No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

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

Respondents.

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

BRIEF OF THE ADVANCEMENT PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

INTEREST OF AMICI CURIAE[1]

In this brief *amici curiae* discuss the historical and social contexts in which the admission policy under challenge developed in order to assist the Court in resolving the issue presented.

Amici curiae, the Advancement Project (AP), is a not for profit organization. In partnership with local communities, AP engages in legal advocacy calculated to achieve universal opportunity and a just democracy. Advancing educational opportunities for all students is integral to AP's mission.

AP has offices in Washington, D.C. and Los Angeles, California, as well as a staff member and Board Chair in Austin, Texas.[2] Gerald Torres, founding board member of the Advancement Project and Bryant Smith Chair in Law, University of Texas School of Law, also is an *amicus curiae*.[3]

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

[2] *See About Advancement Project, available at http://www.advancementproject.org/about-advancement-project* (last visited Aug. 8, 2012).

[3] Institutional affiliations are provided for purposes of identification only. The views expressed in this brief are those of the individual *amici* and do not reflect the views of the institutions at which they teach.

Amicus Julie A. Reuben is a Professor at the Harvard Graduate School of Education who specializes in subject matter pertinent to the issues discussed in this brief. Professor Reuben has published widely on issues related to the purposes of universities, the freedoms necessary for the fulfillment of those aims, and educational equity.

SUMMARY OF ARGUMENT

Fisher v. Texas is unlike any affirmative action case this Court has ever confronted. For the very first time in history, the U.S. Supreme Court is asked to rule on the constitutionality of an admissions program designed to increase racial diversity at a university located in a southern state—Texas.

The history of Texas and of the University of Texas ("UT") distinguishes the present case from *DeFunis v. Odegaard*, 416 U.S. 312 (1974), *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). The aforementioned cases all involved universities located in the North or West that lacked a history of state-mandated segregation. *Fisher* arises out of a profoundly different context.

UT's quest for a racially diverse student body is justified, in part, because it represents an attempt by UT to come to terms with its own history of purposeful discrimination and the history of purposeful discrimination by the state of Texas. Administrators formulated the present admissions policy informed by the institution's and the state's long policy of racial exclusion and long and relatively recent record of resistance to racial inclusion.[4] This resistance continued even after segregation in higher education technically ended as a result of this

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[4] *See* Brief for Respondents at 1-3, Fisher v. Texas, No. 11-345 (S. Ct. Aug. 2012) ("UT is painfully aware of that history [of past discrimination], and the lingering perception that 'UT is largely closed to nonwhite applicants'").

Court's mandates in *Sweatt v. Painter*, 339 U.S. 629 (1950) and *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956); *see also Brown v. Board of Education*, 347 U.S. 483 (1954). UT's admissions policies also developed with awareness of efforts by the federal courts and the Department of Education Office of Civil Rights (OCR) to ensure desegregation of higher education in Texas. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified and aff'd*, 480 F.2d 1159, 1164-65 (D.C. Cir. 1973) (ordering ten states—including Texas—to desegregate their public universities). As recently as the late 1990s, OCR contended in a case involving UT that the state of Texas had not done enough to desegregate its institutions of higher education and demanded that the state take affirmative steps to ameliorate past discrimination. *See Hopwood v. Texas*, 861 F. Supp. 551, 572-573 (W.D. Tex. 1994) ("The OCR findings and the OCR's continuing review of Texas' efforts to desegregate demonstrate the pervasive nature of past discrimination in the higher education system"); *id.* at 573 (finding "strong evidence" of some present effects of past discrimination at UT law school, at the University, and in Texas colleges overall).[5]

These circumstances should inform the Court's assessment of this case. As Justice Sandra Day

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[5] *See* Douglas Laycock, *Hopwood v. Texas Litigation Documents* (Nov. 2001), *available at* http://tarltonguides.law.utexas.edu/content.php?pid=98968&sid=772237 (last visited Aug. 10, 2012). ("Litigation and negotiation with OCR has continued intermittently for more than twenty years; to this day, OCR contends that Texas has not done enough to desegregate its institutions of higher education.").

O'Connor acknowledged in *Grutter v. Bollinger*, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U.S. at 327. In the case at hand, the historical context and the lingering effects of past, purposeful discrimination shape the current campus environment and influence how UT pursues its mission of training leaders to serve the state of Texas. This context explains why UT considers two particular groups—African Americans and Latinos—"underrepresented minorities" in the admissions process.[6] After decades of discriminating against blacks and Latinos, UT now seeks a student body that reflects Texas's multiracial demography and is

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[6] In dissenting from the Fifth Circuit's denial of Fisher's petition for rehearing *en banc*, Judge Edith Jones expressed bafflement at UT's interest in certain "preferred minorities." Judge Jones argued that UT's attention to black and Latino students, as opposed to "Pakistanis and Middle Easterners," violates the Constitution. *Fisher v. Texas*, 644 F.3d. 301, 304 (5th Cir. 2011) (Jones, J., dissenting). She asserted that the "pertinent question" in this case is "whether a race-conscious admissions policy adopted *in this context* (where blacks and Latinos are irrationally "favored") is narrowly tailored to achieve the University's goal of increasing "diversity." *Id.* at 306-307. The history and present effects discussed in this brief demonstrate that it is far from irrational for UT to show special concern for black students. This context also suggests why UT has a special interest in Latinos.

In any event, UT's holistic review permits admissions officials to consider special circumstances, including race-related ones, relevant to evaluating any students—not only blacks and Latinos. Thus, the admissions process *could* and does favor those "Pakistanis and Middle Easterners," whose presence in the admitted class contributes to diversity and the educational aims of the University.

diverse along every relevant dimension—including but not limited to race—in order to advance its mission of educating leaders of the state.[7]

Far from being unconstitutional, UT's modest, race-conscious admissions policy is constitutionally compelled. *See United States v. Fordice*, 505 U.S. 717 (1992) (policies and practices traceable to a prior de jure dual system that continue to have segregative effects, including by influencing student enrollment decisions or otherwise fostering segregation, violate the Constitution); *see also Grutter*, 539 U.S. at 328 (noting that "remedying past discrimination" is one "permissible basis for race-based governmental action"); *cf. Parents Involved v. Community Schools*, 551 U.S. 701, 783

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[7] The official mission statement of the UT system includes its commitment:

> To provide superior, accessible, affordable instruction and learning opportunities to undergraduate, graduate, and professional school students from a wide range of social, ethnic, cultural, and economic backgrounds, thereby preparing educated, productive citizens who can meet the rigorous challenges of an increasingly diverse society and an ever-changing global community.

See Mission Statement: The University of Texas System, available at http://www.utsystem.edu/osm/mission.htm (last visited July 19, 2012); *see also Compact With Texans*, Univ. of Tex. at Austin, *available at* http://www.utexas.edu/about-ut/compact-with-texans (last visited Aug. 10, 2012) (discussing importance of diversity and noting that UT "benefits the state's economy, serves the citizens through public programs, and provides other public service").

