09-50822

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ABIGAIL NOEL FISHER,

Plaintiff-Appellant

v.

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

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

The United States has significant responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of institutions of higher learning, see 42 U.S.C. 2000c-6, and for the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*., which prohibits discrimination on the basis of race, color or national origin by recipients of federal funds, including institutions of higher education. Numerous federal agencies –

including the Departments of Defense, Justice, Education, Commerce, Labor, Homeland Security, and Health and Human Services, among others – have concluded that it is crucial to the fulfillment of their missions to enable such institutions to produce well-qualified graduates who reflect the diversity of the Nation, including in their racial and ethnic backgrounds. The United States also recognizes the importance of diversity in ensuring that the country can effectively participate in an increasingly global economy. The United States thus has a strong interest in the development of the law regarding the consideration of race and ethnicity in admissions in higher education.

The United States has previously filed briefs as *amicus curiae* supporting the University of Texas at Austin (the University) in this Court and in the Supreme Court.

QUESTIONS PRESENTED

The United States will address the following questions:

1. Is the University due any deference in its decision that it had not attained sufficient diversity during the time period at issue?

2. Has the University demonstrated that it had not attained sufficient diversity during the time period at issue?

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Fisher* v. *University of Texas*, 133 S. Ct. 2411 (2013), the Supreme Court clarified the framework set forth in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), for evaluating the constitutionality of a university's consideration of race in admissions. *Grutter* held that "student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U.S. at 325, and that a university may consider race in admissions if doing so is both "necessary to further its compelling interest" in the educational benefits of diversity and "narrowly tailored" to accomplish that goal, *id*. at 333-334. *Fisher* explained that, while reviewing courts should accord deference to a university's educational judgments in evaluating the existence of a compelling interest, they should not accord similar deference in determining whether the university's admissions process is narrowly tailored to that goal. *Fisher*, 133 S. Ct. at 2419-2420. *Fisher* further held that this Court had erroneously "deferr[ed] to the University's good faith in its use of racial classifications." *Id*. at 2421. The Supreme Court therefore vacated and remanded to permit this Court to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Ibid*.

The United States participated as *amicus curiae* supporting the University in this Court and the Supreme Court, arguing that the University's consideration of

race in admissions is constitutional. Specifically, the United States contended that the University has a compelling interest in the educational benefits of diversity; that the University's determination that considering race in admissions was necessary to further that interest was supported by concrete evidence; and that the University's race-conscious admissions policy is narrowly tailored because it affords individualized consideration to all applicants and was adopted only after race-neutral alternatives were examined and deemed insufficient. *Fisher*'s clarification that the reviewing court may not defer to the University's good faith in evaluating narrow tailoring does not alter those conclusions or cast doubt on that analysis. For the reasons stated in the United States' brief before the Supreme Court, the University has satisfied its burden of demonstrating that its use of race in admissions was necessary to achieve the educational benefits of diversity and narrowly tailored when instituted in 2004 and when appellant applied in 2008. Brief for the United States as *Amicus Curiae* 19-35, No. 11-345 (S. Ct.) (U.S. Br.).

In this supplemental brief, the United States will address the Court's question whether "the University [is] due any deference in its decision that 'critical mass' has not been achieved." 9/12/13 Order 2. *Grutter* used the term "critical mass" as shorthand for the point at which a university has attained sufficient diversity to achieve the educational benefits of diversity. 539 U.S. at 330. The question for this Court is therefore how it should review the University's

conclusion that it lacked sufficient diversity in 2004 and 2008 to provide the educational benefits of diversity to its students. That question entails a qualitative assessment of the educational experience the University is providing, rather than, as appellant suggests (Appellant Supp. Br. 23-24), a rote calculation of the number of minority students enrolled in the University, a number that might seem "substantial" in the abstract.

