

No. 09-50822

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IN THE  
**United States Court of Appeals  
for the Fifth Circuit**

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ABIGAIL FISHER,

Plaintiff-Appellant,

v.

UNIVERSITY OF TEXAS AT AUSTIN ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Western District of Texas in Case No. A-08-CA-263-SS  
Judge Sam Sparks

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**BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION  
AND 41 OTHER HIGHER EDUCATION ORGANIZATIONS  
IN SUPPORT OF APPELLEES**

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October 31, 2013

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## **AMICI ON THIS BRIEF**

American Council on Education  
Accreditation Council for Pharmacy Education  
American Anthropological Association  
American Association of Colleges of Pharmacy  
American Association of Colleges for Teacher Education  
American Association of Collegiate Registrars and Admissions Officers  
American Association of Community Colleges  
American Association of State Colleges and Universities  
American Association of University Professors  
American College Personnel Association  
American Dental Education Association  
American Indian Higher Education Consortium  
American Speech-Language-Hearing Association  
Association to Advance Collegiate Schools of Business  
Association of American Colleges and Universities  
Association of American Medical Colleges  
Association of American Universities  
Association of Catholic Colleges and Universities  
Association of Community College Trustees  
Association of Governing Boards of Universities and Colleges  
Association of Jesuit Colleges and Universities  
Association of Public and Land-Grant Universities  
Association of Research Libraries  
The College Board  
College and University Professional Association for Human Resources  
The Common Application  
Council for Christian Colleges and Universities  
Council of Graduate Schools  
Council of Independent Colleges  
Educational Testing Service  
EDUCAUSE  
Group for the Advancement of Doctoral Education in Social Work  
National Action Council for Minorities in Engineering, Inc.  
National Association for College Admission Counseling  
National Association of College and University Business Officers  
National Association of Diversity Officers in Higher Education  
National Association for Equal Opportunity in Higher Education  
National Association of Independent Colleges and Universities  
National Association of Student Financial Aid Administrators  
National Collegiate Athletic Association  
Southern Association of Colleges and Schools Commission on Colleges  
Student Affairs Administrators in Higher Education

**SUPPLEMENTAL CERTIFICATE  
OF INTERESTED PERSONS**

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation; that no amicus curiae on this brief has a parent corporation; and that no publicly held corporation owns ten percent or more of the stock of any amicus curiae on this brief.

Dated: October 31, 2013

/s/ Martin Michaelson

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**STATEMENT OF INTEREST**

Amici are forty-two associations of colleges, universities, educators, trustees, and other representatives of higher education in the United States. Amici represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. American higher education institutions enroll over twenty million students. For decades amici have worked to achieve student diversity.

Amicus American Council on Education (ACE) represents all higher education sectors. Its approximately 1,800 members include a substantial majority of United States colleges and universities. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system to be the cornerstone of a democratic society. Among its initiatives, ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, chaired by Presidents Ford and Carter, which issued One-Third of a Nation (1988), a report on minority matriculation, retention, and graduation. ACE regularly contributes amicus briefs on issues of importance to the education sector.

The Addendum contains information on the other amici on this brief. No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than amici or their members or counsel made a monetary contribution to the brief. All parties have consented to the filing of this brief.

### **SUMMARY OF ARGUMENT**

A diverse student body is essential to the educational objectives of colleges and universities. The Supreme Court held in Grutter v. Bollinger, 539 U.S. 306 (2003), and reaffirmed in this case, that higher education institutions have a compelling interest in the educational benefits that flow from a diverse student

body. That interest can justify the narrowly tailored consideration of race in admissions.

Diversity is not a one-size-fits-all concept, however. Each higher education institution must define student body diversity in a manner consistent with its educational mission. As the Supreme Court recognized in this case and in Grutter, when an institution sets its educational goals—which include its conception of diversity—it makes an educational judgment that merits respect. Courts must scrutinize the means chosen to pursue diversity, but they afford a degree of deference to educators’ expertise in determining what diversity entails in the context of an institution’s educational goals.