(2007) (Kennedy, J., concurring) (citing pursuit of equal educational opportunity, amelioration of racial isolation and pursuit of diversity as legitimate rationales for efforts by public schools, once formerly *de jure* segregated, to voluntarily implement assignment plans designed to increase racial diversity in schools). Consistent with its affirmative constitutional obligations, UT adopted an admissions policy that ameliorates its history of purposeful discrimination, and its remedial effort bolsters UT's diversity-based defense of its admissions practices.[8]

UT's pursuit of classroom diversity remedies discrimination and its present effects because it reduces racial isolation, and consequently promotes robust intellectual exchange in the classroom. *See Grutter*, 539 U.S. at 330 (educational benefits include the "livelier, more spirited" conversations possible "when students have 'the greatest possible variety of backgrounds' and the "cross-racial

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[8] UT argues that its admissions policy is constitutional under *Grutter*'s holding that pursuit of the educational benefits of diversity is a compelling state interest. *See* Brief for Respondents at 1-3, Fisher v. Texas, No. 11-345 (S. Ct. Aug. 2012). *Amici* do not suggest that UT's policy should instead be considered under the line of precedents that permit institutions to voluntarily implement remedies for past purposeful discrimination. *See Fullilove v. Klutznick*, 448 U.S. 448, 484 (1979) (upholding set-aside program designed to remedy purposeful discrimination); *Richmond v. Croson*, 488 U.S. 469, 494, 509 (1989) (where there is relevant history of purposeful discrimination, states or localities can "rectify the effects of identified discrimination within its jurisdiction" and "punish and prevent present discrimination"). Rather, we make an argument intended to supplement UT's diversity-based defense of its admissions policy.

understanding" that can develop out of robust exchange).

More than fifty years ago in the landmark case challenging segregation at UT, the Court recognized that free intellectual exchange across color lines is a critical intangible element of a quality and equal education. *Sweatt,* 339 U.S. at 634 (ordering admission of black plaintiff to UT's all-white law school because makeshift black school denied intangibles of great education by "isolat[ing]" student from "interplay of ideas and the exchange of views"); *see McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950) (ordering admission of black graduate student on equal basis with whites because separation denied him ability to study and "engage in discussions and exchange views" with other students); *Brown v. Board of Education,* 347 U.S. at 493 (citing important "intangibles").

In *Fisher v. Texas*, history comes full circle.

ARGUMENT

I. UT'S CURRENT ADMISSIONS POLICY REFLECTS THE EVOLUTION OF THE STATE OF TEXAS AND THE UNIVERSITY ITSELF FROM A CLOSED, RACIALLY-EXCLUSIONARY SOCIETY TO A MORE OPEN SOCIETY WHERE THE UNIVERSITY VALUES A MULTIRACIAL CITIZENRY

UT is the progeny of a state that seceded from the Union in 1861 with the explicit goal of preserving

"negro slavery" for "all future time."[9] Even after rejoining the Union and despite passage of the Reconstruction Amendments, Texas sought to implement its goal of excluding blacks from public life and political personhood. In the early decades of the twentieth century, the Court repeatedly struck down Texas statutes designed to deny blacks full citizenship.

Nixon v. Herndon, 273 U.S. 536 (1927), ranks among the many Texas-based cases that illustrate the state's relegation of blacks to second-class citizenship. The litigation involved Dr. L.A. Nixon, a black physician in El Paso, Texas and a member of the Democratic Party. Dr. Nixon filed suit claiming he was unlawfully excluded from participating in the Democratic Party primary elections.[10] The case made its way to the Supreme Court, where Justice Oliver Wendell Holmes, writing for a unanimous Court, held that Dr. Nixon's rights had been violated

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[9] *See A Declaration of the Causes which Impel the State of Texas to Secede from the Federal Union (Feb. 2, 1861)*, *available at* http://avalon.law.yale.edu/19th_century/csa_texsec.asp (last visited Aug. 10, 2012) ("[Texas] was received as a commonwealth holding, maintaining and protecting the institution known as negro slavery—the servitude of the African to the white race within her limits—a relation that had existed from the first settlement of her wilderness by the white race, and which her people intended should exist in all future time.").

[10] The Judges of Elections in Texas denied him the right to vote in reliance upon a Statute of Texas enacted in May, 1923, and designated Article 3093a which stated that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas." *Herndon*, 273 U.S. at 540.

under the Fourteenth Amendment. Speaking with the authority of a Civil War veteran who had witnessed the passage of the Civil War Amendments, Justice Holmes explained that Texas had "direct[ly] and obvious[ly]" infringed the Fourteenth Amendment—"specifically drafted to protect Negroes." Though the Amendment "applies to all," he wrote, it was nonetheless "passed, as we know, *with a special intent to protect the blacks from discrimination against them*." *Id.* at 541 (emphasis added).

Despite the Supreme Court's mandate, Texas refused to honor Dr. Nixon's right to participate in the political process. Five years later, Dr. Nixon was back before the Supreme Court alleging discrimination, and once again, the Court vindicated his claims under the Fourteenth Amendment. *Nixon v. Condon*, 286 U.S. 73 (1932). Writing for the majority, Justice Benjamin Cardozo again emphasized that "The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color." *Id.* at 89.

Throughout the Twentieth Century and even into the Twenty-First Century, the Supreme Court of the United States has continued to intervene, as Texas continued to exclude blacks and Latinos from the opportunity to participate effectively in the political process. The struggle between the Court and Texas over equal rights yielded a series of landmark cases, all declaring that African-Americans could not be denied the right to vote. *See Smith v. Allwright*, 321 U.S. 649 (1944) (Democratic Party in Texas operates

as an arm of the State and thus its exclusionary practices against black voters violates the Fifteenth Amendment); *Terry v. Adams*, 345 U.S. 461 (1953) (organized in 1889 for the specific purpose of excluding blacks from voting, the Jaybird Party controlled all the election machinery of Fort Bend, Texas from 1889 to the present in order to deprive black citizens of voting rights because of their color and in defiance of the Constitution); *White v. Regester*, 412 U.S. 755 (1973) (based on "a blend of history and an intensely local appraisal of the design and purpose" of the Texas legislature, the Court invalidated multimember districts in Bexar County, Texas because they "invidiously excluded Mexican-Americans from effective participation in political life" and in Dallas County, where "a white dominated organization" used multimember districts to enhance the opportunity for racial discrimination against blacks). As recently as 2006, the Court found, in an opinion by Justice Anthony Kennedy, that Latino voters were deprived of the opportunity to have their votes "count" because of redistricting decisions made by the Texas State Legislature. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

Texas's recalcitrance to black and Latino rights did not end at the voting booth. The state denied blacks and Latinos equal opportunities in every conceivable domain—including education.[11] And it

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[11] *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973) (record was replete with evidence that the school districts in the San Antonio area, and generally in Texas, had a long history of financial inequity that adversely affected Mexican-American students).

defended its discriminatory admissions policies until the very last decades of the Twentieth Century.