This Court should independently review the University's determination that it lacks sufficient diversity to fully provide the educational benefits of diversity, while giving due regard to the University's exercise of its educational judgment and expertise in reaching its conclusion. The determination that the University lacks sufficient diversity is a necessary predicate for its ultimate conclusion that it is "'necessary' * * * to use race to achieve the educational benefits of diversity." *Fisher*, 133 S. Ct. at 2420. Because the University bears the "ultimate burden" on that question, *ibid.*, the Court must be able to meaningfully review the University's conclusion that it currently lacks sufficient diversity to fully provide the educational benefits of diversity. The Court should therefore verify that the University has amply supported its conclusion with concrete evidence and a reasoned explanation of why that evidence indicates that the University is not providing the educational benefits of diversity. At the same time, because the University's assessment of such evidence rests on the application of educational

expertise and judgments about the University's institutional mission, this Court should evaluate the University's conclusions with due regard for the multi-faceted educational assessments underlying those conclusions. See U.S. Br. 26.

ARGUMENT

I

A UNIVERSITY'S DETERMINATION THAT IT IS NOT YET FULLY PROVIDING THE EDUCATIONAL BENEFITS OF DIVERSITY IS BASED ON A QUALITATIVE ASSESSMENT OF ITS STUDENTS' EDUCATIONAL EXPERIENCE

This Court has asked whether "the University [is] due any deference in its decision that 'critical mass' has not been achieved." 9/12/13 Order 2. The Supreme Court has used the term "critical mass" to refer to a qualitative assessment of whether a university has attained sufficient diversity to provide the benefits of diversity, rather than a quantitative assessment of whether the number of minorities in the student body constitutes "sufficient" representation in the abstract. See *Grutter* v. *Bollinger*, 539 U.S. 306, 329-330 (2003). The question for this Court is how it should review the University's determination, following such a qualitative assessment, that it is not yet fully providing the educational benefits of diversity in a manner consistent with its educational mission.

Grutter held that a university may conclude that the educational benefits of racial and ethnic diversity are "essential to its educational mission." 539 U.S. at 328. Those benefits include "better prepar[ing] students for an increasingly

diverse workforce and society," "promot[ing] 'cross-racial understanding,'" *id*. at 330 (citation omitted), and ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity," *id*. at 332. A university's conclusion that the educational benefits of diversity are critical to its institutional mission gives rise to a compelling interest in achieving sufficient "student body diversity" to attain those educational benefits. *Id*. at 325. As *Fisher* and *Grutter* make clear, a university's assessment that it has such a compelling interest is entitled to deference. See *Fisher* v. *University of Tex.*, 133 S. Ct. 2411, 2419 (2013); *Grutter*, 539 U.S. at 328.

In *Grutter*, the University of Michigan Law School used the phrase "critical mass" as shorthand to describe the point at which its student body would be sufficiently diverse to produce the educational benefits of diversity. 539 U.S. at 329. In upholding the Law School's admissions program, the Supreme Court emphasized that the Law School did not define "critical mass" as "some specified percentage of a particular [racial] group"; rather, "the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id*. at 329-330. In *Fisher*, the Court restated this proposition without using the term "critical mass," observing that a university may consider race in admissions in order to assemble a sufficiently "diverse student

body," 133 S. Ct. at 2419, "to obtain the educational benefits of diversity," *id*. at 2421.

Thus, a university may permissibly pursue the objective of attaining the educational benefits of diversity, and racial and ethnic diversity within the student body is a means to that end. Sufficient diversity is not a number, but the qualitative point at which a university concludes it is achieving the educational benefits of diversity in light of its circumstances and educational mission. See *Grutter*, 539 U.S. at 318 (explaining with approval that the Law School's admissions program lacked a numerical target; the Law School instead measured success in terms of achieving sufficient diversity to "realize the educational benefits of a diverse student body"); see *id*. at 330.

