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

STUDENTS FOR FAIR ADMISSIONS INC.,	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
v.	§	**TRAVIS COUNTY, TEXAS**
UNIVERSITY OF TEXAS AT AUSTIN and GREGORY L. FENVES, in his official capacity as the President of the University of Texas at Austin,	§	
Defendants	§	
ADAYLIN ALVAREZ, MORGAN BENNETT, ALEXIS CARR, T'JAE FREEMAN, MARLIE ASHTON HARRIS, ANGELA KANG, BRIANNA MALLORIE MCBRIDE, DESIREE ORTEGA, TEXAS ORANGE JACKETS,	§	
Intervenor-Defendants	§	**53rd JUDICIAL DISTRICT**

INTERVENOR-DEFENDANTS' RESPONSE TO MOTION TO STRIKE INTERVENTION

Intervenor-Defendants Adaylin Alvarez, Morgan Bennett, Alexis Carr, T'Jae Freeman, Marlie Ashton Harris, Angela Kang, Brianna Mallorie McBride, Desiree Ortega, and Texas Orange Jackets (collectively, "Intervenors") respectfully file this Response to Plaintiff's Motion to Strike Petition in Intervention ("Mot. to Strike"). As further shown below, Intervenors—as students of color and a diverse student organization—stand to suffer serious prejudice if Plaintiff Students for Fair Admissions, Inc. ("SFFA") is successful with any of its claims. Intervenors' participation in this lawsuit is necessary to protect their profound legal and equitable interests—

interests that have been recognized repeatedly by the United States Supreme Court and that are directly invoked by SFFA's own allegations and discovery requests. Their full participation as Intervenor-Defendants will be highly beneficial to the Court in deciding these critical issues. In support, Intervenors show as follows:

I. Texas Law Contemplates Intervention by Defendants Like Intervenors.

A. Intervenors' Participation is Necessary and Proper to Defend Their Legal and Equitable Interests Against Plaintiff's Claims.

Intervenors are college students and a student organization who have more than satisfied their burden of demonstrating their justiciable interests in this case. As Intervenor-Defendants, they are uniquely situated to defend against Plaintiff's claims, because they are the direct recipients of the educational benefits that flow from a diverse student body. Because Intervenors have a justiciable interest and there is not sufficient cause to strike their intervention, Intervenors respectfully urge the Court to deny the motion to strike.

Under Texas Rule of Civil Procedure 60, "[a]ny party may intervene by filing a pleading subject to being stricken out by the court for sufficient cause on the motion of any party." Thus, in this Court, there is a right to intervention, and Intervenors must remain in the case unless "sufficient cause" is shown. *Id.* A party challenging the intervention must move to strike the intervention. *See Guaranty Fed. Savings Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). This contrasts with the federal rules where a party must file a motion before being granted intervention. *See generally* Fed. R. Civ. P. 24. Indeed, SFFA rests much of its argument on federal case law, with little reference to the significant differences between the Texas standards for intervention and the federal standards.

In Texas, when a party challenges a petition for intervention, the intervenors must show a legal or equitable interest that will be affected by the litigation. *See Jenkins v. Entergy Corp.*, 187

S.W.3d 785, 797 (Tex. App.—Corpus Christi 2006, pet. denied). SFFA wrongly argues that Intervenors' participation in this case hinges on their ability to be sued in this case as defendants and defeat recovery. Mot. to Strike at 2-3. SFFA states that because it "could not obtain the relief it desires by suing students" but only by "suing UT itself," Intervenors have no right to intervene under Rule 60. *Id.* at 7. Under such a standard, virtually no individual or organization would be able to intervene in any case against most defendants, especially governmental entities and companies, because they are not the proper defendant. While this standard may apply to rules governing necessary parties, it does not apply to interventions.

The standard for intervenor-defendants, which SFFA later acknowledges in its motion to strike (*see id.* at 5), states that "if an Intervenor-defendant could not have been sued directly, but a judgment for the plaintiff may lead to an action against the Intervenor or otherwise *seriously prejudice* the Intervenor the intervention is necessary to assure a proper defense against the claim." *Consumers Cty. Mut. Ins. Co. v. Mendoza*, No. 13-05-0024-CV, 2007 WL 687157, at *4 (Tex. App.—Corpus Christi Mar. 8, 2007, no pet.) (citing *Evan's World Travel, Inc. v. Adams*, 978 S.W.2d 225, 234-35 (Tex. App.—Texarkana 1998, no pet.)) (emphasis added). A party should remain as an intervenor when it is "necessary or proper" to join the case "for the preservation of that right." *Evan's World Travel, Inc.*, 978 S.W.2d at 234-35 (citation omitted).