Plaintiff would have the Court depart from this settled analysis and superintend colleges’ and universities’ educational objectives. Rather than focus analysis on whether the chosen means fit the articulated educational goals, she would change the focus of judicial scrutiny to the goals themselves—asking courts to supervise and supersede educators’ context-specific judgments about the mix of students that serves the institution’s educational objectives. That approach is at odds with controlling precedent. It would also dictate a single conception of sound educational policy for every college and university, thus truncating institutional pluralism, a hallmark of American higher education. This Court should reject Plaintiff’s invitation.



## ARGUMENT

### I. EDUCATORS' DETERMINATION OF EDUCATIONAL GOALS MERITS JUDICIAL RESPECT.

#### A. Determining The Mix Of Students That Produces The Educational Benefits Of Diversity Entails Academic Judgment.

Plaintiff contends that race-conscious admissions were unnecessary in 2008 because the University of Texas had already attained sufficient diversity through the Top Ten Percent Law to meet its educational goals. In her view, UT “had already achieved educational critical mass no later than 2003” because its “minority enrollment” exceeded the minority enrollment at the University of Michigan Law School. Fisher Supp. Br. 23-24. It is therefore “obvious,” she says, that UT had attained the educational benefits of diversity. Fisher Supp. Br. 23. Although UT itself disagrees with that assessment, she argues that the University’s considered educational judgment on this point “is no longer entitled to any deference.” Fisher Supp. Br. 32.

This Court has already rejected such a focus on the “raw percentage of minorities enrolled,” and rightly so. Fisher v. University of Texas at Austin, 631 F.3d 213, 242-43 (5th Cir. 2011). An institution’s interest in securing the educational benefits of diversity is “complex.” Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2418 (2013). It is “ ‘not an interest in simple ethnic diversity,’ ” id. (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315

(1978) (opinion of Powell, J.)), and “does not lend itself to any fixed numerical guideposts,” Fisher, 631 F.3d at 245. Rather, the “ ‘diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’ ” Fisher, 133 S. Ct. at 2418 (quoting Bakke, 438 U.S. at 315 (opinion of Powell, J.)).

To insist that UT pursue a narrowly conceived, numbers-driven vision of diversity is to misunderstand strict scrutiny. Strict scrutiny distinguishes ends from means. Under Supreme Court precedent, a court must scrutinize whether consideration of race as a factor in admissions is a necessary means to achieve a university’s stated educational goals. Before “turning to racial classifications,” a university must be able to prove that “no workable race-neutral alternatives would produce the educational benefits of diversity.” Id. at 2420.

This inquiry compares the university’s “chosen” means of attaining diversity’s benefits, id.—the use of race as a “plus factor” in admissions—to such race-neutral alternatives as targeted recruiting, enhanced financial aid, and increased consideration of socio-economic factors in admissions. The question is whether any of those alternatives would achieve the educational benefits of diversity “ ‘about as well’ ” as race-conscious means, at “ ‘tolerable administrative expense.’ ” Id. (citation omitted). The university need not exhaust “ ‘every

conceivable race-neutral alternative.’ ” Id. (citation omitted). But it must demonstrate that it gave “ ‘serious, good-faith consideration’ ” to the “available, workable” alternatives, and that those alternatives “do not suffice.” Id. (citation omitted). It “receives no deference” on this question of how to achieve its stated educational goals. Id.

On the other hand, a university’s identification of those goals merits an extent of judicial deference. Whether a given mix of students “ ‘provide[s] that atmosphere which is most conducive to speculation, experiment, and creation’ ” involves considerations educators are best equipped to gauge. Id. at 2418 (citation omitted). Such judgments require knowledge of campus and classroom dynamics, cognitive processes, and ways to nurture students’ capacity for moral reasoning, along with other specialized knowledge in which educators are trained. These “complex educational judgments” lie “primarily within the expertise of the university.” Grutter, 539 U.S. at 328. Courts accordingly must “resist substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.” Christian Legal Soc’y v. Martinez, 130 S. Ct. 2971, 2988 (2010) (internal quotations omitted). It is the university’s responsibility, in the first instance, to define its educational objectives and determine whether they are being met.