A. UT Excluded Applicants Solely on Account of Race for Most of Its History

From its inception in 1881 to 1955, UT accepted all students who graduated from a certified high school.[12] *See* Tex. Const. Art. 7, § 10; *see also* Thomas D. Russell, *Keep Negroes out of Most Classes Where There are a Large Number of Girls: The Unseen Power of the Ku Klux Klan and Standardized Testing at The University of Texas, 1899-1999*, 52 S. Tex. L. Rev. 1, 14 (2010); Karen Nichol LeCompte & O. L. Davis, Jr., *Establishment of Academic Standards for Early Twentieth Century Texas High Schools: The University of Texas Affiliated Schools Program*, 37 J. of Educ. Admin. and History 71 (1995).

Only one barrier—an insurmountable one—stood between a Texas high school graduate and entry to UT: race. Texas's flagship university was founded by white Texans for white Texans. UT categorically barred black Americans from the University and from its graduate and professional schools. State law mandated segregation by race in education. The Constitution of the Republic of Texas, section 7 of article 7, stipulated "[s]eparate schools shall be

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[12] The requirements for admission to the graduate school were similarly minimal. Law school applicants needed only to have received an undergraduate degree. *See* Gary M. Lavergne, *Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice* 17-18 (2012).

provided for the white and colored children." *See Sweatt*, 210 S.W.2d at 443.

Thus, in 1946, the UT School of Law rejected applicant Heman Sweatt, a black graduate of Houston's Jack Yates High School and northeast Texas's Wiley College. Lavergne, *supra*, at 15, 18. The young man, a "good and steady" student, *id.* at 18, "possessed every essential qualification for admission, except that of race, upon which ground alone his application was denied." *Sweatt*, 210 S.W.2d at 443. UT excluded the "mild-mannered" Sweatt and every other person of African descent, no matter how virtuous. By contrast, no white person who met minimal qualifications, no matter how vile, would be denied admission to UT. At UT's flagship campus whites alone could acquire the skills necessary to join the ranks of state leaders.[13] *See generally* Brief of the Family of Heman Sweatt as Amicus Curiae in Support of Respondents, Fisher v. Texas, No 11-385 (2012).

In 1950, the U.S. Supreme Court forced UT to admit Sweatt to its School of Law and to admit other black applicants to the undergraduate college. In

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[13] Latinos, who are considered an ethnic group and can be of any race, were not formally excluded from UT. However, they were a tiny percentage of the UT student population for decades, and the few Latinos on campus experienced discrimination. Teresa Lozano Long recalls that Latinos "sort of grouped ourselves together" during the 1940s to survive the university's climate. *See* Liz Farmer, *University's Racial History Traces Back Generations*, Daily Texan, May 4, 2012, at 5, *available at* http://www.dailytexanonline.com/university/2012/05/04/universitys-racial-history-traces-back-generations (last visited Aug. 10, 2012).

Sweatt v. Painter, 339 U.S. 629 (1950), the Court held that UT could not exclude an otherwise qualified applicant on account of race, a holding that it reinforced in *Brown v. Board of Education*, 347 U.S. 483 (1954), the landmark case barring racially restrictive admissions in public education. *See Florida ex rel. Hawkins v. Board of Control,* 350 U.S. 413 (1956) (applying *Brown* to higher education).

As the public face of the struggle against segregation in higher education, Sweatt faced harassment, on and off UT's campus. During Sweatt's first semester at the law school, a cross was burned on the law school grounds. Russell, *Keep Negroes Out, supra,* at 14. Opponents of integration threatened Sweatt's life, in person and by mail. Lavergne, *supra*, at 211. Vandals defaced his home and threw rocks, shattering windows. *Id.* Sweatt fell ill and struggled academically, financially, and personally. Life at UT became unbearable. Sweatt eventually dropped out of school—a "physical and emotional wreck." *Id.* at 280-82.

After the Supreme Court mandated the desegregation of higher education, UT ended its "open" admissions policy. UT imposed "an enrollment restriction plan" that required applicants to take standardized aptitude tests in segregated testing centers; UT implemented the new policy after an official's analysis revealed it would heavily disfavor blacks. Dwonna Goldstone, *Integrating the Forty Acres: The Fifty-Year Struggle for Equality at the University of Texas* 41 (2006). The testing requirement allowed UT to formally comply with *Brown* without compromising its racial integrity. *Id.*; *see also* Russell, *Keep Negroes Out*, *supra*, at 30.

UT also adopted an inhospitable stance toward the few blacks who did gain admission. Barbara Smith, a black music student who had been cast as the love interest of a white male in a university production, received threats; the administration eventually forced her out of the production "for her safety." Aarti Shah, *The Fight for Integration: How Two Men Broke UT's Color Barrier and Started a Movement,* Daily Texan, Feb. 6, 2002 at 1-2. UT excluded blacks from living in the on-campus dormitories designated for whites and specifically forbade all black students from entering the living quarters of white women. UT established separate and inferior residential housing for blacks. UT barred black students from intercollegiate athletics, excluded them from extracurricular activities such as music and theater, and permitted segregated fraternities and sororities. UT even banned black students from using the same bathroom facilities as whites. *See* Goldstone, *supra*, at 27-28, 43, 58-60, 96. All told, in *Sweatt*'s wake, blacks faced an all-encompassing stigma, purely on account of race.

B. UT and the State of Texas Enforced Segregation and Punished Integrationists Well After *Sweatt v. Painter*

Texas officials and UT administrators also resisted change by attacking proponents of integration and their allies. The state targeted the NAACP and its lawyers for extinction. *See* Jack Greenberg, *Crusaders in the Courts* 217-22 (1994); Gilbert Jonas, *Freedom's Sword*, 135-49 (2005). The lawyers had waged both the court battle that resulted in Sweatt's admission to UT and litigated the series of cases that had banned racial

discrimination in the state's political process. *See Condon*, 286 U.S. 73; *Herndon,* 273 U.S. 536; *Smith,* 321 U.S. 649. In 1956, the attorney general of Texas sought and obtained a court order barring the NAACP's lawyers from practicing law in the state. In league with state legislators in Texas and throughout the South who vowed to resist desegregation through every legal means, the Texas attorney general waged a years-long campaign of harassment "aimed at paralyzing the NAACP and its lawyers." *See* Mark V. Tushnet, *Making Civil Rights Law* 273 (1994). The campaign impeded the organization's legal work, decimated its membership, and imperiled the NAACP's future.[14] *Id.*

During the 1960s university officials lashed out against students and faculty who protested racial exclusion. When black students filed suit to force UT to desegregate dormitories in 1961, the Board of Regents threatened those who dared aid the effort. The Board resolved that "any member . . . who directly or indirectly assists the Plaintiffs in this suit would be guilty of disloyalty to his employer and subject to dismissal or other disciplinary action." Goldstone, *supra*, at 107. It specifically targeted Professor Ernest Goldstein, a member of the law school faculty who had conferred with the black

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[14] The Court ultimately concluded that the civil rights pursuits of the lawyers and members of the NAACP constituted protected modes of expression under the First and Fourteenth Amendments. *See NAACP v. Button*, 371 U.S. 415 (1963); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (state's demand that NAACP disclose membership lists violated associational rights protected by First and Fourteenth Amendment).

students who sought desegregation of the dormitories. The Regents backed down after the harassment of Goldstein precipitated a backlash by other law school faculty, all of whom threatened to resign over the Board's interference. In 1964, the racial bar in the dormitories fell. *Id.* at 109.