Plaintiff also asserts that because Intervenors and UT Austin share the same interests, UT Austin can adequately defend Intervenors' interests in this case, and, therefore, Intervenors' participation is unnecessary. Mot. to Strike ¶ 14. In Texas, however, adequacy of representation by a party, even a governmental entity, is not grounds to strike intervention under Rule 60. *See Miami Indep. Sch. Dist. v. Moses*, 989 S.W.2d 871, 879 (Tex. App.—Austin 1999, pet. denied); *see also infra* § III (distinguishing federal interventions cases from state cases). If an intervenor

demonstrates that it could defeat recovery or show that it is necessary and proper to join the case to avoid prejudice, that intervention is almost essential to effectively protect the intervenor's interest and will not complicate the case by an excessive multiplication of the issues, a court abuses its discretion if it grants a motion to strike. *See Evan's World Travel, Inc.* 978 S.W.2d at 234-35; *see also Guaranty Fed. Savings Bank*, 793 S.W.2d at 657-58 (authorizing party to intervene where intervention did not complicate the case and was "almost essential to effectively protect [the party's] interests").

Here, Intervenors' legal and equitable interests include the educational benefits that flow from a diverse learning environment and the harms they will endure as students and as a student organization if SFFA is successful with its claims. SFFA downplays Intervenors' interest by conclusively suggesting their interests are generalized societal interests and not different from any other UT Austin student or student group. *See* Mot. to Strike ¶ 10. That argument misrepresents the interests of Intervenors.

The Texas Orange Jackets' declaration submitted with Intervenors' Petition plainly establishes its well-defined, organizational interest in UT Austin's race-conscious policy promoting diversity. *See* Pet. for Intervention, Ex. 9 (fully incorporated by reference herein). Contrary to SFFA's suggestion that the Orange Jackets' interest is indistinguishable from any other organization, the Orange Jackets has deliberately made membership diversity a core part of its purpose and activities. *Id.* Ex. 9 ¶¶ 4-5. As the oldest women's honorary service organization on campus, the Orange Jackets' declaration articulates how student body diversity is germane to fulfilling its mission:

> [h]aving a diverse membership and inclusive space for dialoguing about race, gender, and class is critical to our organizational mission. This type of rich diversity allows us to better understand complex issues, engage deeply in discussions about

> today's challenges, and improve the effectiveness of our service projects. Since Orange Jackets are the official hosts of the university, it is important that our organization aims to reflect the broad, multifaceted diversity of both the university and the state of Texas.

Id. Ex. 9 ¶ 6.

The level of racial diversity at UT Austin has a direct effect on the Orange Jackets' racial diversity because the organization recruits its membership from the admitted student body. As its declaration emphasizes: "Orange Jackets would be negatively impacted by a reduction in the number of students of color on UT's campus because it would make it significantly more challenging to ensure our membership represents the broadest array of backgrounds . . . [and thereby] harm the quality of Orange Jackets' service efforts . . . [and] current service agenda." *Id.* Ex. 9 ¶ 10. In addition to making the Orange Jackets less effective in fulfilling its mission, it would also produce direct, discrete harms for the Orange Jackets' members and force the Orange Jackets to expend more resources to support them. Orange Jackets' declaration underscores how "a drop in underrepresented minority students would negatively impact many of our members' daily experiences on campus . . . . It would place greater strain on the Orange Jackets to provide greater levels of support to our members to make sure they feel welcome at UT." *Id.* Ex. 9 ¶ 11. The Orange Jackets have clearly stated an interest which demonstrates their particularized, substantial interest in the diversity cultivated by UT Austin's race-conscious policy. Such an interest does not dissipate upon any individual student's graduation, and will impact the Orange Jackets' capacity to carry forward its three core tenets—service, leadership, and scholarship—in the decades to come.