To determine whether it has achieved the educational benefits of diversity, a university must take stock of the educational experience it is providing. The university must first determine what attainment of the educational benefits of diversity entails in light of its institutional mission. That analysis includes the extent to which its mission involves providing particular benefits of diversity (*e.g.*, cross-racial interaction, decreased racial isolation), as well as which benefits of diversity it views as most important for its institution, and what types of diversity it is seeking. For instance, one university might, in light of its institutional mission, consider it necessary to provide all students with ample opportunities for cross-

racial interaction in many aspects of campus and academic life. Another institution might aim to attain sufficient diversity to improve cross-racial understanding, thereby lessening racial tensions and isolation on campus.

Once a university identifies the benefits of diversity integral to its mission, it must then ascertain whether it is falling short of its objectives. In doing so, the university may legitimately consult, and draw conclusions from, a variety of sources of information. For example, a university that prioritizes students' classroom experience might give great weight to faculty accounts indicating that minority students are isolated in the classroom. Another might survey students to determine whether students continue to face discrimination in the classroom as well as in other aspects of campus life. A third might conclude from the demographic breakdown of the student body that certain minority groups are too underrepresented to overcome racial isolation.

As the above description suggests, the demographic breakdown of the student body is not relevant for its own sake. Instead, it is an indication of the university's ability to provide the educational benefits of diversity. Appellant is therefore incorrect in suggesting (Appellant Supp. Br. 23-24) that a court need only look to the number of minority students enrolled, without more, in order to ascertain whether the university has attained the educational benefits of diversity. *Grutter* recognized that "sufficient diversity" does not reflect a numerical

calculation, and *Fisher* did not suggest otherwise. *Grutter*, 539 U.S. at 329-330; *Fisher*, 133 S. Ct. at 2419-2420. Whether a university's student-body diversity is sufficient turns on whether the university is able to achieve the educational benefits of diversity, not whether the university's minority representation seems "substantial" in the abstract (Appellant Supp. Br. 23), or in comparison to other universities (Appellant Supp. Br. 24). Moreover, diversity is not an all-or-nothing proposition; a university can have sufficient diversity to provide the educational benefits of diversity to some extent without being able to do so to the full extent that its mission requires.

II

A COURT SHOULD INDEPENDENTLY REVIEW A UNIVERSITY'S DETERMINATION THAT IT HAS NOT ATTAINED SUFFICIENT DIVERSITY, WHILE GIVING DUE REGARD TO THE UNIVERSITY'S FINDINGS REFLECTING ITS EDUCATIONAL JUDGMENT AND EXPERTISE

The question whether a university has attained sufficient diversity to fully provide the educational benefits of diversity is not wholly encompassed within either the compelling-interest or the narrow-tailoring inquiry. Instead, the "sufficient diversity" question bridges the two prongs of the strict-scrutiny analysis. A university's conclusion that it has not yet attained sufficient diversity rests in large part on educational considerations much like those that led it to conclude that it has a compelling interest in diversity – namely, the university's

institutional priorities, its firsthand knowledge of its students' interactions and concerns, and its judgments about the educational experience it wants to provide. At the same time, under the narrow-tailoring prong, the university bears the burden of justifying its need to consider race. The university's ultimate determination that it needs to consider race will rest in part on its assessment that it has not yet attained sufficient diversity. As a result, the persuasiveness of the university's conclusion that it lacks sufficient diversity is relevant to the court's examination of the university's showing under the narrow-tailoring inquiry. *Fisher* v. *University of Tex.*, 133 S. Ct. 2411, 2420 (2013).

The standard by which a court should review the university's determination that it lacks sufficient diversity should reflect the hybrid nature of the inquiry. Therefore, a court should independently review a university's determination that it has not yet achieved sufficient diversity in order to ensure that the determination is supported by concrete evidence and that the university has provided a reasoned, principled explanation of its need to increase student-body diversity. At the same time, the court should "take account of a university's experience and expertise" in reviewing those aspects of the university's reasoning that reflect its academic expertise and its judgments about its educational objectives. *Fisher*, 133 S. Ct. at 2420.