Nevertheless, meaningful desegregation still eluded UT. In 1968, UT created the "Program for Educational Opportunity" to provide special educational assistance to academically talented but disadvantaged students. UT provisionally admitted these students, including blacks and Latinos, and then offered them regular admission if they performed well enough. The Regents quickly eliminated the program, however, declaring that no university funds could be used to recruit "students who otherwise would not have had an opportunity for higher education." Goldstone, *supra*, at 147. After UT Board of Regents Chair Frank C. Erwin, Jr. spoke out against the program, many believed that the Regents had canceled it not because of resource limitations but because of "racism." The Regents did not want to see "too many" blacks and Hispanics on campus. *Id.* at 147-48. The political leadership of UT still had not actively committed itself to reversing the legacy of segregation.

Black students continued to experience a hostile environment. In 1969, for example, Professor Robert Hopper greeted black sociology major Rosetta Williams on the first day of class in a most unwelcoming way. "I want feedback from the students because I don't want you sitting around like a bunch of niggers nodding your heads not saying nothing." *Id.* at 136. Williams was stunned into

silence. *Id.* Such casual racism, coupled with UT's anemic efforts at inclusion, discouraged blacks from applying to UT and suppressed the numbers of students of color on campus.

Blacks and Latinos remained sparse on UT's campus well after other institutions of higher education began actively recruiting students from underrepresented communities. Racial isolation endured into the 1980s. *Id.* at 136-37.

The numbers of black and Latino students at UT only began to increase appreciably during the 1980s, and then only after federal intervention. In 1983, at the behest of the U.S. Department of Education Office of Civil Rights ("OCR"), UT instituted "The Texas Plan" to increase the black and Latino presence on campus. *See* John B. Williams, *Race Discrimination in Public Higher Education: Interpreting Federal Civil Rights Enforcement, 1964-1996* (1997); *see also Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). In 1988 the Texas Higher Education Coordinating Board determined that Texas had not met the goals of the plan and voluntarily developed a successor plan to avoid a federal mandate.[15]

Texas remained under active monitoring by the U.S. Department of Education into the late 1990s and some public universities in Texas, including Texas Southern University and Prairie View, remain

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[15] *See Hopwood*, 861 F. Supp. 551 at 557.

under active OCR oversight today.[16] *See* Jayne Suhler, *College Inequities Still Reported*, Dallas Morning News, Apr. 23, 1999, at 37A. In 1996, when *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), held that UT could no longer use race in admissions, OCR argued that its mandate, still in place, in fact *required* UT to take affirmative steps, including race-conscious action, to increase the black and Latino presence on campus. *See Hopwood*, 861 F. Supp. at 572-573.[17] In the wake of the Fifth Circuit's *Hopwood* decision (a holding reversed by the U.S. Supreme Court in *Grutter*), the state of Texas re-endorsed the Texas Plan in January 1997.[18] Texas subsequently developed "Access and Equity 2000," a voluntary plan aimed at improving its higher education system and increasing access to Texas college for students of color.[19]

To this day, the state voluntarily pursues greater equity in higher education. Its current plan,

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[16] *See* E-mail from Andrew C. Hughey, General Counsel, Tex. Southern Univ. to Tomiko Brown-Nagin, Professor of Law, Harvard Law School (Aug. 7, 2012) (on file with author).

[17] For background, *see* Laycock, *supra* note 5.

[18] *See* Texas Higher Education Coordinating Board, *The Texas Plan for Equal Educational Opportunity: A Brief History*, (Nov. 1997), *available at* http://www.thecb.state.tx.us/reports/PDF/0021.PDF?CFID=6758024&CFTOKEN=54037207 (last visited Aug. 10, 2012).

[19] *See* Texas Higher Education Coordinating Board, *Access and Equity 2000: The Texas Educational Opportunity Plan for Public Higher Education (September 1994 through August 2000), available at* http://www.thecb.state.tx.us/reports/PDF/0018.PDF (last visited Aug. 10, 2012).

"Closing the Gap by 2015," is designed to achieve equity for all in Texas's system of higher education—and particularly for blacks and Latinos.[20]

Against this background, UT's current racially literate admissions policy,[21] modest in design and impact, is constitutional. The policy both ameliorates past purposeful discrimination and advances UT's compelling interest in diversity. *See U.S. v. Fordice*, 505 U.S. 717, 728 (1992) ("Our decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation."); *Grutter*, 539 U.S. at 332 (recognizing state interest in educational benefits of diversity).

C. UT's Chilly Racial Climate in Recent Years

By the late 1980s, UT had developed a commitment to a racially inclusive campus; however, segregation and its legacy could not be easily erased. UT's long history of discrimination and of resistance

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[20] *See* Texas Higher Education Coordinating Board, *Closing the Gaps*, *available at* http://www.thecb.state.tx.us/index.cfm?objectid=858D2E7C-F5C8-97E9-0CDEB3037C1C2CA3 (last visited Aug. 8, 2012); Texas Higher Education Coordinating Board, *Accelerated Plan for Closing the Gaps by 2015* 6-9 (Apr. 29, 2010), *available at* http://www.thecb.state.tx.us/reports/PDF/2005.PDF?CFID=31507899&CFTOKEN=70953647 (last visited Aug. 10, 2012) (discussing imperative of increasing black and Latino college participation rates).

[21] Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. Am. Hist. 92, 114-15 (June 2004).

to desegregation impeded its efforts to recruit blacks and Latinos. In 2002, for example, African American student Onaje Barnes reported that when it came time to select a college, his family and friends warned him not to attend UT "because, quite frankly, the environment of UT is known for racism." Goldstone, *supra*, at 152-53. Past incidents, coupled with periodic reports of enduring racial hostility at UT,[22] inspired unease about UT and left "lingering feelings of mistrust" among blacks and Latinos. *Id.* at 152.

