

NO. 09-50822

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ABIGAIL NOEL FISHER AND RACHEL MULTER MICHALEWICZ,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION
1:08-cv-00263-SS

**AMICUS BRIEF OF THE BLACK STUDENT ALLIANCE AT THE
UNIVERSITY OF TEXAS AT AUSTIN AND THE NAACP LEGAL
DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES**

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No. 09-50822

Fisher, et al. v. University of Texas at Austin, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate disqualification or recusal.

1. Those persons and attorneys listed by Appellants, Appellees, and other Amici in their respective briefs.
2. NAACP Legal Defense & Educational Fund, Inc.
3. Black Student Alliance at the University of Texas Austin
4. Fulbright & Jaworski L.L.P.
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Counsel is unaware of any other persons with an interest in this amicus brief.

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<i>Hopwood v. Texas</i> , 861 F. Supp. 551 (W.D. Tex. 1994).....	27
<i>League of United Latin American Citizens v. Perry</i> , 548 U.S. 399 (2006).....	9
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i> , 551 U.S. 701 (2007)	5, 9, 21, 23
<i>Smith v. University of Washington</i> , 392 F.3d 367 (9th Cir. 2004)	9
<i>Sweatt v. Painter</i> , 339 U.S. 629 (1950)	2
<i>United States v. Fordice</i> , 505 U.S. 717 (1992).....	2

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Tex. Educ. Code § 51.803.....	3, 7, 16
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Other Authorities

Anthony Lising Antonio et al., <i>Effects of Racial Diversity on Complex Thinking in College Students</i> , 15 <i>Psychological Science</i> 507 (2004), available at http://cseweb.ucsd.edu/~ddahlstr/misc/ingenta1.pdf	12
Fred A. Bonner II & Kevin W. Bailey, <i>Enhancing the Academic Climate for African American College Men, in African American Men in College</i> 24 (Michael J. Cuyjet ed., 2006)	18
Carole J. Buckner, <i>Realizing Grutter v. Bollinger’s “Compelling</i>	

<i>Educational Benefits of Diversity” – Transforming Aspirational Rhetoric Into Experience</i> , 72 UMKC Law Review 877 (2004).....	14
Alberto F. Cabrera et al., <i>Campus Racial Climate and the Adjustment of Students to College: A Comparison Between White Students and African-American Students</i> , 70 Journal of Higher Education 134 (1999), available at http://www.education.umd.edu/Depts/EDHI/about/faculty_pages/cabrera/Campus%20Racial%20Climate.pdf	15
Mitchell J. Chang et al., <i>Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns</i> , 45 Research in Higher Education 529 (2004), available at http://www.gseis.ucla.edu/faculty/chang/Pubs/chang_astin_kim.pdf	12, 19
Mitchell J. Chang et al., <i>The Educational Benefits of Cross-Racial Interaction Among Undergraduates</i> , 77 Journal of Higher Education 430 (2006), available at http://www.gseis.ucla.edu/faculty/chang/Pubs/77.3chang.pdf	20
Thomas J. Espenshade & Alexandria Walton Radford, <i>No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life</i> (2009)	19, 24
Federal Judicial Center, <i>Biographical Directory of Federal Judges</i> , http://www.fjc.gov/public/home.nsf/hisj	25
Jason M. Fletcher & Marta Tienda, <i>High School Classmates and College Success</i> , 82 Sociology of Education 287 (2009)	18
Sharon L. Fries-Britt & Bridget Turner, <i>Facing Stereotypes: A Case Study of Black Students on a White Campus</i> , 42 Journal of College Student Development 420 (2001).....	15
Danette Gerald & Kati Haycock, Education Trust, <i>Engines of Inequality: Diminishing Equity in the Nation’s Premier Public Universities</i> (2006), available at http://www.edtrust.org/sites/edtrust.org/files/publications/files/EnginesofInequality.pdf	10
Patricia Gurin et al., <i>The Benefits of Diversity in Education for Democratic Citizenship</i> , 60 Journal of Social Issues 17 (2004)	21