A. As *Fisher* explained, judicial review of a university's consideration of race in admissions entails strict scrutiny, but that rigorous review includes consideration of the university's educational judgment and expertise. In evaluating the existence of a compelling interest, "some, but not complete, judicial deference" is due the university's conclusion that the educational benefits of diversity are essential to its mission. *Fisher*, 133 S. Ct. at 2419. That is because a university's determination that the educational benefits of diversity are "integral to its mission" is an "academic judgment" that reflects its educational "experience and expertise." *Ibid.* The court's role in assessing the existence of a compelling interest is not to second-guess the university's interpretation of its own mission, but instead to "ensure that" the university has provided "a reasoned, principled explanation for the academic decision." *Ibid.*

By contrast, a university does not receive deference as to whether the "means chosen * * * to attain diversity are narrowly tailored to that goal." *Fisher*, 133 S. Ct. at 2420. The university must demonstrate that its admissions process ensures that each applicant is evaluated as an individual, and that race is not the "defining feature" of his application. *Ibid.* At the same time, however, "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes." *Ibid.* In addition, "[n]arrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to

achieve the educational benefits of diversity." *Ibid*. That inquiry "involves a careful judicial inquiry into whether a university could achieve sufficient diversity" using race-neutral alternatives rather than "racial classifications." *Ibid*. The "reviewing court must ultimately be satisfied," based on the university's evidence, "that no workable race-neutral alternatives would produce the educational benefits of diversity." *Ibid*.

As *Fisher*'s description of the narrow tailoring inquiry reflects, a university's conclusion that it needs to consider race in admissions to increase diversity must be preceded by its determination that it has not yet reached its goals with respect to providing the educational benefits of diversity. Although *Fisher* made clear that the university has the "ultimate burden" of justifying its need to consider race, 133 S. Ct. at 2420, the Supreme Court did not elaborate on how a court should review the university's predicate conclusion that it has not attained the educational benefits of diversity, and in particular, whether any deference to the university's judgment is appropriate.

B. A court should independently review a university's determination that it has not achieved the educational benefits of diversity in order to verify that the university's determination is well supported by concrete evidence. In *Fisher*, the Supreme Court stated that the University does not receive deference with respect to its ultimate judgment that it needs to use race (or continue to use race) because

race-neutral alternatives have not produced sufficient diversity. 133 S. Ct. at 2420. In reviewing the University's predicate determination that it has not attained sufficient diversity, this Court must ensure that the University's conclusions are amply supported by concrete evidence about the educational experience that the institution is providing and reasonable inferences drawn from that evidence.

At the same time, however, the University's conclusion that it has not yet achieved the educational benefits of diversity will necessarily rest in large part on the University's application of its educational judgment and expertise to the available evidence about the educational experience it is providing. The Supreme Court held in *Grutter* – and reiterated in *Fisher* – that such "academic judgment[s]" are entitled to "some * * * deference," *Fisher*, 133 S. Ct. at 2419, because they fall within the University's expertise and the "tradition of giving a degree of deference to a university's academic decisions," *Grutter* v. *Bollinger*, 539 U.S. 306, 328 (2003). Although *Fisher* and *Grutter* discussed judicial deference to a university's expertise primarily in connection with the existence of a compelling interest in a diverse student body, see *Fisher*, 133 S. Ct. at 2419, the Court also made clear that in evaluating whether the use of race is narrowly tailored, a court may "take account of a university's experience and expertise in adopting or rejecting certain admissions processes," *id*. at 2420. That reasoning indicates that in reviewing a university's determination that it lacks sufficient

diversity to provide the educational benefits of diversity – an inquiry that bridges the compelling-interest and narrow-tailoring prongs – courts should accord some deference to the university's educational judgments.