The legacy of discrimination created a chilly environment for students of color who matriculated at UT. The few hundred black students on campus repeatedly complained about racial isolation. Ernest White, a black freshman who studied accounting at UT during the 1970s, articulated the problem in terms echoed by other students of color on the UT campus years later. White felt "out of place, like when you walk up to someone, and he acts like you're not there." *Id.* at 137. Decades later, UT's black students still voiced similar concerns. In 2003 Nailah Sankofa described the problem in blunt terms: "I do not feel welcome here." Katherine Pace,

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[22] Two illustrative incidents from this decade: two white students who wore Reagan masks attacked a black student leader (Terrence Stutz, *UT Struggling to Recruit Blacks: Fewer African-American Freshman Enrolled for Fall Term*, Dallas Morning News, October 14, 1989, at 37A); and students painted a car on campus with racist epithets, and a fraternity sold tee-shirts bearing an offensive black caricature (*UT Black Enrollment Down for Fall Semester: At 1,808 Number Declines for Second Year in a Row*," Dallas Morning News, September 17, 1991, at 17A). Blacks were reluctant to enroll at a University with such a hostile climate. *Id.*

U. Texas Group: Decline of Affirmative Action a Concern, Daily Texan, Feb. 3, 2003. Persistent complaints that UT's environment was unfriendly to students of color prompted UT to open an on-campus lounge intended as a gathering space for all UT students interested in cross-cultural exchanges, particularly black students, in 1995.[23]

In an April, 2012 article published in the campus newspaper, the *Daily Texan,* Choquette Hamilton described the circumstances that gave rise to the opening of the lounge and that still make it a critically important resource for students. "If you're a black student in your classroom filled with people who don't look like you and possibly say things that are offensive, it's frustrating going through that day in and day out." Rodriguez, *supra,* at 5.

Racial isolation is not the only problem that UT's students of color have reported. These students also have confronted overt racial hostility. UT opened the lounge described above not only to combat loneliness but also because "black students do not feel welcome on all parts of campus." *Id.* Remarkably, even today there are parts of the UT campus, including the West Mall, where black students rarely venture due to an overwhelming sense that they are "not welcome" and should keep out. *Id.*

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[23] *See* Jody Serrano, *Malcolm X Lounge Offers Safe Haven to Students of All Races*, Daily Texan, Apr. 27, 2012, *available at* http://www.dailytexanonline.com/university/2012/04/27/malcolm-x-lounge-offers-safe-haven-students-all-races (last visited Aug. 10, 2012).

Recurrent racially-tinged incidents reinforce the students' feelings of unease. Vandals defaced a statue of Dr. Martin Luther King Jr. in January of 2003 and again in September of 2004. *See* Courtney Morris, *MLK Vandalism in Retrospect*, Daily Texan, Sept. 2, 2004. The campus, embroiled in racial turmoil, required an intervention by UT's President. To address UT's ongoing racial problems the University's President, Dr. Larry R. Faulkner, established a "Task Force on Racial Respect and Fairness" in 2004. UT also hired a Vice Provost for Equity and Diversity to address these concerns. *See A Step Ahead of the Vandals*, Daily Texan, June 2, 2005.

Racial and ethnic tensions persist nevertheless. Channing Holman, a black student currently enrolled at UT, vividly described the campus's racial climate and its adverse impact on learning in a guest column, published in the campus newspaper in the wake of yet another racial controversy on campus provoked by a racially-tinged cartoon. As "one of the blacks that represent 4.5 percent of this university," she wrote:

> [I] came to UT wide-eyed, in awe that I was where many students wanted to be, and I was so excited to begin a new chapter of my life. I knew UT was a predominantly white institution, especially based on the reactions I received from people in my hometown when I told them UT was my school of choice. . .[B]ut I refused to let it deter me from getting a UT education.

> Reality set in during orientation, when there was only one other black girl in my wing and again when I was automatically labeled as an athlete because I was black. I have been the only black in a class of 100, and I have been stared at like I was on display in a museum, perhaps because I'm black. I've been overlooked during office hours because the white girl's question was more important, and I've been called "the n-word" while walking on Dean Keeton [a part of campus].

Channing Holman, *Taking Strides To Make the World Change*, Daily Texan, May 1, 2012, *available at* http://www.dailytexanonline.com/columns/2012/05/01/taking-strides-make-world-change (last visited Aug. 10, 2012).

Black students are not alone in observing or experiencing a chilly environment for students of color on UT's campus. Latinos report being subjected to "stereotypes" and racial epithets on campus.[24] UT is still viewed as a campus that has not "honestly dealt with its past" and that still does not "welcome" Latinos and blacks. Goldstone, *supra*, at 153. Many Latinos also feel isolated at UT, according to Catherine Rodarte, a Latina currently in her junior

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[24] *See* Alexa Ura, *Latino Students Defy Statistics by Attending College, Becoming Role Models*, Daily Texan, Apr. 25, 2012, at 2, *available at* http://www.dailytexanonline.com/university/2012/04/25/latino-freshmen-defy-statistics-attending-college-becoming-role-models (last visited Aug. 10, 2012).

year at UT. "[I]t's hard for me to speak up in class when it's almost all white students around me."[25]

This sense of social isolation is exacerbated by demeaning stereotypes that persist on UT's campus. For example, in March of 2012 the Texas Student Publications Board censured *Daily Texan* editor, Colby Angus Black, after he published articles that mocked two Latino students by name. Black lashed out against the students, Oscar de la Torre and Toni Nelson Herrera, after they staged an on-campus demonstration in favor of diversity.[26] Invoking age-old stereotypes, the paper published a cartoon

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[25] Tamar Lewin, *At the University of Texas, Admissions as a Mystery*, N.Y. Times, Apr. 1, 2012 at A14, *available at* http://www.nytimes.com/2012/04/02/education/university-of-texas-mysterious-admissions-process.html?_r=1 (last visited Aug. 10, 2012).

[26] *See* Megan Strickland, *A History of Racial Controversy at the Daily Texan*, Daily Texan, Apr. 30, 2012, at 7, *available at* http://www.dailytexanonline.com/university/2012/04/30/history-racial-controversy-daily-texan (last visited Aug. 10, 2012). The demonstration mirrored an incident at UT involving a current UT law professor, who in an April 18th, 1997 editorial wrote: "The only reasons we have racial preferences, of course, is the fact that blacks and Mexican-Americans are not academically competitive with whites and Asians." *Id.* After this law professor's comments triggered outrage among Latino and black UT students, a spokesman for George Bush, then Governor of Texas, felt compelled to disavow "that kind of talk." *See* Mark Levin, *It's Hard to Say* (Feb. 9, 1998), *available at* http://weeklywire.com/ww/02-09-98/austin_pols_feature4.html (last visited Aug. 10, 2012)

depicting de la Torre "on horseback, wearing a sombrero and carrying a rifle."[27]

In 2012, the *Daily Texan* was compelled to address "race, racism and diversity on the UT campus" in an eight-part series of articles. The series was precipitated by yet another racial controversy, this one over the paper's publication in March of 2012 of a "racially-charged" cartoon that seemed, to some readers, to mock the killing of Trayvon Martin, a seventeen year-old black teenager. The feature, which called Martin "a colored boy," a term that can indicate racial animus when applied to black males,[28] precipitated a backlash on campus.[29] Zoya Waliany, a senior in the Arabic Flagship Program wrote an essay in the aftermath of the backlash. She lamented a campus

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[27] Strickland, *supra* note 26, at 7. Rodarte's lament about social isolation and de la Torre and Herrera's offense at being stereotyped are not unusual reactions, that can adversely affect student academic performance according to social science literature. *See* Claude M. Steele, *Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do* 5-7, 118-9, 125 (2010) (discussing "stereotype threat," anxiety and physiological changes precipitated when a person has the potential to confirm negative stereotypes about her social group); *see also* Brief of Social and Organizational Psychologists as Amici Curiae in Support of Respondents, Fisher v. Texas, No. 11-385 (2012); *infra* Part II.A, pp.32-37.