Shaun R. Harper, <i>Peer Support for African American Male College Achievement</i> , 14 <i>Journal of Men’s Studies</i> 337 (2006), available at http://www.maricopa.edu/studentaffairs/minoritymales/Peer%20support%20for%20African%20American%20Males.pdf	18
Angel Harris & Marta Tienda, <i>Minority Higher Education Pipeline: Consequences of Changes in College Admissions Policy in Texas</i> , 627 <i>Annals of the American Academy of Political & Social Science</i> 60 (2010).....	8
Jessica S. Howell, <i>Assessing the Impact of Eliminating Affirmative Action in Higher Education</i> , 28 <i>Journal of Labor Economics</i> 113 (2010).....	24
Sylvia Hurtado, <i>Benefits and Barriers: Racial Dynamics of the Undergraduate Experience</i> , in <i>The Next Twenty-Five Years: Affirmative Action in Higher Education in the United States and South Africa</i> 196 (David L. Featherman et al. eds., 2010)	19, 21
Sylvia Hurtado et al., <i>Predicting Transition and Adjustment to College: Biomedical and Behavioral Science Aspirants and Minority Students’ First Year of College</i> , 48 <i>Research in Higher Education</i> 841 (2007)	15
Mark Long, <i>College Applications and the Effect of Affirmative Action</i> , 121 <i>Journal of Econometrics</i> 319 (2004)	8
Mark C. Long & Marta Tienda, <i>Winners and Losers: Changes in Texas University Admissions Post-Hopwood</i> , 30 <i>Education Evaluation and Policy Analysis</i> 255 (2008).....	7
Scott E. Page, <i>The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies</i> (2007)	20
Ajai Raj, <i>UT Lacks Diversity, USC Professor Says</i> , <i>The Daily Texan</i> , Mar. 9, 2005, http://www.dailytexanonline.com/university/ut-lacks-diversity-usc-professor-says-1.980346	14
Victor B. Saenz et al., <i>Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students</i> , 48 <i>Research in Higher Education</i> 1 (2007).....	12

Somnath Saha et al., <i>Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in US Medical Schools</i> , 300 JAMA 1135 (2008), available at http://jama.ama-assn.org/cgi/content/full/300/10/1135	21
Daniel Solórzano et al., <i>Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley</i> , 23 Chicano-Latino Law Review 15 (2002)	14
Texas Exes: The University of Texas Alumni Association, <i>Distinguished Alumni Awards</i> , http://www.texasexes.org/involved/daa.aspx	25
Texas House of Representatives, <i>Biographical Data: House of Representatives</i> , Nov. 11, 2009, http://www.house.state.tx.us/members/pdf/biodata.pdf	25
Texas Senate, <i>Texas Senators of the 81st Legislature</i> , http://www.senate.state.tx.us/75r/senate/Members.htm	25
Marta Tienda & Sigal Alon, <i>Diversity and the Demographic Dividend: Achieving Educational Equity in an Aging White Society</i> , in <i>The Price We Pay: Economic and Social Consequences of Inadequate Education</i> 48 (Clive R. Belfield & Henry M. Levin eds., 2007)	26
Marta Tienda & Sunny Xinchun Niu, <i>Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law</i> , 8 American Law & Economics Review 312 (2006)	20
<i>Top 100 Degree Producers</i> , Black Issues in Higher Education, June 2, 2005	10
University of Texas at Austin, <i>Former Virginia Gov. Wilder to Keynote Diversity Summit and Symposium</i> , Jan. 15, 2004, http://www.utexas.edu/news/2004/01/15/nr_diversity/	13
University of Texas at Austin, <i>Proposal to Consider Race and Ethnicity in Admissions</i> (2004), available at http://www.utexas.edu/student/admissions/about/admission_proposal.pdf	25

University of Texas at Austin, *Report of the Task Force on Racial Respect and Fairness* (2004), available at http://www.utexas.edu/president/speeches/report_respect.pdf13, 14, 27

University of Texas at Austin, *University of Texas at Austin Ranked Fifth-Best Producer of Degrees for Minority Graduates*, July 12, 2005, <http://www.utexas.edu/news/2005/07/12/rankings/>10