Appellant is therefore incorrect in arguing (Appellant Supp. Br. 25-26) that *Fisher* suggested that courts should require a showing with a "strong basis in evidence" that the university has not attained the educational benefits of diversity. The Supreme Court has employed the "strong basis in evidence" standard only in the context of racial classifications that must be justified on the ground that they are necessary to remedy past discrimination: in order to ensure that a local government is not relying on generalized assertions of societal discrimination, the government must set forth a strong basis in evidence to believe that illegal discrimination has occurred and necessitates remedial measures. See *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 499-500 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion). The "strong basis in evidence" standard is thus designed to test the sufficiency of the government's factual and legal inquiry into its own past or present discriminatory practices. Because the judiciary is well-suited to evaluate the government entity's conclusions, the "strong basis in evidence" standard does not entail any deference to the entity's judgments. See *Croson*, 488 U.S. at 500 (stating that the government had not demonstrated a

strong basis in evidence because there was "nothing approaching a prima facie case of a constitutional or statutory violation").

That is a very different inquiry than evaluation of the educational judgments at issue here, where a university is making multi-faceted institutional judgments about whether the facts on the ground are consonant with its mission. The University's conclusion that it lacks the educational benefits of diversity necessarily rests not only on concrete evidence, but also on the University's qualitative assessment of that evidence in light of its educational objectives. The Supreme Court has made clear that such determinations are entitled to deference. *Fisher*, 133 S. Ct. at 2419-2420.

That observation is inconsistent with review under the "strong basis in evidence" standard. Indeed, the Supreme Court did not mention the "strong basis in evidence" standard in *Fisher*, despite appellant's contention that the Court should import it. Nor did the Court suggest, in observing that "additional guidance may be found in this Court's broader equal protection jurisprudence," *Fisher*, 133 S. Ct. at 2418, that the "strong basis in evidence" standard should apply. Rather, the Court cited *Croson* and other decisions for the general proposition that all racial classifications – even those that do not reflect animus – are subject to strict scrutiny. *Id*. at 2418-2419.

Thus, although a reviewing court should ensure that a university's conclusions are well-supported by concrete evidence, the court should also give due regard to the university's application of its expertise in evaluating that evidence. Because that evaluation entails the application of educational judgment, the court cannot simply assess the evidence for itself in the first instance, as it would in a situation involving the remediation of past discrimination. Instead, the court's role is to evaluate the university's explanation of the conclusions that it draws from the evidence it has gathered to ensure that the university's reasoning is adequately supported and sufficiently principled.

C. In sum, a court evaluating a university's determination that it lacks the educational benefits of diversity should independently verify that the university has adequately substantiated and explained its conclusion, while "tak[ing] account of the university's experience and expertise" on those questions that require the application of educational expertise and judgment. *Fisher*, 133 S. Ct. at 2420.

In substantiating its conclusion that it lacks sufficient diversity, the university must first explain which educational benefits of diversity it is pursuing and identify its objectives with respect to those benefits. Those initial judgments are entitled to deference. The university's discretion to decide that the educational benefits of diversity are important to its educational mission – and that it therefore has a compelling interest in diversity – also necessarily implies some discretion to

determine the *extent* to which the university will pursue those benefits (for instance, how much cross-racial interaction it seeks). That determination is just as closely linked to the university's conception of its institutional mission as is the university's decision that it seeks the educational benefits of diversity in the first place. See *Grutter*, 539 U.S. at 328-329; *Fisher*, 133 S. Ct. at 2414, 2419 (suggesting that the way in which a university "define[s] diversity" is entitled to "some deference," so long as the university does not engage in racial balancing). For instance, a university might decide – as the University has here (S.J.A. 24a-25a)[1] – that because its students will become the leaders of an increasingly diverse State, its educational mission requires students to have frequent opportunities for cross-racial interaction in all aspects of campus life, rather than merely limited, occasional opportunities for cross-racial interaction. Of course, the court may examine the university's statement of its objectives to ensure that the university is not in effect pursuing an impermissible goal, such as racial balancing. See *Fisher*, 133 S. Ct. at 2419. But absent such evidence, the court should not second-guess the university's judgment about its educational objectives and the extent to which

[1] Because the University's supplemental brief cites the record materials that are reprinted in the Joint Appendix (J.A.) and Supplemental Joint Appendix (S.J.A.) filed in the Supreme Court, this brief will also cite those sources.

the educational benefits of diversity must be present for the university to achieve its objectives.