[28] *See Ash v. Tyson Foods*, 546 U.S. 454, 456 (2006) (plant manager's use of the word "boy" to refer to African-American employees was potentially probative of discriminatory animus).

[29] *See* Ben Carrington, Michelle Mott, Vivian Shaw, & Maggie Tate, *Trayvon Cartoon Controversy: Reflecting Back, Moving Forward*, Daily Texan, May 2, 2012.

climate that gave rise to the racially-tinged cartoon. Waliany noted the extent to which racism is present at UT, embedded in its landscape. Too often ignored are:

> the years of racism ingrained in UT's landmarks and building. . . . From buildings named for a KKK Grand Dragon to the three Confederate flags that fly on the forty acres. . . . RLM Hall was named for Robert Lee Moore, a mathematician who refused to let African American students in his classes. Prof. Moore would walk out of class if a black student showed up. . . . Painter Hall is named for the former UT President who defended the case involved in preventing Heman Sweatt, a black UT Law School applicant from attending the school because of his race.

Zoya Waliany, *Building from the University's Racist Past*, Daily Texan, April 30, 2012, at 4, *available at* http://www.dailytexanonline.com/columns/2012/04/30/building-universitys-racist-past (last visited Aug. 10, 2012). *See* 1a (Appendix A: UT Campus Map with Landmarks and Monuments), *available at* http://www.dailytexanonline.com/image/2012/05/01/ccampu-statues (last visited Aug. 10, 2012).

One of the most significant racial flare-ups in recent years at UT concerned a campus landmark built in 1954 and named in honor of William Simkins, a professor at UT's law school from 1899 until his death in 1929. Within five weeks of the Supreme Court's decision in *Brown v. Board of*

Education, UT named its new dormitory in honor of Simkins—a man who symbolized violent white resistance to equality.[30] *See* 2a (Appendix B: Simkins Hall). Professor Simkins, who preferred to be called Colonel Simkins for his service during the Civil War, was an active leader of the Ku Klux Klan. Russell, *Keep Negroes Out*, *supra*, at 2-4. Together with his brother, Eldred James Simkins, Colonel Simkins organized the Ku Klux Klan in Florida following the Civil War. Simkins was not merely a member of the Ku Klux Klan. He, along with his brother Eldred James Simkins (a regent of UT from 1882 to 1896), was "a criminal and a terrorist, a gun-toting, mask-wearing, night-riding Klansman who headed a group in Florida that murdered 25 people in three years in just one county."[31] *See* 3a (Appendix C: Portrait of William Simkins). "Simkins threatened an African-American legislator and kept blacks from the polls. In just one of the Florida counties under his command, Klansmen murdered 25 freed slaves during a three-year period."[32] During his tenure at UT, Colonel Simkins

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[30] Ralph K.M. Haurwitz, *Half-Century Later, UT to Reconsider Naming of Dorm for Klansman*, American Statesman, May 20, 2010, *available at* http://www.statesman.com/news/local/half-century-later-ut-to-reconsider-naming-of-698255.html (last visited Aug 10. 2012).

[31] *DU Law Professor Tom Russell Battles Klan Ghosts in Texas*, Law Week Colorado, Jul. 26, 2010, *available at* http://www.lawweekonline.com/2010/07/du-law-professor-tom-russell-battles-klan-ghosts-in-texas/ (last visited Aug 10. 2012).

[32] Tom Russell, *Professor's Paper Targets Klan Reference on U. of Texas Dorm…And Gets Action*, July 12, 2010, *available at* http://www.huffingtonpost.com/dr-tom-russell/professors-paper-targets_b_643347.html (last visited Aug 10. 2012).

delivered an annual address describing with great pride his exploits with his brother, Eldred. That address was ultimately published in the 1916 commencement edition of UT's alumni magazine, The Alcalde. Goldstone, *supra*, at 15. In that article, Professor Simkins boasted of his participation in the Klan's night rides: "The immediate effect upon the Negro was wonderful," he wrote, "the flitting to and fro of masked horses and faces struck terror to the race."[33]

UT also honored Simkins with a brass bust, which sat in UT's law library. *See* 4a, (Appendix D: Bust of William Simkins). For decades, students engaged in a ritual of rubbing the head of the Simkins bust before taking exams. *See* Russell, *Keep Negroes Out, supra*, at 29. Officials removed the bust during the 1990s after a complaint by a librarian who was familiar with Simkins' history.

And in 2010, after a campus-wide debate over whether UT should honor Simkins, UT officials removed Simkins's name from the dormitory. It no longer wished to give Simkins and his crimes UT's imprimatur.

D. UT's Current Admissions Policy Helps to Redeem its History and to Remedy Vestiges of Segregation

The numerous and concrete incidents described above documenting UT's chilly campus climate for blacks and Latinos are traceable to Texas' and UT's

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[33] *DU Law Professor*, *supra* note 31.

history of segregation. UT's present effort to diversify its student body is thus an appropriate and necessary response to ongoing racial and ethnic tensions on campus precipitated by its history and its enduring yet often intangible effects.

In *United States v. Fordice*, this Court held that the state of Mississippi could not discharge its constitutional obligation to dismantle segregation in higher education merely by adopting race-neutral policies. 505 U.S. at 729. Public institutions with histories of *de jure* segregation that remain racially identifiable and bear vestiges of segregation traceable to the state are constitutionally obligated to adopt policies that remove remnants of segregation. *Id.* at 729-30.

The historical context that provides the backdrop for *Fisher v. Texas* is substantially similar to the circumstances that compelled the Court's holding in *Fordice*. Texas and UT, like Mississippi and its flagship universities, resisted desegregation well after *Brown,* and also adopted policies—including standardized testing practices—"tainted" by discrimination. Compare *Fordice*, 505 U.S. at 734 with Goldstone, *supra,* at 41 and Russell, *Keep Negroes Out*, *supra*, at 30-31. Texas, like Mississippi, only began to actively desegregate its educational institutions after OCR and the federal courts demanded it. *Hopwood v. Texas*, 861 F. Supp. 551, 572-573 (W.D. Tex. 1994) ("The OCR findings and the OCR's continuing review of Texas' efforts to desegregate demonstrate the pervasive nature of past discrimination in the higher education system"); *id.* at 573 (finding "strong evidence" of some present effects of past discrimination at UT law school, at the

University itself, and in Texas colleges overall). Texas, like Mississippi (*Fordice* 505 U.S. at 741-42), maintained a system of historically black colleges unequal in resources and in other respects to the state's historically white, flagship universities.[34]

It is thus evident that UT, an arm of the state of Texas, bears vestiges of segregation that UT rightly seeks to remedy. *Fordice*, 505 U.S. at 729-30; *see also id.* at 744-45 (O'Connor, J., concurring) (*de jure* segregated states where vestiges of discrimination remain must "counteract[ ]" and minimize[ ]" the "segregative impact" of practices); Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1791 (2004) ("Southern and border state schools have a compelling interest in complying with their desegregation obligations.").