**B. Different Institutions Properly May Pursue Different Educational Goals.**

All parties acknowledge that some measure of deference is owed universities' identification of their educational goals. Plaintiff would limit that deference, however, to the abstract judgment that "diversity" produces educational benefits. Fisher Supp. Br. 32-33. The suggestion is that universities have no role in identifying just what mix of students best fits their particular educational goals.

The Supreme Court's decisions provide no support for that proposition. A university's conclusion that its students would benefit from greater student body diversity, or a different type of diversity, entails quintessential academic judgment. Because it is at the heart of "a university's definition of its educational objective," Grutter, 539 U.S. at 388 (Kennedy, J., dissenting), diversity is to be analyzed by the institution, in accordance with its mission and concept of education. The constitutionally protected freedom of a university to assemble a diverse student body would amount to little if it did not include a weighty role in defining the diversity being sought.

The Supreme Court has endorsed substantial deference to institutional judgment on such matters—not only to the abstract decision that "diversity is a compelling interest," but also to the more practical and institution-specific determinations about what diversity means for an institution. In Grutter, for example, the Court deferred to the University of Michigan Law School's

articulation of its specific goal—pursuit of a “critical mass” of underrepresented minorities—because that goal was “defined by reference to the educational benefits that diversity is designed to produce.” 539 U.S. at 330, 333. Justice Kennedy made the same point in his controlling opinion in Parents Involved in Community Schools v. Seattle School District No. 1, where he observed that the First Amendment affords each institution “particular latitude in defining diversity.” 551 U.S. 701, 792 (2007) (opinion concurring in part); see also Grutter, 539 U.S. at 388 (Kennedy, J., dissenting) (distinguishing permissible “deference to a university’s definition of its educational objective” from impermissible “deference to the implementation of this goal”). And the Supreme Court reaffirmed that view in this case, classifying a university’s efforts to “define diversity” among the issues on which it receives “some, but not complete, judicial deference.” 133 S. Ct. at 2419.

Educational objectives necessarily—and properly—vary from institution to institution. The hallmark of American higher education is its unique pluralism. In contrast to most other countries, in the United States the path of higher education is not directed from a central ministry. Higher education here, allowed to evolve organically, is now characterized by a rich diversity of institutions: community colleges and four-year institutions, public and private universities, non-profit and for-profit colleges, religious-affiliated and secular institutions, vocational and

liberal arts colleges. This diversity is matched by an equally broad array of institutional missions—from one university’s commitment to religious leadership, to a small college’s focus on the student’s self-governance and manual labor, to a leading technology institute’s engagement with the cutting edge of physical science.

The pluralism of American higher education fosters a healthy competition among institutions that is key to the success of the entire system. Colleges and universities in the United States compete for students, faculty, and resources. They strive to distinguish themselves and to offer advantages over their peer institutions, testing new educational strategies and learning from one another. When a university identifies a successful strategy, others adapt it; when a college stumbles, others draw lessons. Yet each institution ultimately forges its own path in light of its distinct mission. These efforts have led American colleges and universities to become, like the States themselves, “laboratories for experimentation to devise various solutions where the best solution is far from clear.” United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Their innovation drives the rich variety within American higher education and is responsible for its unparalleled success.

Judgments about whether “the educational benefits of diversity [are] being attained,” Fisher Supp. Br. 23, necessarily depend on an institution’s particular

mission. The educational benefits a small liberal arts college aims to impart may call for a student body different than that a flagship state university needs; the student body a secular university seeks may ill-suit an institution committed to a delicate balance of Catholicism and denominational inclusiveness. In the admissions process, merit for admission—and the weight placed on academic metrics, such as standardized test scores and grade-point averages—varies from one institution to another. And institutions’ needs and educational goals evolve over time.

