided *Grutter* twelve years ago, and when it reaffirmed *Grutter*'s key principles in *Fisher I* two years ago.

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[3] Given this extensive history, the race-conscious component of UT's admissions process also constitutes a constitutionally justifiable remedial measure for past and present discrimination. *See Fordice*, 505 U.S. at 729 ("If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed"); *Veasey v. Abbott*, 796 F.3d 487, 510 (5th Cir. 2015) ("Texas's maintenance of a 'separate but equal' education system . . . contributed to the unequal [educational] outcomes that presently exist").

Petitioner has previously acknowledged and now assumes *arguendo*, Pet. Br. 22, that "the interest in the educational benefits that flow from a diverse student body" is a constitutionally permissible government compelling interest for a university, *Fisher I*, 133 S. Ct. at 2413 (quoting *Bakke*, 438 U.S. at 299 (opinion of Powell, J.)). Indeed, Petitioner has expressly and "very carefully [said that she was] not trying to change the Court's disposition of the issue in *Grutter*" or the "legitimacy of the interest" in diversity, *Fisher I*, Tr. of Oral Arg. at 8. Notwithstanding these clear and unequivocal concessions in *Fisher I*, and in light of the failure of her challenge, Petitioner now attempts to relitigate *Grutter*, relitigate *Fisher I*, and challenge the contours and core of the government's compelling interest in racial diversity. Pet. Br. 3, 20, 21, 26, 29, 30, 33. But Fisher should not be given a second bite at the apple – let alone a third or more.

Indeed, Petitioner's attempts to excavate and re-examine settled law are particularly inappropriate given the fundamental questions about her standing that remain unresolved. Fisher's claims, even if they were properly before this Court, are not redressable. *See generally* Resp. Br. Because Petitioner did not litigate her case on behalf of a class and she graduated from another university in 2012, her forward-looking demands for an injunction and declaratory judgment have fallen away. *Cf. DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) (per curiam). Thus, the only relief Petitioner now seeks is "monetary damages in the form of refund of application fees." JA 89a. However, Fisher has no standing to pursue this relief because UT's allegedly unconstitutional conduct did not cause her to pay the application fee in the first place. Nor would a refund

redress her alleged injury resulting from the University's purported failure to treat her application fairly. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). Indeed, Fisher conceded in her complaint that, insofar as she was unconstitutionally "deprived of the opportunity to attend the UT Austin," that is "an injury that cannot be redressed by money damages." JA 119a.[4]

These standing challenges have been repeatedly presented, preserved,[5] and examined by parties, scholars, and commentators.[6] Were this Court to

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[4] Fisher's complaint also requested attorney's fees and costs, but that demand cannot on its own establish an Article III case or controversy. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990). Moreover, since Petitioner would not have been admitted to UT, even with a different admissions policy or a "perfect" score on certain achievement indices, Petitioner has not suffered any cognizable injury. JA 465a-66a; *see also Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 639 & n.17 (5th Cir. 2014) (no Fall 2008 applicants were admitted with Fisher's achievement index score). This fact is fatal to Fisher's claim under *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam).

[5] *See* Br. of Defs.-Appellees at 24, 29-32, *Fisher*, 631 F.3d 213 (No. 09-50822), 2010 WL 2624785, at *24, *29-32; Resp. Br. in Opp'n at 6-20, *Fisher I*, 133 S. Ct. 2411 (No. 11-345), 2011 WL 6146835, at *6-20; Br. for Resp. at 16 n.6, *Fisher I*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3245488, at *55; Supp. Br. for Defs.-Appellees at 6-19, *Fisher*, 758 F.3d 633 (No. 09-50822), 2013 WL 5885633, at *6-19. *See also* Tr. of Oral Arg. at 3:22-8:5, 54:23-57:17, 73:11-75:19, *Fisher I*, 133 S. Ct. 2411 (No. 11-345). Even had these standing arguments not been preserved, they can, of course, be raised at any time. *See, e.g.*, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990).

[6] *See, e.g.*, Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 Vand. L. Rev. 297 (2015); Adam D. Chandler, *How*

ignore these grave justiciability infirmities, it would raise serious questions about whether the doctrine of standing is applied evenhandedly to all litigation that involves questions of racial bias. Leaving Fisher's standing deficiencies unaddressed suggests that these requirements need not be thoroughly satisfied when plaintiffs claim that their rights have been violated for the alleged benefit of racial minorities. Turning a blind eye to these important jurisdictional questions defies principles of judicial restraint and raises serious questions about the fair and consistent application of the standing doctrine by this Court.[7]

II. CONSIDERATION OF RACE IN UT'S HOLISTIC ADMISSIONS PROCESS IS NARROWLY TAILORED TO ACHIEVE A DIVERSE STUDENT BODY.

The only question properly before this Court is whether UT's admissions policy is narrowly tailored. This inquiry assesses the *means* used by UT to achieve the benefits of diversity in education.