Each individual Intervenor has also plainly articulated their specific interest in this case and how their lived experiences have been impacted by a diverse student body at UT Austin. *See*

Pet. for Intervention, Exs. 1-8 (fully incorporated by reference herein). For example, in her submitted declaration, Adaylin Alvarez explains how her educational experience with higher racial and ethnic diversity levels at UT Austin has helped her "draw new connections in new ways between the walls being built in Palestine, to the walls that were built in Berlin, to the walls now being called for at the U.S. Mexico border. It also made me think more deeply about how we treat Native Americans in the U.S., both historically and today." *Id.* Ex. 1 ¶ 11. Ms. Alvarez further explained her experiences in a racially diverse class with many Black, Latinx, and White students.[1] She notes how "some of my classmates who identified as Black shared their preference that racially pejorative words should not be said, that we should not speak for someone else's experiences, and we should not erase anybody's experience." *Id.* Ex. 1 ¶ 12.

Intervenor T'Jae Freeman speaks in her declaration of how having higher numbers of Black students has enabled her to better understand the "the wide range of experiences, challenges, and perspectives within the Black community." *Id.* Ex. 4 ¶ 10. For example, when interacting with a student whose parent is an African immigrant, she learned how "language barriers add an extra layer of complexity to the prejudice that Black immigrants encounter based on skin color as they navigate the school system or health care system." *Id.* Such conversations have taught her to be aware of "the wide range of needs within the Black community" and how problematic blanket assertions about people solely based on race can become. *Id.*

[1] For purposes of this Response, Intervenors use the gender-neutral term "Latinx" to refer collectively to Latinos, Latinas, and non-binary persons of Latin American background and is used interchangeably with the term "Hispanic." Intervenors use the terms "Black" and "African American" interchangeably and the term "White" means White/Non—Hispanic.

Intervenor Angela Kang notes how her interactions with students from different backgrounds, including racial backgrounds, challenges her "to think differently" as she was "not nearly as informed about people's struggles" as she is now. Ex. 6 ¶ 8. She reflects on how this has "grown my sense of empathy and passion for justice." *Id.* ¶ 8. Ms. Kang further states how her enriched conversations with other diverse students has helped her recognize how "Asians are often grouped as a monolith but the struggles of East Asians, for example, vary from the struggles and experiences of other Asian groups" and that "Asian Americans belong in conversations about diversity because even this racial group holds such diversity." *Id.* ¶ 11.

Clearly, these interests and the interests further articulated in the Petition for Intervention and accompanying declarations are not merely ideological interests. Whatever Plaintiff may think of the value of such experiences, they reflect personal and individualized benefits Intervenors directly derived from interacting with a diverse student body. If race is not considered, Black and Latinx enrollments will likely decline and, in turn, Intervenors' experiences with the educational benefits of a diverse student body will worsen. Each will be directly impacted if SFFA successfully enjoins UT Austin's consideration of race.

SFFA also mischaracterizes the interests of Intervenors by suggesting that because they have already been admitted to UT Austin, they have no other interest. *See* Mot. to Strike ¶ 9. As noted above and in the respective declarations of Intervenors, their interests in defending the race-conscious admissions policy are quite profound because of the ongoing educational benefits that flow from a diverse student body. The benefits extend even beyond graduation, through a more diverse alumni network, a more respected and prestigious degree, better preparedness to collaborate in a growing and diverse workforce, and pathways to leadership. SFFA has directly teed up these issues by alleging that under the Texas constitutional and statutory provisions under

which it seeks relief in this case, there is no compelling interest in racial diversity. Orig. Pet. ¶¶ 32-45. Furthermore, SFFA not only asks that UT Austin officials be permanently enjoined from considering a person's race or ethnicity in the admissions process, it also asks that all persons engaged in the process be prohibited from knowing or learning the race or ethnicity of any applicant. *Id.* at 20-21.

Intervenors' interest in defending against SFFA's claims are not mere societal interests, or personally held ideological interests, but interests that have been repeatedly recognized by the Supreme Court and other courts for over forty years. The courts have held that universities have a compelling interest in the "educational benefits that flow from a diverse student body." *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) ("*Fisher II*"). *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013) ("*Fisher I*"); *Grutter v. Bollinger*, 539 U.S. 306, 330-33, 354 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978) (controlling opinion of Powell, J.). These benefits are directly reflective of the experiences of, and impacts on, *students*. They include cross-racial understanding, enabling students to better understand persons of different races, preparing students for an increasingly diverse workforce and society, promoting learning outcomes, lessening racial isolation, and diminishing stereotypes and beliefs regarding students of color. *See, e.g.*, *Fisher II*, 136 S. Ct. at 2210-11. In ruling on SFFA's claims, it is imperative that the Court have the benefit of the testimony and evidence that Intervenors can present in this case.