In Grutter, the University of Michigan Law School identified one particular conception of diversity—“ ‘enroll[ing] a “critical mass” of minority students’ ”—and determined that attaining critical mass was “necessary to further its compelling interest in securing the educational benefits of a diverse student body.” 539 U.S. at 329 (quoting Br. for Respondent). The Supreme Court deferred to that judgment based in part on the Law School’s “experience and expertise” within the educational realm. Id. at 333. But one law school’s particular judgment about what type of diversity to pursue in light of its mission does not bind every other college and university in the nation. See Fisher, 631 F.3d at 243-44. What constitutes diversity sufficient for the educational objectives of one institution might not suffice at another.

Accordingly, the Court should reject Plaintiff’s contention that universities’ educational judgment regarding diversity must be supplanted by a rigid numerical test. Under controlling precedent, universities may properly conclude for themselves that a particular conception of diversity would best serve their educational goals. Universities do not have unfettered discretion in this regard, of course. They must be able to articulate a “reasoned, principled explanation” for their academic decisions. Fisher, 133 S. Ct. at 2419. And they must define their goals “by reference to the educational benefits that diversity is designed to produce.” Grutter, 539 U.S. at 330. Within those parameters, however, some extent of judicial deference is proper. Fisher, 133 S. Ct. at 2419. A university may appropriately conclude, in the exercise of its academic judgment, that the status quo does not meet its educational objectives. Neither a rejected applicant nor this Court is well-positioned to second-guess the merits of such a judgment.

Were the judiciary to renounce educators’ reasoned judgment on the diversity the institutions need, a historic premise of American higher education—that student bodies shall be assembled in accordance with the college’s or university’s educational philosophy—would be vitiated. The Fourteenth Amendment does not require this result. Strict scrutiny “is designed to take relevant differences into account.” Johnson v. California, 543 U.S. 499, 515 (2005).



## CONCLUSION

For the foregoing reasons, the Court should reaffirm that UT's determination of its diversity goal merits substantial judicial deference and that no particular conception of diversity is binding on all of American higher education.

Respectfully submitted,

/s/ Martin Michaelson

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## **ADDENDUM**

## ***AMICI ON THIS BRIEF***

- The American Council on Education is described at page 2 of this brief.
- Accreditation Council for Pharmacy Education (ACPE) is the national agency for the accreditation of professional degree programs in pharmacy and of providers of continuing pharmacy education.
- The American Anthropological Association (AAA) represents more than 11,000 archaeologists and anthropologists in the academy and practice.
- The American Association of Colleges of Pharmacy (AACP), which represents the interests of pharmacy education and educators, comprises 129 accredited colleges and schools of pharmacy including more than 6,300 faculty, 61,000 students enrolled in professional programs, and 4,300 individuals pursuing graduate study.
- The American Association of Colleges for Teacher Education (AACTE) is a national alliance of educator preparation programs dedicated to the highest quality professional development of teachers and school leaders in order to enhance PK-12 student learning. Its 800 members represent public and private colleges and universities.
- The American Association of Collegiate Registrars and Admissions Officers (AACRAO) includes as members more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and over 40 countries internationally.
- The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges. It represents nearly 1,200 two-year, associate degree-granting institutions.
- The American Association of State Colleges and Universities (AASCU) includes as members more than 400 public colleges, universities, and systems whose members share a learning- and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