History and practice amply demonstrate that UT justifiably determined that it needed to increase diversity beyond that which it had achieved between 1997 and 2004, under an ostensibly "race-neutral" system. Today, UT's hybrid system of admissions remains fully compliant with the letter and spirit of this Court's precedents.

(Not) To Bring An Affirmative-Action Challenge, 122 Yale L.J. Online 85 (2012).

[7] *Cf. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) ("[I]t is not enough that the party invoking the power of the court have a keen interest in the issue.").

A. History amply demonstrates that race-conscious holistic review is a necessary supplement to the Top Ten Percent Plan to achieve a broadly diverse student body.

Fisher I reiterated that narrow tailoring requires "careful judicial inquiry" and assigns to universities the "ultimate burden" of demonstrating the inadequacy of race-neutral alternatives. 133 S. Ct. at 2420. When admonishing that "[s]trict scrutiny must not be strict in theory, but fatal in fact," this Court recognized that there is some latitude as to *how* a university can make its required showing. *Id*. at 2421.

UT could have addressed the insufficiency of its race-neutral alternatives to achieving the benefits of diversity in any number of ways. Here, UT analyzed the data and results from its actual implementation of a race-neutral process, carefully determined that those measures remained inadequate, and developed an admissions policy that gave it the flexibility to address those inadequacies. This Court should give UT due latitude in constructing its admissions policy after having tried so assiduously to use race-neutral alternatives. UT should not be penalized with the imposition of an impossibly exacting standard that is effectively "fatal in fact."

UT extensively experimented with race-neutral measures from 1997 to 2004, when a ban on race-conscious admissions was in place as a result of the Fifth Circuit's decision in *Hopwood*, 78 F.3d 932. As part of this effort, UT expanded outreach and scholarships, took full advantage of the state law establishing the Top Ten Percent Plan, and instituted individualized review for applicants not admitted through that plan. *See Fisher v. Univ. of Tex. at*

Austin, 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011). That individualized review included the socio-economic status of applicants' families, extracurricular activities, community service, leadership qualities, and multiple other factors—but it did not consider race. *See* JA 97a-105a.

The race-neutral admissions process failed to achieve UT's desired level of campus diversity to serve its educational goals. In assessing whether it was providing the necessary exposure to different viewpoints to achieve the educational benefits of student diversity, UT appropriately considered the very low number of African-American students who matriculated between 1997 and 2004. In that seven-year time period following *Hopwood*,[8] an average of 7,000 first-year students enrolled at UT each year, and no more than 309 of those enrolled students per year were African Americans. JA 177a. In addition, the percentage of African-American students admitted through the Top Ten Percent Plan dropped and then stagnated at 3-4%. *Fisher*, 758 F.3d at 649. At no point between 1997 and 2004 did African-Americans constitute more than 5% of any first-year class. *Id.*

Further, the low enrollment numbers of African-American students exacerbated the substantial racial isolation experienced by the students of color who attended UT in the post-*Hopwood*, pre-*Grutter*

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[8] "The first freshman class after *Hopwood*—the percentage of African–American admitted students fell from 4.37% to 3.41%, representing a drop from 501 to 419 students even as the total number of admitted students increased by 833 students. Similarly, the percentage of Hispanic admitted students fell from 15.37% to 12.95%." *Fisher*, 758 F.3d at 649.

period. During this period of low-minority enrollment incidents of racial hostility on campus sparked student protests and prompted UT to convene a Task Force on Racial Respect and Fairness in March 2003. The Task Force's January 2004 report was produced while the University's post-*Grutter* review of its admissions policies was still pending. *See* Univ. of Tex. at Austin, *Report of the Task Force on Racial Respect and Fairness*, at 3 (2004). This review of racial hostility and racial isolation informed UT's conclusion that the race neutral admissions process failed to ensure that UT's students received the educational benefits of diversity.

Because the facially race-neutral measures failed to achieve sufficient diversity, UT adopted the hybrid process now at issue, which combines the race-neutral Top Ten Percent Plan (whereby over 75% of UT students are admitted each year—80% during the relevant time period here) and the race-conscious holistic review process (under which the remainder of the class is admitted). Such limited consideration of enrollment levels is acceptable in a university's critical mass[9] inquiry. As this Court has explained, "'some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323 (appendix to opinion of Powell, J.)) (alteration in original).