B. Plaintiff's allegations in its Original Petition and its discovery propounded on UT Austin further implicate Intervenor's interests and show how Intervenors' full participation is essential for the Court to rule on the merits.

Intervenors' legal and equitable interests are further implicated by SFFA's claims and allegations in its Original Petition and in the scope of its discovery served on UT Austin. *See McCord v. Watts*, 777 S.W.2d 809, 812 (Tex. App.—Austin 1989, no writ) (holding that in

determining whether an intervention should be struck, the Court may review the sufficiency of the facts alleged in the petition for interventions, as well as the allegations in the pleadings of other parties).

SFFA avers in its Motion to Strike that its claims in this case focus "solely on questions of Texas law." Mot. to Strike ¶ 1. However, SFFA does not control how this Court or the higher courts will examine the issue and how relevant the development of facts in the defenses by the parties in this case will affect the eventual outcome. Indeed, if SFFA's claims were solely aimed at narrow questions of law on whether either of two constitutional provisions or a Texas statute bar UT Austin's consideration of race for admissions, SFFA would not have alleged several contestable facts in its Original Petition and it would not need to propound broad discovery on UT Austin. Yet, it did and those allegations, claims, and discovery requests demonstrate how the participation of Intervenors is necessary and proper to protect their justiciable interests.

SFFA's Allegations in its Original Petition

In SFFA's Original Petition, for example, it alleges that White and Asian "[a]pplicants were denied the opportunity to compete for admission to UT Austin on equal footing with other applicants because of Defendants' discriminatory admissions policies." Orig. Pet. ¶ 4. SFFA further alleges that "[g]iven the limited number of places in UT Austin's freshman class, granting a racial preference to African American and Hispanic applicants diminishes the chances of admission for White and Asian applicants." *Id.* ¶ 23. SFFA is plainly alleging that less-qualified Black and Latinx students have been admitted in lieu of "higher qualified" White and Asian students. Intervenors, who include Black and Latinx students, should be provided an opportunity to present testimony to rebut these allegations, seek discovery of Plaintiff on these issues, and defend their interests against SFFA's claims. Such evidence will be invaluable to the Court.

Indeed, SFFA's alleged facts directly target Intervenors by suggesting that "[r]acial preferences 'stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences.'" *Id.* ¶ 35 (citation omitted). SFFA's far-reaching allegations implicate the good name, reputation, honor and integrity of Intervenors, not the university. *See, e.g., Univ. of Texas Medical Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995) (Due process must be satisfied "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."). Intervenors are best situated to investigate and refute these allegations with not only social science research but also their own testimony and evidence to protect their legal and equitable interests.

SFFA further alleges that the Kroll Report—an investigation of admissions holds allegedly ordered by UT Austin's former president between 2009-2014—reflects admissions that were highly political and "based on requests from Texas legislators and members of the Board of Regents," is somehow relevant to its purely "legal claims." Orig. Pet. ¶¶ 27-30. It is difficult to determine how these admissions are relevant to its constitutional and statutory claims of discrimination, and they appear to be beyond the scope as its claims based on students who were denied admission in 2018 and 2019. Nevertheless, SFFA later alleges that *race* played a role in many of these admissions decisions. To the extent that SFFA plans to introduce evidence in this case on these allegations, Intervenors—as a diverse student organization and students of color—are better suited to defending against such claims on these highly sensitive issues for UT Austin and in presenting evidence on how such admission decisions—if true—were based on considerations other than race.

SFFA's Scope of its Discovery Requests

SFFA has propounded its discovery requests on UT Austin and this discovery further shows how Intervenors' interests are directly and indirectly implicated. For example, in SFFA's Interrogatory Number 1, it asks UT Austin how the university uses race in the admissions process. *See* Exhibit A (Defs.' Responses to Plf.'s First Set of Interrogatories). By extension, this question is important and substantial as it relates to Intervenor students who applied and reflected their race either directly or indirectly in their application and how erasing race from consideration would impact the application process. Allowing Intervenors to present evidence on this issue is critical for the Court to comprehend the application process and the implications for student applicants that would result if SFFA is successful.