University of Texas at Austin, Office of Admissions, *Diversity Levels of Undergraduate Classes at the University of Texas at Austin, 1996-2002* (2003)10, 11, 12

University of Texas at Austin, Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588)* (2008), available at <http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf>.....8, 18

University of Texas at Austin, Office of the President, *Comments on the Report of the Task Force on Racial Respect and Fairness*, May 10, 2004, available at http://www.utexas.edu/president/speeches/rrf_051004.html13, 14, 25

INTEREST OF AMICI

Amici are the Black Student Alliance (BSA) at the University of Texas at Austin (hereinafter UT Austin or the University) and the NAACP Legal Defense & Educational Fund, Inc. (LDF). Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this amicus brief. No counsel for any party had a role in authoring this brief.

The BSA is a membership organization for African-American students currently attending UT Austin. Founded in the 1980-81 academic year, the BSA serves as the voice of, and conducts recruitment and retention programs for, African-American students. Members of the BSA have a strong interest in the preservation of efforts to promote diversity and address racial isolation at UT Austin. In their view, having a critical mass of African-American students matters in recruiting *and* retaining students. Many BSA members have experienced being the sole or one of very few African-American students in their classes. Some members also feel that African-American students lack a sufficient support network and find UT Austin to be an isolating environment.

LDF is a non-profit legal organization that has worked for over six decades to dismantle racial segregation and ensure equal educational opportunity for all students. LDF represented African-American plaintiffs in the cases leading up to and including *Brown v. Board of Education*, 347 U.S. 483 (1954), and has

participated in the litigation of numerous cases to promote diversity and reduce racial isolation in higher education, including *Grutter v. Bollinger*, 539 U.S. 306 (2003); *United States v. Fordice*, 505 U.S. 717 (1992); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

INTRODUCTION AND SUMMARY OF ARGUMENT

The substantial educational benefits that come from a student body with a critical mass of diverse students are a compelling interest justifying the use of race in university admissions. *Grutter v. Bollinger*, 539 U.S. 306, 328, 330 (2003). This principle of constitutional law has not been in doubt since the Supreme Court’s seminal decision in *Grutter*. That is because the educational benefits of diversity go to the heart of our democracy: “[T]he nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.” *Id.* at 324 (internal quotations and citation omitted). Contrary to *Grutter*, Appellants seek to cap the enrollment of African-American and Latino students at UT Austin, without any regard for the University’s considered judgment about the level of diversity—or “critical mass”—necessary to achieve its educational mission. No precedent supports that position. As the district court rightly concluded, “as long as *Grutter* remains good law, UT’s current admissions program remains constitutional.” *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 613 (W.D. Tex. 2009).

There is no need to speculate about the devastating impact that Appellants' desired ban on race-conscious admissions at UT Austin would have on African-American students, and, indeed, all students. Between 1997 and 2004, UT Austin took full advantage of race-neutral measures, including a state law guaranteeing admission for all Texas residents ranked at the top of their high school graduating class. *See* Tex. Educ. Code § 51.803 [hereinafter the Top Ten Percent Plan]. Yet, despite these efforts, at no point between 1997 and 2004 did African-American students comprise more than 4.5% of the entering first-year class, an enrollment level far below the 13% of Texas high school graduates who are African-American. *See Fisher*, 645 F. Supp. 2d at 594.

In 2003-2004, UT Austin conducted a comprehensive review of its admissions policies. After determining that it had failed to achieve a critical mass of African-American and other underrepresented minorities using only race-neutral measures, UT Austin reintroduced race into its admissions process in a manner fully in compliance with *Grutter*. Pursuant to Texas law, UT Austin admits the vast majority of undergraduate students through the Top Ten Percent Plan. But UT Austin now considers race “as a factor of a factor of a factor of a factor” in the holistic admissions program that it uses to review applicants who do not qualify for admission through the Top Ten Percent Plan. *Fisher*, 645 F. Supp. 2d at 608.