Consistent with UT's affirmative obligations, administrators are now intent on creating a racially diverse and healthy campus climate for all Texans. UT's holistic, race-sensitive admissions policy both remedies vestiges of segregation on campus and satisfies constitutional standards for voluntary adoption of affirmative action policies designed to achieve the educational benefits of diversity. *See Grutter*, 539 U.S. at 336-37 (endorsing race as a "plus" factor where each applicant's file is scrutinized). UT's policy is justified and lawful

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[34] Texas remains under active OCR oversight regarding its policies toward Texas Southern and Prairie View, historically black colleges. *See supra* note 16.

under two distinct strands of Supreme Court doctrine.

II. UT'S FOURTEENTH AMENDMENT-COMPELLED ADMISSIONS POLICIES PROTECT AND PROMOTE "EDUCATIONAL INTANGIBLES" LONG- RECOGNIZED AS CRUCIAL COMPONENTS OF A QUALITY AND EQUAL EDUCATION

A. UT's Policy Promotes Students' Freedom to Engage in Robust Intellectual Exchange in the Classroom

"'Livelier, more spirited…more enlightening and interesting' classroom discussions" flow from diverse classrooms and robust classroom exchange is a major benefit of educational diversity. *Grutter*, 539 U.S. at 330. When classrooms feature meaningful, visible diversity, Latinos and blacks are less likely to experience the social isolation that typically is a part of their UT experience. *See supra* Part I.C, pp. 20-29. Such isolation impedes learning by producing "stereotype threat,"[35] the anxiety and accompanying physiological changes that occur when students of color feel scrutinized and in danger of confirming negative stereotypes about their social group. *See* Steele, *supra*, at 5-7. Channing Holman, the black UT undergraduate who explained her discomfort, was "the only black in a class of 100" who was

[35] "Stereotype threat" and its impact on the learning environment is ably described in the *Amicus* Brief filed in this case by Greg Walton and Jerry Kang. Brief of Greg Walton and Jerry Kang as Amici Curiae in Support of Respondents, Fisher v. Texas, No 11-385 (2012).

"stared at like I was on display in a museum" described circumstances that precipitate "stereotype threat." So did Catherine Rodarte, the Latina in her junior year at the University, quoted *supra*, who found it "hard . . . to speak up in class when it's almost all white." Many Latino students, like many black students at UT, experience a sense of loneliness, even estrangement, and these feelings can often depress performance. *See* Steele, *supra,* at 5-7, 118-19, 125; *cf.* Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (2007) (diversity can facilitate better problem solving and increase productivity).

Fittingly, and long before the *Grutter* Court endorsed the state's compelling interest in diversity's educational benefits, the U.S. Supreme Court recognized the detrimental effects of racial isolation on learning and the importance of free deliberation and robust intellectual exchange to the effectuation of Fourteenth Amendment equality rights. The leading case recognizing the connection between intellectual exchange and quality and equal education involved UT. In *Sweatt v. Painter,* 339 U.S. 629 (1950), the Court endorsed the value of democratic free expression to equal educational opportunity. The Court held that UT's exclusion of black applicant Sweatt from the university violated the Fourteenth Amendment because Sweatt could not access the intangibles of a quality education in a makeshift black law school. Those intangibles, said the Court, included "qualities which are incapable of objective measurement but which make for greatness in a law school." *Id.* at 634. The Court called the "interplay of ideas and the exchange of views" one of these intangibles of a quality and equal education.

Id. The *Sweatt* Court cited *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950), an earlier case in which it held that a university could not relegate a black graduate student to a seat in a classroom, in a row specified for colored students, or to a library or to a special table in cafeteria. The separation denied McLaurin the "ability to study, to engage in discussions and exchange views with other students" and consequently violated McLaurin's "personal and present" right to equal protection of the laws. *McLaurin*, 339 U.S. at 641-42.

The Court again acknowledged that "intangible factors" are vital to a quality and equal education in *Brown v. Board of Education*. Citing *Sweatt* and *McLaurin,* a unanimous Court explained that a learning environment depends in large part on "those qualities which are incapable of objective measurement" but which affect one's "ability to study, to engage in discussions and exchange views with other students." *Brown*, 347 U.S. at 493. When those intangible factors are ignored—as in segregated schools—learning suffered.

The understanding that cross-racial dialogue is vital to education is the essence of *Grutter* and *Bakke*'s holdings. In these recent cases the Court linked students' free expression to a University's entitlement to academic freedom. *See Grutter*, 539 U.S. at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."); *Bakke*, 438 U.S. at 312 (endorsing diversity rationale

for affirmative action on grounds that "academic freedom" has "long been a concern of the First Amendment"); *see also Keyishan v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"). The Court did not specifically cite First Amendment interests in *Sweatt*, *McLaurin* or *Brown*, as did the *Grutter* and *Bakke* Courts. Nonetheless, in all of these cases the U.S. Supreme Court recognized the precise student interests at issue in the present case: the ability to freely exchange and the confidence to interact across racial boundaries.[36]

The robust intellectual exchange that is a by-product of the diverse classrooms that UT now pursues is fundamental to "effective participation by members of all racial and ethnic groups in the civic life of our Nation," *Grutter*, 539 U.S. at 332, and is a sound educational policy to which this Court should

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[36] Robust exchange in the classroom not only is protected by UT's First Amendment right to academic freedom, but also by students' right to freedom of expression on campus. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (curtailing student viewpionts poses danger of chilling expressive rights protected by the First Amendment and is especially dangerous on univeristy campuses, which serve as vital forums of public dialogue); *Carey v. Brown*, 447 U.S. 455 (1980) (vital First Amendment speech principles are at stake when a University withholds benefits because a student chooses to express a particular point of view); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

defer. *See Fordice*, 505 U.S. at 743 (state must take steps to disestablish racially identifiable system of higher education, consistent with sound policy). Free intellectual exchange and cross-racial dialogue are vital to liberal education.

Within a multiracial, polyglot context,[37] UT's embrace of an admissions policy that can facilitate cross-racial classroom exchange not only is compelling, but also is urgent. In 1996, UT President Robert Berdahl explained why: "as a flagship university, we have always educated leaders of our state and nation. We have an obligation to prepare future leaders who reflect the diversity of the country."[38] *See Grutter*, 539 U.S. at 332 ("because universities . . . represent the training ground for a large number of the Nation's leaders, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity").

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[37] Latinos and blacks now constitute almost fifty percent of the state's population and make vital contributions to social, economic, cultural, and political life in the state. *See Demographic Profile of Hispanics in Texas, 2010*, Pew Hispanic Center, http://www.pewhispanic.org/states/state/tx/ (last visited Aug. 10, 2012).

[38] Felicia J. Scott and William Kibler, *A Case Study: The Effects of the Hopwood Decision on Student Affairs*, 83 New Directions for Student Services: Responding to the New Affirmative Action Climate, 60 (Gehring 1998).