- The American Association of University Professors (AAUP) represents some 48,000 faculty members and research scholars. It defends academic freedom and the free exchange of ideas in higher education.
- The American College Personnel Association (ACPA) is the largest comprehensive student affairs association that advances student affairs and engages students for a lifetime of learning and discovery. ACPA, with almost 8,000 members, supports and fosters college student learning through the generation and dissemination of knowledge, which informs policies, practices, and programs for student affairs professionals and the higher education community.
- The American Dental Education Association (ADEA) represents all 66 dental schools in the United States, nearly 700 dental residency training programs, 600 allied dental programs, and more than 12,000 faculty who educate and train over 50,000 students and residents attending these institutions.
- The American Indian Higher Education Consortium (AIHEC) is the unifying voice of our nation's 37 Tribal Colleges and Universities—federally recognized public institutions working to strengthen tribal nations and make a lasting difference in the lives of American Indians and Alaska Natives. Through public policy, advocacy, research, and program initiatives AIHEC strives to ensure strong tribal sovereignty through excellence in American Indian higher education.
- The American Speech-Language-Hearing Association (ASHA) is the professional, scientific, and credentialing association for more than 166,000 members and affiliates who are audiologists, speech-language pathologists, and speech, language, and hearing scientists in the United States and internationally. Support personnel in audiology and speech-language pathology also affiliate with ASHA.
- The Association to Advance Collegiate Schools of Business (AACSB) represents more than 1,300 business schools worldwide in 85 countries. Its mission is to advance quality management education worldwide through accreditation, thought leadership, and value-added services.

- The Association of American Colleges and Universities (AAC&U) has more than 1,250 member institutions, including accredited public and private colleges, community colleges, and universities of every type and size. Its mission is to reinforce commitment to liberal education and help institutions prioritize the quality of student learning.
- The Association of American Medical Colleges (AAMC) represents all 141 accredited U.S. and 17 accredited Canadian medical schools; nearly 400 major teaching hospitals and health systems; and 90 academic and scientific societies. Through these institutions and organizations, the AAMC represents 128,000 faculty members, 75,000 medical students, and 110,000 resident physicians.
- The Association of American Universities (AAU) is an association of 61 leading public and private research universities in the United States and Canada. Founded to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research-intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education.
- The Association of Catholic Colleges and Universities (ACCU) serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.
- The Association of Community College Trustees (ACCT) represents over 6,000 board members who govern community, technical, and junior colleges.
- The Association of Governing Boards of Universities and Colleges (AGB) serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership. Its mission is to strengthen, protect, and advocate on behalf of citizen trusteeship that supports and advances higher education.
- The Association of Jesuit Colleges and Universities (AJCU) represents all 28 Jesuit institutions in the U.S. and is affiliated with over 100 Jesuit institutions worldwide. The first Jesuit institution opened in 1548 in Messina, Sicily, and Jesuit institutions remain committed to academic rigor, with a focus on quality teaching, learning, and research to educate the whole person.

- The Association of Public and Land-grant Universities (APLU) is a research and advocacy organization of public research universities, land-grant institutions, and state university systems with member campuses in all 50 states, U.S. territories, and the District of Columbia.
- The Association of Research Libraries (ARL) is an organization of 126 research libraries at comprehensive, research-extensive institutions in the U.S. and Canada that share similar research missions, aspirations, and achievements.
- The College Board connects students to college success and opportunity. Founded in 1900, The College Board was created to expand access to higher education. Today, the membership association is made up of more than 6,000 of the world's leading educational institutions and is dedicated to promoting excellence and equity in education.
- The College and University Professional Association for Human Resources (CUPA-HR), the voice of human resources in higher education, represents more than 14,000 human-resources professionals at over 1,800 colleges and universities. Its membership includes 92 percent of all United States doctoral institutions, 75 percent of all master's institutions, 60 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions.
- The Common Application is committed to providing reliable services that promote equity, access, and integrity in the college application process. It serves students, member institutions, and secondary schools by providing applications that students and school officials may submit to any of its nearly 500 member institutions. Membership is open to colleges and universities that promote access by evaluating students using a holistic selection process.
- The Council for Christian Colleges and Universities (CCCC) is an international association of 174 fully accredited Christ-centered institutions of higher education committed to the integration of Christian faith and higher learning. Its member institutions transform lives by faithfully relating scholarship and service to biblical truth. CCCC member and affiliate campuses currently serve over 400,000 students.
- The Council of Graduate Schools (CGS) is an organization of institutions of higher education in the United States, Canada, and across the globe engaged in graduate education, research, scholarship, and the preparation of candidates for advanced degrees.