Petitioner's contention "that UT effectively achieved critical mass no later than 2003, the last

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[9] A "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330. There can be no quota, target, or predetermined percentage of student enrollment that automatically produces these benefits. *Id.* at 329-30, 334.

year it employed its race neutral admissions plan," Pet. Br. 46, is belied by the undisputed record: "When the holistic review program was modified to be race-conscious, 90% of classes had one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students." *Fisher*, 758 F. 3d at 658. And, despite Petitioner's claims to the contrary, *cf.* Pet. Br. 46, the adoption of race-conscious holistic review significantly increased the enrollment of African-American and other underrepresented minority students at UT, thus becoming an essential supplement to the Top Ten Percent Plan and other race-neutral efforts.[10]

For example, in the incoming freshman class for the 2008-2009 year (the class to which Fisher applied), total African-American enrollment increased by 21.4%, as compared to the incoming freshman class for the 2004-2005 school year (the last class admitted exclusively through race-neutral admissions). Moreover, in the first four entering classes after UT's 2004 decision to use race-conscious admissions, 435

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[10] Even if Petitioner were correct that UT's race-conscious admissions policy is unnecessary to achieve a critical mass of students of color, the policy would still pass constitutional muster. *Cf.* Pet. Br. 45-46. Although *Parents Involved* questioned the necessity of a K-12 student assignment plan that had minimal statistical impact, the plan in that case had rigid, binary racial classifications that could be "determinative standing alone." 551 U.S. at 723; Pet. App. 310a-311a. Thus, *Parents Involved* distinguished that rigid type of student assignment plan from the individualized review, at issue in *Grutter* and here, where race is considered "as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'" 551 U.S. at 723 (quoting *Grutter*, 539 U.S. at 330); *see also id.* at 793 (Kennedy, J., concurring in part and concurring in the judgment).

out of the total of 1,544 African-American students—a full 28%—were admitted through the holistic admissions program. *See* SJA 156a-157a. While the race-conscious component of the admission program is "modest" in its approach, *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting), its impact is substantial in achieving its diversity goals.

UT "does not suggest that the end point . . . is a specific measure of diversity in every class," *Fisher*, 758 F. 3d at 658, but research confirms that increases in the enrollment of African-American students, even on a small scale, have a multiplier effect. A study of selective universities found that even "a one percentage point increase in the share of [ ]students [of color] in the entering freshman cohort is associated with a 3 or 4 percent increase in the odds of interacting with students of different racial backgrounds." Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 199 (2009).

Overall, this history of experimentation, revision, and improvement demonstrates how UT extensively explored race-neutral alternatives, rigorously determined they were inadequate alone, and carefully crafted narrow race-conscious supplementary measures. Moreover, the comparatively slim and individualized consideration of race here—as just one factor among many—should itself inform this Court's narrow tailoring analysis, because it speaks directly to the specificity with which UT has formulated a remedy and sought to fulfill its goals. Together, these circumstances more than suffice to satisfy the strictures of narrow tailoring.

B. Overhauling UT's policy would distort established precedent and impair UT's ability to carry out its educational mission.

Petitioner seeks drastic changes to UT's admissions system that would upend this Court's longstanding precedents and UT's commendable efforts to achieve diversity in several detrimental ways.

First, Petitioner astoundingly criticizes UT for *not* choosing a "specific or approximate level of minority admissions," Pet. Br. 8. This argument fundamentally misconceives of critical mass and comes perilously close to contravening this Court's prohibition on racial quotas. *See supra* n.9. Indeed, it would create a constitutional Catch-22 to require UT to undertake a highly individualized admissions process and then fault it for not specifying categorical racial targets or goals.

Second, Petitioner's race-blind alternative, Pet. Br. 26-30, would cap enrollment of underrepresented minority students at the level achieved prior to *Grutter*. That is impractical and problematic for many of the reasons UT cataloged in recent years. *See supra* Section II.A. Moreover, this unduly rigid understanding of critical mass is inconsistent with this Court's pronouncements and would severely impair UT's ability to advance "vital component[s] of its educational mission," *Grutter*, 539 U.S. at 340.

Third, Petitioner would elevate the numerical presence of minorities over the substantive value of viewpoint diversity. Currently, UT's educational goal of attaining a broadly diverse student body depends on the understanding that minority students cannot and should not be required to express some stereotypical minority viewpoint on any issue.

