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Velva L. Price
District Clerk
Travis County
D-1-GN-17-002930
Raeana Vasquez

CAUSE NO. D-1-GN-17-002930

STUDENTS FOR FAIR ADMISSIONS INC.,	§	**IN THE DISTRICT COURT**
	§	
	§	
Plaintiff,	§	
v.	§	
	§	
UNIVERSITY OF TEXAS AT AUSTIN; WILLIAM McRAVEN, in his official capacity as Chancellor of the University of Texas System; GREGORY L. FENVES, in his official capacity as the President of the University of Texas at Austin; and ERNEST ALISEDA, DAVID J. BECK, KEVIN P. ELTIFE, PAUL L. FOSTER, R. STEVEN HICKS, JEFFREY D. HILDEBRAND, JANIECE LONGORIA, SARA MARTINEZ TUCKER, and JAMES CONRAD WEAVER, in their official capacities as Members of the Board of Regents of the University of Texas System,	§	**TRAVIS COUNTY, TEXAS**
	§	
Defendants.	§	**53RD JUDICIAL DISTRICT**

DEFENDANTS' ORIGINAL ANSWER AND PLEA TO THE JURISDICTION

TO THE HONORABLE COURT:

Defendants University of Texas at Austin ("UT"); William McRaven, in his official capacity as Chancellor of the University of Texas System; Gregory L. Fenves, in his official capacity as the President of the University of Texas at Austin; and Ernest Aliseda, David J. Beck, Kevin P. Eltife, Paul L. Foster, R.

Steven Hicks, Jeffrey D. Hildebrand, Janiece Longoria, Sara Martinez Tucker, and James Conrad Weaver, in their official capacities as Members of the Board of Regents of the University of Texas System, file this Original Answer and Plea to the Jurisdiction and would respectfully show the following:

I. Preliminary Statement

A. The Plaintiff

Plaintiff Students for Fair Admissions, Inc. ("SFFA") is a Virginia nonprofit corporation formed in 2014 to serve as a vehicle for litigating university admissions policies. It has three officers—Edward Blum, Abigail Fisher, and Richard Fisher. Blum and the Fishers also sit on SFFA's board of directors, and they comprise a majority of the board's members.

B. The Prior Litigation

SFFA's officers and directors have a long history of aggressive challenges—all unsuccessful—against UT's admissions program. Abigail Fisher first sued UT in federal court in 2008 following UT's denial of her application for admission the same year. That litigation, which lasted from 2008 through 2016, is commonly referred to as *Fisher v. University of Texas*.[1] Ms. Fisher was unsuccessful in that litigation, losing her arguments in the United States District Court, in the United

[1] Fisher was originally one of two plaintiffs in the underlying district court litigation and the immediate appeal but was the only petitioner when the case was twice heard by the United States Supreme Court.

States Court of Appeals for the Fifth Circuit, and, ultimately, in the United States Supreme Court. Each court upheld the validity of UT's admissions program. The petition in this case itself acknowledges that it challenges the same admissions program at issue in the prior litigation. *See* Pl.'s Orig. Pet. ¶ 23 ("UT Austin used the same admissions process it ha[s] used since 2004 . . . .").

Ms. Fisher's involvement in that 8-year litigation came about as a result of a friendship between her father, Richard Fisher, and Blum. Blum had been searching for unsuccessful UT applicants to be the plaintiff in the suit against UT he was then organizing. Blum has publicly taken credit for Ms. Fisher's case as one of two dozen lawsuits for which he was "the architect." *RadioLab Presents: More Perfect - The Imperfect Plaintiffs, Podcast* (June 28, 2016) at 00:49:36.

Now, through their organization SFFA, Blum and the Fishers seek yet another opportunity to challenge UT's admissions program. They cannot accept that each court in their prior litigation ruled against them and determined that UT may lawfully consider race as one of many factors—a "factor of a factor of a factor," *see Fisher v. University of Texas at Austin*, 579 U.S. ___, ___ (2016) ("*Fisher II*") (slip op., at 5) (quoting *Fisher v. University of Texas at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009))—in seeking to foster a diverse student body, which benefits the education of all students.

Having lost the legal arguments that they asserted from 2008 through 2016, Blum and the Fishers now claim that this honorable Court should give them a new and different result. They apparently believe that their new second-choice, third-choice, and fourth-choice theories should be equally compelling to the unsuccessful arguments they pushed for eight years. This time, they argue that UT's admissions program is prohibited by provisions of the Texas Constitution and a Texas statute. But their claims in this lawsuit simply try to re-package the same allegations and arguments that were unsuccessful in the prior suit. Blum and the Fishers could have raised these claims in the prior litigation, yet chose not to.