In Interrogatory Number 5, SFFA asks, "If you contend that UT has a compelling interest in using race in the undergraduate admissions process, state the basis for the contention and identify with particularity all facts supporting your contention." *Id.* at 5. UT Austin answers, in part, that the university has a "compelling interest in maintaining an admissions program that allows for the consideration of race and ethnicity—namely, the educational benefits that flow from student body diversity." *Id.* at 13. UT Austin proceeds in identifying some benefits including breaking down stereotypes, promoting cross-racial understanding, creating a more positive environment where students are not regarded as spokespersons for their race, and better preparing students to participate in an increasingly diverse workforce and society. *Id.* Again, these benefits are those that flow directly to Intervenor students and the Texas Orange Jackets, demonstrating the legal and equitable interests at stake.

Similarly, in Interrogatory Number 6, SFFA asks UT Austin if it contends that it must use race to achieve racial diversity, state the basis for the contention and identify with particularity all

facts supporting your contention. *Id.* at 14. Testimony and perspectives from Intervenor students can assist the Court in determining how and why a state university like UT Austin, especially given its historical and ongoing challenges in serving students of color, must continue using race in a lawful manner.

In several declarations, Intervenors note the benefits they have experienced but also the continuing issues impacting their respective educational experiences. *See, e.g.,* Petition for Intervention ¶¶ 32-34. UT Austin is not likely to present this type of evidence and related arguments and the lack of such references in their answers indicates as much.

SFFA's First Requests for Production further undercut its argument that the legal issues are narrowly focused and will not seriously prejudice the interests of Intervenors. *See* Exhibit B (Defs.' Responses to Plf.'s Requests for Production). For example, among its several requests, SFFA asks for:

> 1. All documents from any time (including, but not limited to, electronic databases and electronic files) that include information reflecting the race, geographic residence, qualifications, financial aid awards, or academic performance, of individuals who have or are seeking admission to UT, including applicants, admitted students, and enrolled students. This request includes, but is not limited to, information relating to applications, admissions, transfer applications, transfer admissions, freshman enrollment, and total undergraduate enrollment. If information responsive to this Request is produced in the form of an electronic database or electronic files, please provide any guide to data entry, codebook, key, manual sorting capabilities, or data dictionary containing explanations or other useful information on the content or makeup of the data, variables, fields, and observations in such electronic databases.
>
> 3. All documents and information from any time relating to the use of race in the admissions process at UT. This Request includes, but is not limited to, any reports, analyses, complaints, investigations, statements, or data compilations relating to the use of race in the admissions process at UT.
>
> 9. Documents and information sufficient to show any forms used to evaluate applicants to UT, including but not limited to, forms used by staff interviewing or meeting with applicants or potential applicants and forms used by staff in evaluating individual admissions files and application summary sheets.

Id.

Clearly, SFFA's request for such information, including the applications of applicants, admitted students and enrolled students, reports, analyses, complaints relating to the use of race and forms used to evaluate applicants, places the interests of Intervenors directly at issue. From the requests, it is reasonable, if not obvious, to suggest that SFFA seeks to demonstrate that Black and Latinx students admitted into UT Austin are less qualified and were provided unfair advantages over SFFA's "higher qualified" purported student members.

Thus, SFFA's discovery and allegations in its petition demonstrate some of Intervenors' justiciable interests in this case and show why their full participation in this case is necessary and proper to defend their interests and their direct educational experiences—legal and equitable interests that would be seriously prejudiced if they were denied intervention.

II. Plaintiff's Bald Assertion that Intervention would Complicate and Unnecessarily Delay the Case is Unfounded and Untrue.

Intervenors' desire to intervene in this case and actively defend and protect its justiciable interests is driven by SFFA's allegations and claims. As noted above and in SFFA's Original Petition and discovery requests, the claims and issues in this case are far more expansive and complicated than it avers in its Motion to Strike. Intervenors' discovery in this case will be targeted to defending against SFFA's claims and will not unnecessarily increase expenses, complicate scheduling, or multiply the issues before the Court.

SFFA first argues that the intervention will unnecessarily complicate the case by adding nine parties, which would delay adjudication by expanding the scope and duration of discovery, increasing expenses and judicial resources, complicating scheduling and generating more conflict between and among parties. Mot. to Strike at ¶¶ 12-13. However, aside from SFFA's suggestion

that certain defenses Intervenors may raise to SFFA's petition, it never explains how Intervenors' participation will complicate this case.