Individualized race-conscious review helps to overcome the stereotypes that all students of any given race think alike. As explained in Section III.B, *infra*, the presence of different types of students of various races, with unique perspectives and viewpoints, is the hallmark of UT's push for broader diversity. Petitioner's emphasis on the value of "race-neutral" processes impermissibly assumes that minority students always embody a certain perspective that will be attained by simply enrolling a certain number of racially diverse students. This ignores the value of the diversity of viewpoints, and experiences within racial groups, and thereby distorts this Court's holdings from *Bakke* onwards.

Fourth, Petitioner's desire to overhaul UT's admissions policy is ill-suited for other colleges and contexts. This Court previously recognized that a percentage plan may "not [be] a workable alternative . . . 'in a constitutionally significant sense'" since such plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 239 (5th Cir. 2011) (quoting *Grutter*, 539 U.S. at 340); UT Supp. Br. 31-34 (Fifth Circuit, Oct. 25, 2013). Other schools have similarly found Top Ten Percent style-plans are not workable alternatives to race-conscious holistic review processes. *See generally* Amicus Br. of Dean Robert Post and Dean Martha Minow. If Petitioner's drastic remedy were applied nationally, there would be a significant drop in minority enrollment, with predictably grim consequences for achieving the educational benefits of diversity and for diversity within professional trajectories and leadership

development. *See infra* Section III.C; *see e.g.*, Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. Labor Econ. 113, 116 (2010) (finding that African-American and Latino enrollment at selective universities would decline 10.2% if race-neutral admissions were mandated nationwide).

Finally, we note that Petitioner's proposal would eliminate the gains that UT has already made, when, in reality, notwithstanding promising increases in African-American enrollment, UT is still working to achieve a critical mass. The representation of minority students is still at *de minimis* levels in too many settings on campus. For example, African-American male students still account for a mere 1.8% of UT student enrollment. *See* Jasmine Johnson, *For Black Male Students at UT-Austin, Data Tells Different Story about Diversity*, Daily Texan, Nov. 25, 2013. Perhaps not surprisingly, current African-American students who are members of *amici curiae* BSA and BEST have reported that they frequently feel singled out and misunderstood. Some students have had to grapple with others on campus assuming that they sell drugs. Others have often felt as though they were the only Black male student in a given major. While UT may have taken strides to create a more welcoming and inclusive campus climate, *amici curiae* experience continuing racial hostility[11] and a sense of racial isolation in the classroom.

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[11] *See, e.g.*, Matt Levin, *UT Austin Frats Now Could Face Sanctions for Racist Parties*, Hous. Chron., Apr. 16, 2015 (reporting on fraternity party where guests wore stereotypical Mexican clothing); Meghan Keneally, *Other Sigma Alpha Epsilon Chapters Now Investigated for Rumored Racist Chants*, ABC News, Mar. 11, 2015 (describing UT's investigation into fraternity's exclusion of African-Americans and racist chant);

In the face of these challenges, *amici curiae* BSA and BEST and other members of UT's African-American community—like prior generations of African-Americans and others that fought to integrate UT—have remained committed to improving the UT community by creating a more inclusive campus environment. For example, students successfully petitioned for the removal of Confederate statues from prominent places on campus. David Ng, *Jefferson Davis statue deemed racist to be relocated at UT Austin*, L.A. Times, Aug. 13, 2015. One student recently founded an online newspaper aimed at increasing the visibility of African-American students on campus. Bobby Blanchard, *New UT Publication Brings Different Perspectives to 40 Acres*, Daily Texan, May 2, 2012.

Thus, contrary to Petitioner's claim that critical mass had been or can be achieved through the Top Ten Percent Plan, *amici curiae* firmly believe that—consistent with *Grutter*—UT can and must do more,

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Kolten Parker, *'Affirmative Action Bake Sale' Hits Sour Note with University of Texas Officials*, Hous. Chron., Oct. 3, 2013 (recounting "affirmative action bake sale" that UT officials characterized as "inflammatory and demeaning" and "creat[ing] an environment of exclusion and disrespect"); Alberto Long, *Bleach or No Bleach, Balloon Attacks in West Campus Cause Controversy*, Daily Texan, Sept. 14, 2013 (detailing reports that African-American students were targeted by balloons, allegedly filled with bleach, thrown from student apartments); Ahsika Sanders, *Racial Conflicts Tarnish History of Roundup*, Daily Texan, Apr. 13, 2012 (tracing history of racial tensions at UT fraternities); Ralph K.M. Haurwitz, *UT Student Paper Issues Apology for Cartoon*, Austin American-Statesman, Mar. 28, 2012 (noting apology for racialized editorial cartoon about fatal shooting of Trayvon Martin); Andrew Freidenthal, *Shameful Graffiti Paints Larger Picture*, Daily Texan, Sept. 22, 2008 (reporting on depiction of President Obama as lynched and hanging from a tree).

not less, to ensure that all students fully attain the educational benefits of diversity.