- The Council of Independent Colleges (CIC) represents 619 liberal arts colleges and universities and 90 state associations and other higher education organizations.
- The Educational Testing Service (ETS) advances quality and equity in education for people worldwide by creating assessments based on rigorous research. Founded as a nonprofit in 1947, ETS serves individuals, educational institutions, and government agencies by providing customized solutions for teacher certification, English language learning, and elementary, secondary and post-secondary education, as well as conducting education research, analysis, and policy studies.
- EDUCAUSE is an association of over 2,400 colleges, universities, and related organizations whose mission is to advance higher education through the use of information technology.
- The Group for the Advancement of Doctoral Education in Social Work (GADE) promotes excellence in doctoral education in social work and facilitates information exchange among its member doctoral programs.
- The National Action Council for Minorities in Engineering, Inc. (NACME) ensures American competitiveness in a flat world by leading and supporting the national effort to increase the number of successful African American, American Indian, and Latino women and men in science, technology, engineering and mathematics education and careers. It has supported over 24,000 students with more than \$124 million in scholarships and other support.
- The National Association for College Admission Counseling (NACAC) is a non-profit education association of more than 13,000 secondary school counselors, independent counselors, college admissions and financial aid officers, enrollment managers, and organizations that work with students as they make the transition from high school to postsecondary education.
- The National Association of College and University Business Officers (NACUBO) represents more than 2,500 colleges, universities, and higher education service providers. It represents chief business and financial officers through advocacy efforts, community service, and professional development activities. NACUBO's mission is to advance the economic viability and business practices of higher education institutions in fulfillment of their academic missions.

- The National Association of Diversity Officers in Higher Education (NADOHE) is the leading voice of chief diversity officers in higher education. Its membership includes almost 200 colleges and universities, as well as individual members, affiliated professional organizations, and two formal state chapters.
- The National Association for Equal Opportunity in Higher Education (NAFEO) is the umbrella organization of the nation's Historically Black Colleges and Universities and Predominantly Black Institutions. It represents the presidents and chancellors of the diverse black colleges and universities: public, private, and land-grant, two-year, four-year, graduate, and professional, historically and predominantly black colleges and universities.
- The National Association of Independent Colleges and Universities (NAICU) serves as the unified national voice of private, nonprofit higher education in the United States. It has nearly 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions.
- The National Association of Student Financial Aid Administrators (NASFAA) represents more than 18,000 student financial assistance professionals at nearly 2,800 institutions of higher education, serving over 16 million students. It supports the training, diversity, and professional development of financial aid administrators; advocates for public policies and programs that increase student access to and success in postsecondary education; and serves as a forum for communication and collaboration on student financial aid issues.
- The National Collegiate Athletic Association (NCAA) serves as the organizing, regulating, and standard-setting body for 23 intercollegiate sports. The NCAA's active membership includes over 1,000 institutions of higher education that jointly create seasons of amateur intercollegiate competition across three Divisions.
- The Southern Association of Colleges and Schools Commission on Colleges (SACSCOC) is the regional body for the accreditation of degree-granting higher education institutions in the Southern states. Its mission is the enhancement of educational quality throughout the region, and it strives to improve the effectiveness of institutions by ensuring that institutions meet standards established by the higher education community that address the needs of society and students.



- Student Affairs Administrators in Higher Education (NASPA) is the leading association for the advancement, health, and sustainability of the student affairs profession. It serves a full range of professionals who provide programs, experiences, and services that cultivate student learning and success in concert with the mission of our colleges and universities. NASPA has more than 13,000 members in all 50 states, 29 countries, and 8 U.S. Territories.

## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 2,256 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in Microsoft Word 2010 14-point font.

/s/ Martin Michaelson

## **CERTIFICATE OF SERVICE**

I hereby certify that on October 31, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

/s/ Martin Michaelson