First, Intervenors' participation in this case will not delay adjudication. Intervenors have received a draft Agreed Scheduling Order from UT Austin and the parties have reached agreement on nearly all dates in the proposed order. Thus, deadlines for discovery, experts, pleas to the jurisdiction, motions for summary judgment and trial are not extended.

Second, SFFA argues that Intervenors' participation is unnecessary because UT Austin can adequately represent their interests as they share the ultimate objective. Mot. to Strike, ¶ 15. However, sharing the same ultimate objective is not part of the test for considering whether sufficient cause exists to strike an intervention. The test is whether Intervenors have shown a justiciable interest, which may be legal or equitable. *See Guaranty Fed. Savings Bank*, 793 S.W.2d at 657. In fact, Texas courts have rejected the "adequacy of representation" defense available to litigants in the federal courts. *See, e.g., Miami Indep. Sch. Dist.*, 989 S.W.2d at 879 (holding that unlike Federal Rule of Civil Procedure 24, Texas Rule of Civil Procedure 60 does not weigh whether an existing party can adequately represent the interests of intervenors). As noted above and in their Petition for Intervention, Intervenors have demonstrated a justiciable interest and how their intervention is essential to effectively protecting their interests.

If the Court decides to consider whether UT Austin's defense of the claims renders Intervenors' role in this case unnecessary, the facts belie such argument. For example, in the event that the parties were to settle at some point during the litigation or the Court was to issue its judgment, Intervenors would be shut out of those negotiations and would not be able to intervene post-judgment unless the Court set aside the judgment. *See State v. Naylor*, 466 S.W.3d 783, 788

(Tex. 2015) (noting that Texas' common law does not allow interventions post-judgment unless trial court first sets aside the judgment).

UT Austin may further limit its experts to defending its own admissions policy and subordinate race and ethnicity while Intervenors could present experts who show the Court how UT Austin could do even more in assisting underrepresented students of color. And, as noted above, UT Austin may not be willing to present similar evidence as Intervenors related to the Kroll Report, which is highly political in nature.

Additionally, UT Austin is not likely to present evidence showing its continuing problems with addressing racial and ethnic harassment and discrimination or its history of segregation and discrimination and how its admission process should be responsive to address such concerns identified, as required under the challenged statute and constitutional clauses. Although Plaintiff *argues* that such evidence has been rejected in *federal* cases interpreting *federal* claims, the Texas courts have not directly addressed these issues when interpreting the challenged provisions of law. Furthermore, there remain questions about whether UT Austin remains subject to ongoing desegregation obligations. *See, e.g.*, *Fisher v. Univ. of Texas at Austin*, No. 11-345, Brief of the Advancement Project as *Amicus Curiae* in Support of Respondents and Urging Affirmance (2012) at 4, (citing UT Austin's continuing oversight of its desegregation obligations by the Office for Civil Rights).[2] It is imperative that this Court have the benefit of such argument and evidence.

Similarly, SFFA argues that Intervenors' presentation of evidence on the educational benefits of diversity is neither helpful nor essential to defend against SFFA's claims. Mot. to

[2] Available at https://www.scotusblog.com/wp-content/uploads/2016/08/11-345-respondent-amicus-Advancement-Project.pdf (last visited Feb. 26, 2020).

Strike ¶ 18. However, SFFA does not get to dictate to the other parties or the Court what evidence and arguments are to be considered. While SFFA may believe that the educational benefits of diversity have nothing to do with the challenged statutory and constitutional provisions, Intervenors disagree and intend to make such arguments. It will be critical for the Court to understand from Intervenors and their experts what these educational benefits are, how they impact students' academic and social lives, and how they may be impacted if UT Austin was forced to adopt a "colorblind" approach to admissions as proposed by SFFA. Intervenors should not be deprived of presenting to the Court such evidence and argument as it considers these important issues.

In sum, Intervenors' substantial interest in this case should not be left to UT Austin, which owes no legal or ethical responsibilities to the students. Intervenors' participation in this case will ensure the Court has a full and complete record of the claims and defenses that the parties may offer.

III. Though Not Controlling, Federal Cases Show How Intervenors' Interests Will be Harmed if this Court Strikes Their Intervention.