C. A student's self-reported racial identity is an act of important self-definition that must be permitted, respected, and considered.

Under UT's hybrid policy, one race-conscious component of the admissions process is the personal statement or open-ended application essay, JA 467a, in which students share the most important and individual aspects of themselves, such as their aspirations, formative experiences, or adversities they might have overcome. This is a near-universal requirement of college applications throughout the nation, *see, e.g.*, The Common Application, Writing Requirements for the Common App, https://www.commonapp.org/whats-appening/application-updates/writing-requirements-common-app. While the focus in this case has been on the consideration of race in a "checkbox," any determination by this Court that race cannot be a component of UT's admissions procedures could potentially have the disastrous effect of limiting or prohibiting discussions of personal racial identity in the essay portion of the application, and in other parts of the application process.

Rejecting or otherwise negatively evaluating applicants merely because they touch upon, reveal, or discuss personal racial identity in the admissions process demeans the respect and individualized treatment that every prospective student is owed. Yet, Petitioner seeks exactly that: admissions policies that consider *every* aspect of students' experience, background, and identity, *except for their race*. Taken to its logical conclusion, Petitioner's proposed race-blind holistic review process would require

admissions officials to scrub all references to personal racial identity from students' application files, including their essays, thereby resulting in "a form of viewpoint discrimination." *See* Gerald Torres, Fisher v. University of Texas: *Living in the Dwindling Shadow of LBJ's America*, 65 Vand. L. Rev. En Banc 97, 110 (2012); *see also* Devon W. Carbado and Cheryl I. Harris, *The New Racial Preferences*, 96 Cal. L. Rev. 1139, 1152 (2008) ("[T]he personal statement generally calls upon applicants to provide some personal narrative in which they state something unique about themselves.").

For many students, the stories they share in their personal essays touch upon experiences directly connected to their own racial identity: e.g., an African-American male in Ferguson who is more likely to be stopped by the police than his white counterpart or an Asian-American student who volunteers at an anti-human trafficking organization. Others share stories of adversity or accomplishment that touch upon subjects other than racial identity: e.g., serving in the military or being gay or lesbian. Both types of stories are relevant and important:

> Just 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. Universities must be able to consider and weigh the totality of an applicant's life experiences, including their race, in addition to numerical scores and high school rank.

Singling out race for exclusion contradicts *Grutter*'s requirement that a university's individualized review

be "flexible enough to consider all pertinent elements of diversity[,]" 539 U.S. at 337 (quoting *Bakke*, 438 U.S. at 318) (opinion of Powell, J.)), and forces universities like UT "to become . . . much different institution[s] and sacrifice . . . vital component[s] of [their] educational mission." *Id.* at 340. Moreover, constricting applicants' reference to their race sends a message to minority students that a critical element of their identity is irrelevant or worse, unwelcome. It also suggests that access to and opportunity in public colleges must come at the expense of full personhood and individual dignity.

Such a result is neither constitutionally compelled nor pedagogically advisable, particularly in a country, region, state, and campus where race is often a salient factor in students' experiences. *See Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.,* 135 S. Ct. 2507, 2525 (2015) ("Much progress remains to be made in our Nation's continuing struggle against racial isolation."). Instead, this Court should recognize the importance of allowing universities to permit their applicants to share individual experiences and to afford those experiences the respect they deserve, regardless of whether or not they pertain to race.

III. UNIVERSITIES CHARGED WITH PREPARING OUR NATION'S LEADERS HAVE A COMPELLING INTEREST IN ENSURING THAT ALL STUDENTS RECEIVE THE BENEFITS OF DIVERSITY

Because Petitioner seeks to relitigate the settled question of the educational benefits of diversity, *amici* now reassert and reemphasize the compelling interest in diversity that has been clearly-recognized by universities and by the Court. The benefits of

student-body diversity take several forms and span the duration of a student's college and life experiences: from the application process, to the campus and its classrooms, and after graduation in the broader community and public and private sectors. A critical mass of underrepresented minorities in higher education is essential to countering the pernicious racial stereotypes that undermine the dignity of the individual, and a broadly diverse student body provides all students with academic benefits.