Without mentioning in their petition that these same allegations and claims were expressly rejected in prior litigation, SFFA seeks a second bite at the apple for its officers and directors: Blum and the Fishers. Thus, SFFA attempts to revisit the same set of underlying issues, while totally ignoring the outcome of the prior litigation. For example, SFFA contends that "student body diversity" is not a "compelling state interest." Pl.'s Orig. Pet. ¶ 34. The United States Supreme Court has repeatedly held otherwise, including twice in Fisher's own litigation against UT. *See Fisher II*, 579 U.S. at __ (slip op., at 11) (identifying "the educational benefits that flow from student body diversity" as "the compelling interest that justifies consideration of race in college admissions"), *Fisher v. University of Texas at Austin*, 570 U.S. ____, ___ (2013) ("*Fisher I*") (slip op., at

7) ("[O]btaining the educational benefits of 'student body diversity is a compelling state interest that can justify the use of race in university admissions.'"); *see also Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265, 311-15 (1978) (Powell, J.). Blum and the Fishers had their day in court on this issue (indeed, many days in court), and lost. They should not be able to re-litigate this or any other aspect of UT's admissions policy by dressing up the challenge with state law theories they failed to advance the first time around.

In another retread from the prior litigation, SFFA's suit accuses UT of maintaining "vague" and "amorphous" diversity goals for its admissions program. Pl.'s Orig. Pet. ¶ 32. Blum and the Fishers made the same arguments in the prior case, and the United States Supreme Court rejected them, concluding that UT's objectives "mirror the 'compelling interest' this Court has approved in its prior cases." *Fisher II*, 579 U.S. at __ (slip op., at 12-13).

SFFA likewise asserts that UT has already achieved a "critical mass" of students from historically underrepresented groups. As it did in the prior litigation, SFFA bases its argument on the false premise that the overall percentage of non-white students at UT is high enough that, in the opinion of Blum and the Fishers, there is "enough diversity." Pl.'s Orig. Pet. ¶ 35. Ms. Fisher made the same arguments in the federal case, but the United States Supreme Court found

significant evidence justifying UT's inclusion of race as a factor in its holistic admissions program. *Fisher II*, 579 U.S. at __ (slip op., at 13-15).

Again advancing prior arguments that Ms. Fisher litigated and lost, SFFA contends that UT's consideration of race in admissions is not "narrowly tailored" because its effect on the diversity of its admitted students has allegedly been "minimal." Pl.'s Orig. Pet. ¶¶ 35-38. The United States Supreme Court squarely rejected this contention as well. Indeed, far from being a flaw, the Court recognized that the fact that race played only a marginal role in holistic review was a virtue. *See Fisher II*, 579 U.S. at __ (slip op., at 15) ("[I]t is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality."). The Court also concluded that UT's consideration of race had a "meaningful" effect on the diversity of its incoming freshman class. *Id.*

C. UT's Admission Program

UT's central mission, as a public institution, is educating the future leaders of Texas, in a State that is increasingly diverse. Like virtually every other selective university in America, UT has concluded that assembling a student body that not only is exceptionally talented, but also richly diverse, is key to achieving its mission. UT has a broad vision of student body diversity, which looks to many

factors, including socioeconomic background, race and ethnicity, extracurricular interests, demonstrated leadership, hardships overcome, and special talents.

UT's own experience has confirmed the judgment of the Nation's highest ranked colleges and universities that student body diversity is critical to preparing students to succeed in the world they will enter when they leave campus. This same judgment concerning the important role of diversity is echoed by policies in America's military and in its leading companies. The educational benefits of student body diversity include, but are not limited to, bringing unique and direct perspectives to the issues and topics discussed and debated in classrooms; promoting cross-racial understanding; breaking down racial and ethnic stereotypes; creating an environment in which students do not feel like spokespersons for their race; and preparing students to participate in—and to serve as leaders within—an increasingly diverse workforce and society.

These benefits enhance the education that every UT student receives. As the United States Supreme Court has repeatedly recognized, these objectives mirror the approved compelling state interest in student body diversity, and UT's program is lawful and narrowly tailored to achieve them. The program is equally proper when examined against Plaintiff's new theories and arguments proposed in this lawsuit, which could have—and should have—been raised in the prior litigation, if Blum and the Fishers had wished to litigate them.

II. General denial

Consistent with Rule 92 of the Texas Rules of Civil Procedure, Defendants assert a general denial of all the material allegations contained in Plaintiff's Original Petition and demand strict proof of the allegations by a preponderance of the evidence.

III. Affirmative Defenses

1. Claim Preclusion. Plaintiff's claims are barred by the doctrine of res judicata.

2. Issue Preclusion. Plaintiff's claims are barred in whole or in part by the doctrine of collateral estoppel.

3. Standing. Plaintiff lacks proper standing to assert its claims, in whole or in part.

4. Mootness. To the extent Plaintiff's claims challenge past admissions decisions or programs or relate to students no longer seeking admission to UT, Plaintiff's claims are moot in whole or in part.

5. Immunity. Plaintiff's claims are barred by sovereign immunity, governmental immunity, and official immunity.

IV. Plea to the Jurisdiction

Because Plaintiff lacks standing to assert the claims in this lawsuit, and because the claims, in whole or in part, are moot and/or barred by the doctrines of

sovereign immunity, governmental immunity and official immunity, this Court lacks subject matter jurisdiction to hear the case.

V. Prayer

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that the Court enter judgment that the Plaintiff take nothing by its claims, that Defendants recover all costs of Court, and that they be awarded all such further and additional relief to which they may show themselves to be justly entitled.

Respectfully Submitted,

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