The university should then present concrete evidence supporting its conclusion that it lacks sufficient diversity to provide the benefits of diversity that it has identified as essential to its mission. That evidence might take a number of forms, depending on the university's assessment of what indicators are relevant. For instance, a university might use student surveys to determine how many opportunities for cross-racial interaction are available or the degree to which minority students feel isolated. It might also compile data on the extent to which minority students are represented in student activities involving leadership, such as student government, or in other areas of student life. The university should then explain the conclusions it draws from this evidence and how the evidence demonstrates that the university is not yet providing the educational benefits of diversity to an extent consonant with its mission.

The court should examine the university's evidence to ensure that it is reliable, that it stands for the propositions the university says it does, and that it adequately substantiates the university's inferences and ultimate conclusions. The court thus should not defer to the university's overall conclusion that it has not fully achieved the educational benefits of diversity. Rather, the court should consider the whole record, including conflicting evidence, to ensure that the

university has reached a conclusion that is not merely reasonable, but is persuasive in light of all the evidence. In particular, the court should consider the university's reasoning in light of the demographics of the student body: as a minority group's representation increases, the university will have more difficulty demonstrating that the educational benefits of diversity are still lacking.

At the same time, the court should take account of the university's educational expertise where the university has relied on that experience in drawing a particular inference or reaching a particular conclusion. See *Fisher*, 133 S. Ct. at 2420. For instance, in investigating the extent to which it is providing the educational benefits of diversity, the university must determine what metrics it should use to evaluate the educational experience it is providing. That choice – to focus on the classroom experience, extracurricular activities, or other measures – generally reflects the university's knowledge of how its students interact and learn on campus, as well as its judgment about what educational experiences are most important to its mission. The court should take that expertise into account. In addition, in evaluating the data, a university might choose to place more weight on certain pieces of evidence. For instance, it might place more emphasis on evidence that classroom interactions are lacking rather than on evidence that extracurricular interactions are plentiful, or vice versa. So long as the university has adequately explained how its analysis follows from its judgments about its educational

objectives, a court considering all the evidence should take into account the university's reasons for weighing the evidence as it did.

Ultimately, the court must be satisfied that the university's determination is well supported by concrete evidence and that the university has provided a reasoned explanation of how that evidence demonstrates that the university is not yet providing the educational experience that is necessary to its mission.

III

THE UNIVERSITY OF TEXAS HAS ESTABLISHED THAT IT HAD NOT ATTAINED SUFFICIENT DIVERSITY TO FULLY PROVIDE THE EDUCATIONAL BENEFITS OF DIVERSITY IN 2004 AND 2008

The record amply supports the University's conclusion that, in light of its objectives as Texas's flagship university, it had not attained sufficient diversity to provide the educational benefits of diversity in 2004 or 2008.

A. As an initial matter, the University concluded that its educational mission, as the "flagship" state university, is to provide a "comprehensive education" (S.J.A. 23a), and "to produce graduates who are capable of fulfilling the future leadership needs of Texas" (S.J.A. 24a). Because Texas will soon "have no majority race," its leaders "must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate" (S.J.A. 24a). As the State's flagship university, moreover, the University aspired to be "visibly open to talented and qualified individuals of

every race and ethnicity" (S.J.A. 1a); *Grutter* v. *Bollinger*, 539 U.S. 306, 332 (2003). The University therefore sought to assemble a diverse student body in order to provide an educational experience that includes ample opportunities for cross-racial interaction in all areas of campus life, and in particular, in the classroom. *Grutter*, 539 U.S. at 332. Those determinations about which benefits of diversity are particularly important to the University, and the extent to which it wishes to pursue them, are precisely the sort of "complex educational judgments" that fall within the core of the University's expertise, *id.* at 328, as well as its traditional freedom "to make its own judgments as to education," *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.). The University's conclusions are therefore entitled to some deference.[2] See *Fisher* v. *University of Tex.*, 133 S. Ct. 2411, 2419 (2013).