A. A critical mass of underrepresented minorities substantially benefits all students.

Racial diversity in higher education enhances essential educational functions in multiple ways. The "substantial" benefits that flow from such diversity include enhanced "cross-racial understanding, . . . break[ing] down racial stereotypes," and enabling students "to better understand persons of different races."[12] *Grutter*, 539 U.S. at 330, 332 (internal quotation marks omitted); SJA 1a-3a, 16a-17a.

The full realization of the educational benefits of diversity, however, depends on an important predicate: "meaningful representation," or, to use *Grutter*'s shorthand, "a critical mass," of underrepresented minority students. 539 U.S. at 329-30. A critical mass of students of color is necessary because, "[b]y virtue of our Nation's struggle with

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[12] Diversity also helps foster improved cognitive skills and civic engagement, and diverse teams produce better and more creative results. *See, e.g.*, Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Society* 131-238 (2007) (discussing how diversity produces collective benefits).

racial inequality, such students are both likely to have experiences of particular importance to [a university's] mission, and less likely to be admitted in meaningful numbers [based] on criteria that ignore those experiences." *Id*. at 338.

First, critical mass is essential to "diminishing the force of [racial] stereotypes" on campus and in the classroom. Id. at 333.[13] This Court has long recognized that pernicious stereotypes based on immutable characteristics undermine the essential dignity of the individual. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644-45 (1974). Racial integration, and the statutory tools designed to further it, can and does "counteract unconscious prejudices and disguised animus," *Inclusive Cmty.*, 135 S. Ct. at 2511-12.[14]

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[13] Petitioner's dismissal of UT's assessment of classroom diversity, Pet. Br. 44-45, overlooks the pervasive racial isolation faced by African-American students across the campus, regardless of class size. *See, e.g.*, *Fisher*, 758 F. 3d at 658 ("90% of classes had one or zero African-American students"); Resp. Br. 7-8. *cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) (recognizing that an "inexorable zero" can be probative evidence of racial inequity) (internal quotation marks and citation omitted). The record in *Grutter* included similar evidence of racial isolation at the classroom level. *See* Resp. Br., *Grutter v. Bollinger*, 539 U.S. 306 (No. 02-241), 2003 WL 402236, at *6 n.7.

[14] A critical mass also encourages an atmosphere of "speculation, experiment and creation [that is] so essential to the quality of higher education," *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (internal quotation marks and citation omitted), in classrooms as well as in extracurricular activities, which "facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self," *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2999 (2010) (Kennedy, J., concurring).

Second, attaining a critical mass of minority students at a given university is necessary to counter the underlying patterns of residential segregation that limit racial integration at the K-12 level. This Court recently recognized that the "vestiges [of *de jure* residential segregation] remain today, intertwined with the country's economic and social life." *Id.* at 2515. "Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole." *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment). Absent critical mass, these national patterns of residential segregation, and their impact on K-12 education, facilitate racial stereotyping. Specifically, students are likely to come to college from schools where they were "surrounded only by the likes of themselves," and, therefore, have perspectives that are limited by these formative experiences. *Bakke*, 438 U.S. at 312 n.48 (opinion of Powell, J.) (citation omitted). These facts are plainly relevant here because, as UT acknowledges, the "vestiges of *de jure* segregation" persist and "the Texas school system remains largely segregated," Resp. Br. 4, 7.

Third, a critical mass ensures that underrepresented minority students are not unfairly regarded as "spokespersons for their race." *Grutter*, 539 U.S. at 319-20. Meaningful representation of underrepresented minorities ensures that "nonminority students learn there is no minority viewpoint but rather a variety of viewpoints among minority students." *Id.* (internal quotation marks and citation omitted). Critical mass also reduces the likelihood that minority students will feel isolated or limited by what may be perceived as their token

status. And in such circumstances, "nonminority students learn there is no minority viewpoint but rather a variety of viewpoints among minority students." *Id*.

Finally, although this fact is frequently overlooked, courts have long recognized that *all* students, regardless of their race, benefit from the presence of a critical mass of underrepresented students. *See, e.g.*, *Fisher*, 768 F. 3d at 660 (recognizing this effect at UT). As far back as the *Brown v. Board of Education* case, LDF presented evidence demonstrating that segregation hurts not just racial minorities but also majority groups. *See The Effect of Segregation and the Consequences of Desegregation: A Social Science Statement*, *reprinted in* 37 Minn. L. Rev. 427 (1953) (appendix to appellants' briefs) (hereinafter, "Social Scientists Statement").[15] *See also Wright v. Rockefeller*, 376 U.S. 52, 69 (1964) (Goldberg, J., dissenting) ("[T]he Court's decisions since *Brown v. Board* . . . hold that harm to the Nation as a whole and to whites and Negroes alike inheres in segregation."). When students encounter classmates from different backgrounds—within and across dimensions of race, socio-economic status, and beyond—and come to understand and respect each other as individuals, they are all better for it.[16] While

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[15] *See generally* Social Scientists Statement (describing negative effects of segregation on children of majority group, including guilt, rationalization, unrealistic fears and hatreds, confusion, moral cynicism, and disrespect for authority); *id.* (explaining that segregation leads to blockages in the communications between majority and minority groups that tend to increase suspicion, distrust, and hostility).

