CAUSE NO. D-1-GN-19-002739

STUDENTS FOR FAIR ADMISSIONS INC.,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
v.	§	
	§	
UNIVERSITY OF TEXAS AT AUSTIN; JAMES B. MILLIKEN, 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 DAVID J. BECK, CHRISTINA MELTON CRAIN, KEVIN P. ELTIFE, R. STEVEN HICKS, JODIE LEE JILES, JANIECE LONGORIA, NOLAN PEREZ, KELCY L. WARREN, 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, PLEA TO THE JURISDICTION, AND PLEA OF RES JUDICATA AND COLLATERAL ESTOPPEL

TO THE HONORABLE COURT:

Defendants University of Texas at Austin ("UT"); James B. Milliken, 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 David J. Beck, Christina Melton Crain, Kevin P. Eltife, R. Steven

Hicks, Jodie Lee Jiles, Janiece Longoria, Nolan Perez, Kelcy L. Warren, 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, Plea to the Jurisdiction, and Plea of Res Judicata and Collateral Estoppel 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.

SFFA has no "members" within the meaning of the Virginia Nonstock Corporation Act. Instead, Blum—who is SFFA's President and operates the corporation out of his several homes—made the decision that SFFA would have no voting members. The individuals that SFFA has denominated "General Members" are not statutory members within the meaning of the law under which it was formed, and they do not have the ability to control SFFA's leadership, operations, or decision-making, nor do they play a substantial role in financing SFFA's activities (including litigation).

B. The Prior Unsuccessful Lawsuits

This is SFFA's second lawsuit against these defendants in the past two years, and it is the *third* in a series of suits that SFFA's officers and directors have orchestrated against UT, the UT System, and their respective officials. These suits, collectively, have now occupied the better part of the last eleven years.

SFFA most recently sued UT and the official-capacity defendants in 2017, raising essentially the same claims it raises here—only with respect to the 2017 entering class, as opposed to the 2018 and 2019 entering classes it puts in issue in this suit. SFFA's claims concerning the 2017 class were dismissed with prejudice on March 5, 2019 for lack of standing, following an evidentiary hearing at which SFFA failed to demonstrate it had any individual members who would have had standing to bring suit in their own right.

But 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 case, losing her arguments in the United States District Court, in the United States Court of Appeals for the Fifth Circuit, and, ultimately, in the United States Supreme Court. Each court upheld the validity of

[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.

UT's admissions program. SFFA's petition in this case acknowledges that the aspects of the admissions program it challenges here are essentially the same as those at issue in the *Fisher* 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 her 8-year litigation against UT 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 alternately described himself as "Yenta the Matchmaker" and "the architect" for the lawsuits he puts together, including Fisher's and SFFA's prior suits against UT.

Once again using SFFA, Blum and the Fishers seek yet another opportunity to challenge UT's admissions program. They cannot accept that each court in the *Fisher* litigation ruled against their equal protection arguments 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, for the second time in Travis County District Court, claim

that this honorable Court should give them a new and different result. Here, 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 once again re-package the same allegations and arguments that were unsuccessful in the prior litigation. Blum and the Fishers could have raised these claims in *Fisher v. University of Texas*, yet chose not to.

Without mentioning in their petition that these same allegations and claims were expressly rejected in prior litigation, SFFA seeks what amounts to a third bite at the apple. SFFA attempts to revisit the same set of underlying issues, while totally ignoring the outcome of the *Fisher* 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. 297, 309 (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 *Fisher*, 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 continues to suggest 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 already. Pl.'s Orig. Pet. ¶ 21. 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).

Finally, to escape the binding force of *Fisher II* and its underlying precedents, SFFA previously suggested that this Court should ignore the Texas

Supreme Court's precedents applying federal law and instead follow a divided ruling from a 1996 Louisiana case interpreting the Equal Rights Amendment of the Louisiana Constitution. *See Louisiana Associated General Contractors v. State*, 669 So.2d 1185, 1196 & n.16 (La. 1996) (cited by SFFA in its last case against these defendants). Defendants believe that, when deciding the substance of the Texas equal protection challenge presented here, this Court should look to three unanimous decisions of the Texas Supreme Court—authored by Chief Justice Tom Philips, Chief Justice Wallace Jefferson, and Justice Harriet O'Neill—all of which are in agreement that the Texas constitutional analysis is the same as the federal analysis that the Supreme Court already performed in deciding *Fisher* and *Fisher II*. *See In re Dean*, 393 SW3d 741, 749 (Tex. 2012) (Jefferson, C.J.) (explaining that the Texas Equal Rights Amendment analysis applies the traditional federal equal protection standard, *i.e.*, whether the challenged action "is narrowly tailored to serve a compelling governmental interest"); *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 262, 266 (Tex. 2002) (O'Neill, J.) ("[T]he federal analytical approach applies to equal protection challenges under the Texas Constitution"; the function of the Equal Rights Amendment is to "elevat[e] sex to a suspect class and subject[ ] sex-based classifications to heightened strict-scrutiny review"); *Richards v. League of United Latin Am. Citizens (LULAC)*, 868 S.W.2d 306, 310-11 & n.3

(Tex. 1993) (Phillips, C.J.) ("[T]he Texas ERA would not afford any additional level of scrutiny in such a case" where strict scrutiny already applies).

C. UT's Admission Program

UT's central mission, as a public institution, involves 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 *Fisher* 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. Plea of Res Judicata and Collateral Estoppel

Plaintiff's claims are barred by the doctrines of res judicata and collateral estoppel. The plaintiffs in this suit and the prior litigation are in privity. Furthermore, the claims Plaintiff asserts here include claims and issues that were actually litigated and necessarily decided—or which arise from the same nucleus of operative facts and thus could have been litigated and decided—in the prior litigation that resulted in a final judgment on the merits in favor of Defendants.

VI. 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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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on counsel of record for Plaintiff via the Court's electronic filing and service system and also via email service as indicated below, on this the 1st day of July, 2019, as follows:

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