In opposing Intervenors' Petition, SFFA relies mostly on a few federal court decisions that have either denied or limited the participation of intervenors in other affirmative action cases. However, those cases are neither helpful nor dispositive as they invoke the far more convoluted federal standard, rather than the three-part test required to show a sufficient interest under Rule 60. As noted earlier, under Rule 60 intervention is automatic and can only be stricken upon motion and finding that sufficient cause exists to strike the petition. *See Guaranty Fed. Savings Bank*, 793 S.W.2d at 657. This process and standard contrast with the federal rules where a party must be granted intervention by the courts only after considering several factors: timeliness, adequacy of

representation, substantial legal interest in the subject matter, and impaired ability to protect that interest in the absence of intervention. *See, e.g., Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999). In contrast, Texas courts have repeatedly recognized state intervention as one grounded in equity. *See, e.g., Naylor*, 466 S.W.3d at 791 (citing *Zeifman v. Sheryl Diane Michels*, 229 S.W.3d 460, 464 (Tex. App—Austin 2007, no pet.)). And, as noted above and further below, Texas does not recognize adequacy of representation as a necessary element for intervention. Consequently, at best, federal court decisions considering interventions under conditions more aligned to Texas standards provide better guidance than the decisions cited by SFFA.

For example, in a case that SFFA and its counsel are involved in but curiously did not mention in their motion, the Middle District of North Carolina considered a motion to intervene filed by students and prospective students in SFFA's challenge to the University of North Carolina-Chapel Hill's race-conscious admissions plan. *See Students for Fair Admissions v. Univ. of N. Carolina*, 319 F.R.D. 490 (M.D. N.C. 2017). Both SFFA and UNC challenged the intervention.

In granting the intervention, the court found persuasive several factors that distinguished the intervention from the *Harvard* decision on which SFFA relies, including the fact that, like Intervenors here, the students were mostly from the state and the university was a state institution that primarily served state residents. *Id.* at 496-97. The court further noted how the students intended to proffer evidence that included the state's and university's history of racial segregation and discrimination, similar to what Intervenors propose here. *Id.* at 496. The court also highlighted the fact that the discovery deadlines would not be prolonged. *Id.* at 496. As the court explained, "even if intervention by Proposed Intervenors may potentially add some degree of complication to the discovery process, this Court believes that such inconvenience is a small price to pay when issues of this magnitude are before the Court." *Id.* at 496.

In *Grutter v. Bollinger*, the Sixth Circuit reviewed a district court's denial of intervention to then-current and prospective students and student groups seeking to intervene as defendants in a challenge to Michigan's race-conscious program. Recognizing its more lenient approach to the substantial legal interest element, the court reversed and remanded the case, holding that the proposed intervenors need show only that there is a *potential* for inadequate representation. *Grutter*, 188 F.3d at 400 (emphasis added). This standard is more in line with the Texas courts where defendant intervenors can show how their participation is "almost essential."

The *Fisher*, *Hopwood* and *Harvard* admissions cases cited by SFFA in its motion are inapposite here. First, each case was a federal case that relied on factors not considered under Texas standards and would lead to a ruling inconsistent with Rule 60. For example, the court in *Hopwood* held that the "proposed intervenors have the burden of demonstrating inadequate representation." *Hopwood v. State of Tex.*, 21 F.3d 603, 605 (5th Cir. 1994). Moreover, the court held that the Fifth Circuit requires "a much stronger showing of inadequacy is required" when a governmental agency is a defendant and, accordingly, affirmed the denial of the motion to intervene. *Id.* Here, however, SFFA cites to no Texas court decisions supporting such a proposition, and such a ruling contrasts sharply with the Texas standards. Texas requires a showing that their presence is "almost essential" to defend their legal and equitable interests, which is not the same test as for adequacy under the federal standard. As the Second Court of Appeals held in affirming the denial of a motion to strike intervention:

> *Hopwood* involved an application of Federal Rule of Civil Procedure 24. *See Hopwood,* 21 F.3d at 605. While adequacy of representation is an element under Federal Rule 24, Rule 60 is not derived from the federal rule. *See* 1 McDonald *Texas Civil Practice* § 5:78, at 603 n. 619 (Diane M. Allen et al. eds., 1992). The parties have not cited any cases applying an "adequacy of representation" requirement to an intervention under Texas's Rule 60, and we have found none.

> Therefore, we do not find *Hopwood* persuasive in the present circumstances. The trial court did not abuse its discretion in refusing to strike the Intervenors' pleas.