[16] "Research shows that individuals become more aware of within-group variability when the minority group is not too small relative to the majority group, and that individuals have

Fisher views diversity as a zero-sum game, the truth remains that when our campuses and our country become more inclusive and integrated, everyone benefits.

B. A critical mass of broadly diverse underrepresented minorities is an essential component of the constitutionally permissible interest of student body diversity.

Petitioner asserts that "intra-racial diversity" is an improperly-raised, "post-hoc" justification for race-conscious admissions by UT that has no basis in this Court's precedent. *See* Pet. Br. at 30-35. This contention is wrong for several reasons.

First, while the precise phrasing has changed, the concept of "diversity within diversity"—or intra-racial diversity—is firmly rooted in this Court's precedents upholding narrowly-tailored race-conscious admissions policies. *See Bakke*, 438 U.S. at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."). This Court has long recognized that institutions of higher education

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more complex views of members of other groups when relative group size is not greatly imbalanced." Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 360-61 (2002) *See also Parents Involved*, 551 U.S. at 723 (acknowledging race may be considered in certain contexts "as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints'") (quoting *Grutter*, 539 U.S. at 330); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.").

have a compelling interest in assembling diverse student bodies not only across racial lines, but also "along all the qualities valued by the University." *Grutter*, 539 U.S. at 340. Justice Powell recognized in *Bakke* that university admissions programs could consider "the variety of points of view, backgrounds and experiences of blacks in the United States." 438 U.S. at 323 (appendix to opinion of Powell, J.). Indeed, the concept of diversity within diversity was introduced by this Court long before the concept of "critical mass." *Grutter*, 539 U.S. at 335–36. *See also* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1763 n.87 (1996) ("Justice Powell's *Bakke* Appendix pointedly quoted Harvard's recognition of the importance of intra- as well as inter-racial diversity.") (citation omitted).

Second, in light of this clear law, UT's critical mass inquiry can and should consider the rich diversity within and among underrepresented minority groups. UT's current, multi-faceted admissions process meets this goal by properly ensuring consideration of factors beyond high school rank so that it is able to "assembl[e] a class that is both exceptionally academically qualified and broadly diverse," *Grutter*, 539 U.S. at 329. Because the Top Ten Percent Plan, on the other hand, considered the single rigid measure, class rank, it excluded students with richly varied qualifications that cannot be captured by grades and class standing. Academically qualified and broadly diverse students who may not meet the top ten percent requirements could include intellectually adventurous students who enroll in demanding classes outside of their comfort zones rather than playing it safe to preserve their class rank; prodigies who achieve excellence in non-academic fields; backyard entrepreneurs who have

less academic success but are demonstrated leaders and risk-takers; or late bloomers who mature into their academic potential over time. These sorts of valuable experiences and qualities create a richly textured diversity within diversity that would be overlooked in a mechanical admissions program like the Top Ten Percent Plan. *See* Gurin et al., *Diversity and Higher Education*, at 360 (outlining research on diversity that "demonstrates the significant impact of interactions with diverse peers" and its "critical importance [to students'] personal development").

Third, because UT proactively recruits students of all races from disadvantaged socio-economic backgrounds, Petitioner's claim that UT's reliance on diversity within diversity serves only to identify affluent students from integrated, suburban schools is patently false. Fisher Supp. Br. 47-48 (Fifth Circuit, Oct. 4, 2013). Several variables in UT's holistic review take into account socio-economic status. JA 162a-63a, 197a-98a. Thus, UT's admissions process does not favor students from any particular background, racial or otherwise; instead, its individualized holistic review promotes diversity—including intra-racial diversity— by admitting racially diverse students from diverse backgrounds of all kinds.

C. A diverse graduating class opens pathways to leadership and fosters public confidence and trust in educational institutions.