UT Austin’s race-conscious holistic admissions program is an essential supplement to the Top Ten Percent Plan. It has resulted in significant and meaningful additions to the African-American student population at UT Austin, and it has enabled the University to “conduct[] the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.” *Grutter*, 539 U.S. at 340. Moreover, as Texas’s flagship public university, UT Austin provides a critical pathway to leadership and prepares students to engage in the civic and political life of an increasingly diverse state and nation. *Id.* at 330-32. The continued consideration of race in its admissions process is a significant component of UT Austin’s efforts to “cultivate a set of leaders with legitimacy in the eyes of the citizenry” and to ensure that the University is “visibly open to talented and qualified individuals of every race and ethnicity.” *Id.* at 332.¹

¹ Although this brief primarily focuses on the detrimental consequences of Appellants’ arguments for African-American students, Amici believe that UT Austin’s consideration of race as one factor among many in its holistic review of the applications of other students is also constitutionally permissible.

ARGUMENT

It is now a settled principle of constitutional law that universities have a compelling interest in attaining the “substantial, . . . important and laudable” benefits that stem from a diverse educational environment; those benefits include enhanced “cross-racial understanding,” the breaking down of “racial stereotypes,” and enabling students “to better understand persons of different races.” *Grutter*, 539 U.S. at 330 (internal quotations and citation omitted); *see also Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722-23 (2007). The Supreme Court also recognized that universities cannot attain these benefits without a “critical mass” of African-American and other underrepresented minority students. *Id.* at 330. Critical mass is not a rigid percentage; rather, it is the level of enrollment at which such students are “meaningfully represent[ed]” and encouraged “to participate in the classroom and not feel isolated.” *Id.* at 318 (internal quotations and citation omitted).

Grutter held that a university seeking to attain a critical mass of African-American and other underrepresented minority students may constitutionally adopt race-conscious admissions policies, so long as they are narrowly tailored and instituted after “serious, good faith consideration” of race-neutral alternatives. *Id.* at 339. As the district court concluded, UT Austin plainly met these requirements. *See Fisher*, 645 F. Supp. 2d at 613.

I. During the Period When UT Austin Was Banned from Using Race-Conscious Admissions, African-American Students Experienced Pervasive Racial Isolation.

Appellants argue that it was unconstitutional for UT Austin to use race as one factor among many in its holistic admissions program starting with the 2005 entering class, because the University’s “pre-existing race-neutral approach to admissions was fully capable of meeting any legitimate educational interest it might have in student body diversity.” Appellants’ Br. 50. Appellants misread the undisputed factual record and the clear mandates of the Supreme Court.

After its eight-year experience with race-neutral admissions, UT Austin concluded that—in its educational judgment—African-American students were not “meaningfully represent[ed]” on campus or in the classroom. *Grutter*, 539 U.S. at 318 (internal quotations and citation omitted). UT Austin engaged in “serious, good faith consideration” of race-neutral alternatives, *id.* at 339, and found them insufficient. Thus, UT Austin’s subsequent race-conscious efforts to increase African-American enrollment should not be curtailed. Indeed, Amici firmly believe that UT Austin needs to do *more*, not less, to reduce the racial isolation of African-American students and ensure that *all* students attain the educational benefits of diversity.

A. African-American Students Were Not Meaningfully Represented on Campus from 1997-2004.

Pursuant to this Court's decision in *Hopwood*, UT Austin was prohibited from taking account of an applicant's race in its admissions process beginning with the 1997 entering class. *See Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996). This ban had a devastating impact on African-American students. *Fisher*, 645 F.Supp.2d at 591-92. In UT Austin's 1997 entering class, only 2.7% of enrolled students were African American. *See id.* at 592.

Following *Hopwood*, the University and the Texas Legislature took a number of steps to increase the enrollment of African-American and other underrepresented minority students. In 1997, the Texas Legislature enacted what became known as the Top Ten Percent Plan. Tex. Educ. Code § 51.803. In addition, UT Austin "instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools." *Fisher*, 645 F. Supp. 2d at 592.