CONCLUSION

Tejas Es Diferente: Texas is different. This brief has argued that the history of Texas and the way it shapes the present provides context that should matter to the outcome of this case. *See Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); *id.* ("Strict scrutiny must take 'relevant differences' into account."). Although Texas is commonly thought of as a Western state and is known today for its cultural diversity, it also is a former Confederate state with a lamentable history of race-based discrimination and exclusion. UT shares in this history; for the majority of its existence, it admitted whites only and consequently cultivated a lily-white state leadership.

UT's present commitment to a meaningful black and Latino presence on campus cannot be fully comprehended or assessed without attention to the ways that history lives on in the present at UT—affecting the social climate on campus and the dynamics inside the classroom. At UT, "The past is never dead; it's not even past." William Faulkner, *Requiem for a Nun*, act 1, sc. 3 (1950).

Yes, Texas is different. Through its current policy, Texas seeks to redeem its history. Its holistic review is driven by a mission to provide an education of the first class to all of the people of Texas.

Respectfully submitted,

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AUGUST 13, 2012

INDEX OF APPENDICES

APPENDIX

APPENDIX A

MAP OF MONUMENTS
UNIVERSITY OF TEXAS CAMPUS
2012

1. Littlefield Fountain

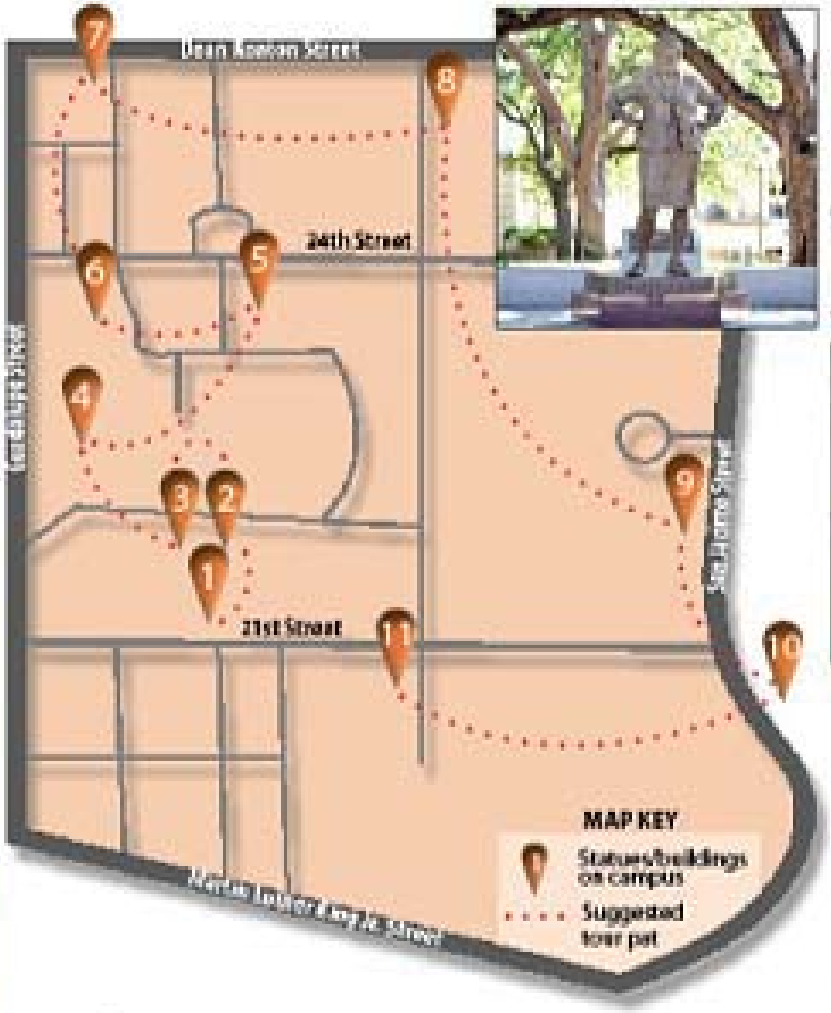
The fountain bears the inscription "To the men and women of the Confederacy who fought with valor ..." The fountain was originally intended to serve as the centerpiece of a larger memorial with all the South Mall statues positioned around it.

2. Robert E. Lee Statue

The figure of Lee, who was the chief general of the Confederacy and who was based in Texas while serving the U.S. Army, can be found in the South Mall.

3. Albert Sidney Johnston Statue

Also in the South Mall, a statue depicts Johnston, who served as general of the Confederacy. Johnston was the highest-ranking officer killed in either army during the war. Johnston also fought in the Texas War of Independence.



4. Cesar Chavez Statue

Unveiled in the West Mall on Oct. 9, 2007, it celebrates Cesar Chavez, the most influential leader in the struggle for Hispanic workers' rights and Latino civil rights who founded the National Farm Workers Association.

5. Painter Hall

The hall is named after Theophilus Painter, who served as UT president from 1944-1952 and is known for his role in the Supreme Court case Painter v. Sweatt in which he and the University refused admission of Heman Marion Sweatt to the law school because he was black, claiming he had access to "separate but equal" facilities elsewhere. Sweatt eventually won the case and was allowed admission, despite UT's opposition.

7. Duren Residence Hall

The hall is named after Almetris Duren who served as an adviser, mentor and housemother to black students at UT during its early years of integration. Duren also served as the student development specialist for minority affairs and started the Innervisions of Blackness Choir and founded Project Info, the first minority recruitment program at UT.

11. Perry–Castañeda Library

Opened in 1972, the PCL is named for two former UT professors, Carlos Castañeda and Ervin Perry. Castañeda played a central role in the development of the Benson Latin American Collection and Perry was the first African-American to be appointed to the academic rank of professor.

6. Barbara Jordan Statue

Unveiled on April 24, 2009, the statue celebrates the life of civil rights leader and prominent African-American politician Barbara Jordan. In 1966, she was the first African-American elected to the Senate after reconstruction and later became the first southern black woman to be elected to the House of Representatives. In 1976, she became the first African-American woman to deliver the keynote address at the Democratic National Convention.

8. Robert Lee Moore Hall (RLM)

Constructed in 1974, RLM was named after Moore, a mathematics professor at UT from 1920-1969 who insisted he would not teach black students. Moore is infamous for having walked out of a lecture once he realized the speaker was black.

9. Texas Cowboys' Pavilion

During segregation, the Texas Cowboys were known for hosting the event "Round Up," which featured racially degenerative minstrel shows of white men with black makeup on their faces singing "The Eyes of Texas."

10. Darrell K Royal Texas-Memorial Stadium

The stadium was renamed in 1996 to honor Royal, who coached the last all-white national championship football team in 1970. UT was one of the last football teams to recruit black players.

APPENDIX B

PORTRAIT OF
WILLIAM STEWART SIMKINS

APPENDIX C

SIMKINS HALL
UNIVERSITY OF TEXAS

APPENDIX D

BRASS BUST OF PROFESSOR SIMKINS