The University is also entitled to "some * * * deference," *Fisher*, 133 S. Ct. at 2419, with respect to the metrics it chose to examine in order to evaluate the educational experience it was providing. Although appellant suggests (Appellant Supp. Br. 27) that the University's attention to classroom diversity is illegitimate, the University used its classroom diversity study as one means of measuring cross-

[2] There is no evidence that the University was engaged in racial balancing. As this Court and the district court previously found (Pet. App. 43a-52a, 153a-156a), the University designed and implemented its admissions process to pursue the educational benefits of diversity, and not any form of proportional representation.

racial interaction on campus in those small classes that are most likely to foster discussion and student interactions. S.J.A. 69a; J.A. 266a. Exposing students to diverse perspectives within the classroom is an important educational benefit of diversity, *Grutter*, 539 U.S. at 330, and it is particularly important at a large, sprawling institution like the University, where taking classes might be the only university activity in which *all* students are certain to participate. See Appellee Supp. Br. 46. The University also gave some attention to "significant differences" between its student demographics and the State's population – Hispanics and African Americans were substantially underrepresented in the student body (S.J.A. 24a-25a) – in light of its mission of preparing students for success in Texas's diverse community and ensuring that the "path to leadership" was "visibly open" to "qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332; S.J.A. 24a-25a. The University thus considered statewide demographics for the limited and permissible purpose of ascertaining the existence of stark demographic disparities that affected its ability to provide the educational benefits of diversity. A student body that bears little resemblance to the state population, thereby suggesting that the pathway to leadership is not truly open to all, could undermine future leaders' "legitimacy in the eyes of the citizenry," *Grutter*, 539 U.S. at 332, and harm the institution's efforts to recruit highly qualified minorities. The University was therefore justified in considering demographic disparities.

B. The University's conclusion that it lacked sufficient diversity to attain the educational benefits of diversity in a manner consonant with its institutional mission is well supported by concrete evidence.

The classroom diversity study demonstrated that, as the University increased the number of smaller classes between 1996 and 2002, the percentage of such classes with one or no African-American or Hispanic students had increased (to 90% and 43%, respectively). S.J.A. 26a. That trend was of concern to the University (S.J.A. 25a), because it intended to further increase the number of smaller classes in order to improve educational experiences (S.J.A. 70a), and an unintended consequence of that effort could be greater racial isolation and less cross-racial interaction. The University's concern on that score contributed to its conclusion that increasing diversity in the overall student body was necessary. S.J.A. 24a-25a. Among other things, increasing overall diversity could create more opportunities for cross-racial interaction in all aspects of student life, which might in turn offset falling diversity within the classroom.

Turning to student-body demographics, African Americans totaled only 309 enrolled freshmen out of 6796 in 2004, and 375 out of 6715 in 2008. S.J.A. 156a. Appellant does not argue that the University was required to find those numbers sufficient to avoid racial isolation, break down stereotypes, or promote cross-racial

understanding – much less provide a visible path to leadership. *Grutter*, 539 U.S. at 332.