On-campus diversity is critical to a robust educational environment. It is also essential to creating a diverse pipeline of students who, after graduation, populate the echelons of the government, military, private sector, and civil society. For this reason, it is important for "[a]ll members of our

heterogeneous society [to] have confidence in the openness and integrity of the educational institutions that provide this training." *Grutter*, 539 U.S. at 332. Indeed, in *Sweatt*, this Court struck down UT Law School's policy of racial segregation based, in part, on its recognition that a law school "cannot be effective in isolation from the individuals and institutions with which the law interacts." *Grutter*, 539 U.S. at 332 (quoting *Sweatt*, 339 U.S. at 634).

It is for these reasons that here, and in *Fisher I*, a broad array of *amici curiae* have submitted briefs to this Court detailing the many ways in which diversity in higher education benefits all aspects of society. *See generally* Amicus Br. of Fortune-100 and Other Leading American Businesses; Amicus Br. of Lt. Gen. Julius Becton, et al.; Amicus Br. of Association of American Medical Colleges, et al.

A diverse graduating class is particularly vital for large public universities like UT, whose graduates overwhelmingly fill the ranks of state legislatures and judiciaries. Indeed, UT alumni have gone on to become formidable leaders in Texas and across the nation in a wide variety of fields, including federal, state, and local governments, the private sector, and civil society. *See e.g.*, *Fisher I*, Amicus Br. of Distinguished Alumni, at 5. Given this critical leadership development function, it is sensible and desirable that UT seek to bring together potential leaders from different backgrounds, races, and parts of the state and the world.

It is particularly crucial for UT to pursue diversity because, as detailed in Section I, *supra,* and acknowledged by UT, Resp. Br. 4, African-Americans were excluded from UT for much of its history—first by law and then in effect. And, more recently, before it adopted race-conscious admissions, *see* Section II.A

supra, UT had a "less-than-realistic environment" that was "not conducive to training the leaders of tomorrow," SJA 24a-25a, because of the significant disparities between the numbers of African-Americans students at UT, and the number of African Americans in Texas and of African Americans in the populations of Texas's high schools, *Fisher I,* Pet. App. 273a; JA 177a; SJA 3a.[17] UT recognizes that "[p]ublic confidence is the only real endowment of a state university."[18] Thus, UT's efforts to develop a pipeline of diverse leaders serve the broader community, and bolster the public's trust in the organizations and institutions that they populate.

CONCLUSION

At bottom, this case is not only about the pedagogical benefits of diversity but also about the related principle of individual dignity that students, like every member of our society, are due. A statement submitted by social scientists in *Brown v. Board* noted that segregated students "like all other

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[17] This legitimate concern about significant racial disparities does not in any way suggest—as Petitioner claims—that UT's pursuit of critical mass was designed to achieve "demographic proportionality." Pet. Br. 44. Rather, some degree of attention to the surrounding community is required, since "[a] university presenting itself as open to all may be challenged when the state's minority population grows steadily but minority enrollment does not," as has been the case in Texas. Pet. App. 196a. UT's consideration of such demographics arose only when it "first studied whether a race-conscious admissions program was needed to attain critical mass," and not "as part of any individual admissions decision." Pet. App. 193a.

[18] University of Texas System Administration, Standards of Conduct Guide 3 (2009) (quoting H.Y. Benedict, UT President (1927-37)), http://www.utsystem.edu/systemcompliance/SOCcombined.pdf.

human beings [] require a sense of personal dignity" and yet "almost nowhere in the larger society do they find their own dignity as human beings respected by others." Social Scientists Statement, *supra*. Likewise, Dr. Martin Luther King, Jr., observed that the "founding fathers were really influenced" by the theological precept that all humans have "a uniqueness . . . [and a God-given sense of] dignity." Dr. Martin Luther King, Jr., Address at the Ebenezer Baptist Church, The American Dream (July 4, 1965). That tenet rightly has continued to guide this Court's jurisprudence in recent years. *See e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) ("[Petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right."); *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) (Equal Protection principles apply to lesbian and gay couples who "aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

The right to define one's own concept of existence is null if a salient aspect of that existence is relegated to oblivion by judicial fiat. Prospective students would be forced to cloak their differences and suppress their life-experiences to hide the personal racial identity that is intrinsic to who they are. In the end, Petitioner's proposal to eliminate race from the individualized review process, if accepted, would require racial closeting. A decision finding UT's admissions policy unconstitutional would send an unmistakable message at a crucial and sensitive moment for our nation's progress: universities, consider any experience an applicant may share, but

just not her race; administrators, retreat from your modest advances to reap the benefits of diversity; students, do not share your identity, because it is irrelevant or even unwelcome. The Court must not and need not pursue such a perilous path.

As this Court has wisely chosen to do before, it should instead adhere to existing precedent and affirm the validity of UT's narrowly tailored, holistic review process. For the foregoing reasons, the Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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