Miami Indep. Sch. Dist., 989 S.W.2d at 879.

Indeed, the Sixth Circuit in *Grutter* rejected a similar defense and refused to hold the intervenors to a higher standard regarding adequacy of representation. *See Grutter*, 188 F.3d at 400. Even placing aside the fact that adequacy of representation does not apply here, as shown further above, Intervenors have demonstrated how their participation in this lawsuit is critical to defend their interests and how UT Austin will not adequately represent their interests.

The *Harvard* admissions case, which Plaintiff emphasis repeatedly to show that intervention is unwarranted, relies heavily on adequacy of representation, a factor not considered under Texas law. In both the district court and the First Circuit the courts relied on the adequacy requirement. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39, 45 (D. Mass.), *aff'd*, 807 F.3d 472 (1st Cir. 2015) ("*Harvard*"). In denying the intervention but granting amicus-plus status[3], the district court held that "intervention is unwarranted where Harvard *adequately represents* the Students' interests." *Harvard*, 308 F.R.D. at 52 (emphasis added). The district court's decision hinges on its finding that Harvard could adequately represent the students' interest. Likewise, on appeal of the ruling, the First Circuit

[3] Although SFFA is also involved in the *Harvard* case, it misrepresents the role of proposed intervenors as amici, suggesting that Intervenors, here, be limited to expressing their views with briefings on legal issues and with accompanying declarations. Mot. to Strike at 2. In *Harvard*, the court allowed the students to proceed as *amici curiae* and, essentially, granted them amicus-plus status, authorizing them, in part to submit a brief or memorandum of law not to exceed 30 pages, exclusive of exhibits, on any dispositive motion in this case; participate in oral argument on any dispositive motion in this case; submit personal declarations or affidavits in support of their memorandum of law, which may be accorded evidentiary weight if otherwise proper; and request to participate in trial. *Harvard*, 308 F.R.D. at 53.

affirmed the decision after examining, solely, the adequacy of representation argument. *See generally, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472 (1st Cir. 2015).

Here, however, adequacy of representation is not relevant under Texas law and has not even been advanced by UT Austin. In addition, as the *Harvard* district court concedes, it applied a much more rigorous test to determining the legal interests of the students than the Sixth Circuit in *Grutter*. *Harvard*, 308 F.R.D. at 49. The district court's test contrasts with Texas' precedent relative to Rule 60, which allows intervention "if a judgment for the plaintiff may … seriously prejudice the intervenor" and "the intervention is necessary to assure a proper defense against the claim." *Jenkins*, 187 S.W.3d at 797; *see also Zeifman*, 229 S.W.3d at 467 (noting how the standard of being "potentially prejudiced" by a judgment is consistent with the equitable considerations underlying the first element of the *Guaranty* intervention analysis).

IV. Intervenors' Participation Would be Seriously Limited and Prejudiced if Relegated to Amicus Status.

As SFFA recognizes, intervenors become a party to the suit for all purposes. Mot. to Strike ¶ 13 (citing *Abdullatif v. Erpile, LLC*, 460 S.W.3d 685, 694 (Tex. App.—Houston 2015, no pet.). Intervenors can participate fully in the proceedings to protect their interest and apprise the Court of critical evidence and arguments. As noted in Plaintiff's Motion to Strike, SFFA wants to keep out many of the important, relevant issues raised by Intervenors and there is no duty UT Austin owes to Intervenors to pursue their interests. Intervenors will also be able to secure their party status in the event that settlement negotiations are entered into and to defend their positions on appeal, should this Court's decision be appealed.

On the other hand, if Intervenors are relegated to the sidelines as *amici*, they will not be able to fully develop their defenses through discovery of the parties, present witnesses or arguments, and the Court will be deprived of the benefit of key voices of, and evidence from, UT Austin students in ruling on SFFA's claims.

While Intervenors assert that they should enjoy the full benefits of party status as Intervenors, they are willing to limit their interrogatories, requests for production and requests for admissions to twenty each. This should allow Intervenors reasonable latitude to propound and discover facts and evidence that support its defenses and alleviate SFFA's concerns with receiving discovery requests that place an undue burden on the organization.

CONCLUSION

For the reasons stated above and their Petitioner for Intervention, Intervenors respectfully ask the Court to deny SFFA's Motion to Strike and afford Intervenors any other relief so entitled.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2020, 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 as indicated below.

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