With respect to Hispanic students, the fact that they made up 16.9% of the freshman class in 2004 (and 20% in 2008) may have alleviated concerns about racial isolation and tokenism campus-wide. S.J.A. 156a. But those figures also showed that Hispanics were substantially underrepresented compared to their numbers in the statewide population (34.9% in 2004 and 36% in 2008). Pet. App. 154a-155a; U.S. Census Bureau, U.S. Dep't of Commerce, *The American Community – Hispanics: 2004* (Feb. 2007), at 6, http://www.census.gov/prod/2007pubs/acs-03.pdf. In view of the significant – and growing – Hispanic proportion of the State's population, as well as the trend toward less classroom diversity, the University concluded that it could not provide the degree of cross-racial interactions necessary to prepare its students for leadership in Texas. S.J.A. 24a. To be sure, as a minority group's representation in the student body increases, it will be harder for the University to demonstrate that it has not yet attained the educational benefits of diversity. But the University relied on the under-representation of Hispanics as only one data point, along with such other evidence as a decrease in classroom diversity. When taken together and viewed in light of the University's mission of training the next generation of Texas leaders, all of this

evidence provides ample support for the University's determination that it had not yet attained sufficient diversity. J.A. 267a-268a, 395a-396a; S.J.A. 24a.

That determination gains additional support from the University's desire to ensure that it admitted minorities with diverse backgrounds, interests, and leadership capabilities, even as the Top Ten Plan limited its ability to do so. Because the Top Ten plan guarantees admission based solely on class rank, the University must rely heavily on its holistic admissions process to ensure that the remainder of the student body is composed of students who are "diverse along all the qualities valued by the university." *Grutter*, 539 U.S. at 340; J.A. 203a, 359a. Only the holistic analysis enables the University to select students who have exhibited leadership potential or particular talents, but whose class rank does not place them in the Top Ten, as well as out-of-state students and in-state students who are academically qualified but missed the Top Ten cut in the most rigorous high schools. By 2003, however, Top Ten applicants made up a substantial portion of the entering class, and the non-Top Ten admissions process became extremely selective. Pet. App. 59a-60a & n.155. Excluding all consideration of race, the University had increasing difficulty ensuring that its non-Top Ten admissions included significant numbers of minority students who possessed the attributes valued by the University but not accounted for in Top Ten admissions. Taking race into account as one factor in the holistic individual assessment therefore

helped ensure that the admissions process remained effective in admitting significant numbers of students from underrepresented minority groups, as well as non-minorities, who would contribute the variety of experiences and attributes that the University sought in assembling its student body.

Appellant attacks (Appellant Supp. Br. 29) the University's objective of admitting minority (and non-minority) students with diverse backgrounds and interests as "discrimination against disadvantaged minorities," contending that the University's focus on all aspects of applicants' backgrounds is in effect an attempt to enroll "affluent minorities" (Appellant Supp. Br. 28). But the University's desire to admit students – including minority students – whose attributes and talents might not translate into Top Ten class rank is hardly discrimination against economically disadvantaged minorities. The very purpose of the holistic analysis permitted under *Grutter* and *Fisher* is to enable universities to assemble classes that are diverse in many ways.

In addition, the University could legitimately conclude that excluding any consideration of race from the Personal Achievement Index analysis would deprive the University of valuable context that helps it take the measure of the whole person, even as the shrinking size of the non-Top Ten portion of the class forced the University to make increasingly nuanced admissions decisions. A student's "own, unique experience of being a racial minority in a society * * * in which race

unfortunately still matters" may affect a student's opportunities and views. *Grutter*, 539 U.S. at 333; accord *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). An applicant's race therefore may provide necessary – and illuminating – context for evaluating the applicant's experiences and achievements. For example, knowing that the student-body president at an overwhelmingly white school is African-American provides a more complete understanding of his achievement and the contributions to student body diversity he is positioned to make. J.A. 204a-205a, 207a, 210a-211a, 309a-310a.

For these reasons, the University has provided ample support for its conclusion that it had not yet achieved the educational benefits of diversity to an extent that would be consonant with its educational mission.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2013, I electronically filed the foregoing SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(d), because it contains 6145 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

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Date: November 1, 2013