Despite these efforts, African-American enrollment remained low, and African-American students experienced severe racial isolation on campus. Mark C. Long & Marta Tienda, *Winners and Losers: Changes in Texas University Admissions Post-Hopwood*, 30 Educ. Eval. & Pol'y Analysis 255, 266, 278 n.46

(2008) (under the Top Ten Percent Plan, the University was “unable to maintain the share of Black and Hispanic students that would have been admitted under a regime that allowed explicit consideration of race”). At no point during this period did African-American students constitute more than 4.5% of the first-year entering class. UT Austin, Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) 6* (2008) [hereinafter *Implementation and Results*].²

After careful review in 2003-2004, UT Austin determined that it was necessary to supplement its use of race-neutral initiatives to attain a critical mass of African-American students. *Fisher*, 645 F. Supp. 2d at 608; *see also* Appellees’ Br. 24-29. UT Austin reintroduced race as a factor in its holistic admissions program for applicants who did not qualify for the Top Ten Percent Plan. *Fisher*, 645 F. Supp. 2d at 608. While they acknowledge the importance of critical mass, Appellants’ claim that it has been achieved rests on the assumption that critical mass should be calculated by lumping together African-American and Latino students. *See* Appellants’ Br. 41-43. No precedent supports this position. *See* Appellees’ Br. 44-46.

² The ban on race-conscious admissions also had a “chilling effect” on African-American applications to UT Austin. Angel Harris & Marta Tienda, *Minority Higher Education Pipeline: Consequences of Changes in College Admissions Policy in Texas*, 627 *Annals Am. Acad. Pol. & Soc. Sci.* 60, 66 (2010); Mark Long, *College Applications and the Effect of Affirmative Action*, 121 *J. Econometrics* 319, 337-41 (2004).

In fact, *Grutter* emphasizes the importance of exposing students to “a variety of viewpoints among minority students,” which strongly suggests that different racial groups should be considered separately by universities seeking to attain the educational benefits of diversity. 539 U.S. at 320. This conclusion is supported by *Parents Involved*, which sharply criticized the Seattle school district for lumping together students of different racial backgrounds in its efforts to promote diversity. Under Seattle’s plan, a school with “50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not.” *Parents Involved*, 551 U.S. at 724. The Court noted that it was “hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is ‘broadly diverse.’” *Id.* (citing *Grutter*, 539 U.S. at 329).³

Throughout their brief, Appellants mistakenly rely on aggregated numbers of minority students. For instance, Appellants cite a University press release

³ Indeed, it could be a mistake for a university to treat even members of one ethnic group as homogenous in its efforts to attain the educational benefits of diversity. *See Smith v. Univ. of Wash.*, 392 F.3d 367, 378 (9th Cir. 2004) (“In reality, [Asian-American] applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan and the People’s Republic of China . . . have different cultures, backgrounds and languages, and thus would bring different experiences to the educational environment.”); *cf. League of United Latin American Citizens v. Perry*, 548 U.S. 399, 435 (2006) (recognizing that Latino populations in different areas of Texas have “divergent needs and interests”).

announcing that a magazine had ranked UT Austin fifth in the nation in the absolute number of undergraduate degrees awarded to African-American, Latino, Native American, and Asian students collectively in 2003-2004. Appellants' Br. 42 (citing UT Austin, *The University of Texas at Austin Ranked Fifth-Best Producer of Degrees for Minority Graduates*, July 12, 2005, <http://www.utexas.edu/news/2005/07/12/rankings/>). But that same magazine separately examined undergraduate degrees awarded to African-American students in 2003-2004, and UT Austin did not even make the top 100. *See Top 100 Degree Producers*, *Black Issues in Higher Education*, June 2, 2005, at 44. Moreover, other rankings were highly critical of UT Austin's efforts to enroll a diverse student body during the period when race was banned from University admissions. *See, e.g.,* Danette Gerald & Kati Haycock, Ed. Trust, *Engines of Inequality: Diminishing Equity in the Nation's Premier Public Universities* 10 (2006) (grading UT Austin with an F in terms of access for African-Americans, Latinos, and Native Americans in comparison to other flagship public universities based on 2004 data).

B. Reduced African-American Enrollment Resulted in Widespread Racial Isolation in UT Austin Classrooms.

In 2003-2004, as part of its comprehensive investigation into whether students of color were meaningfully represented on campus, UT Austin conducted an extensive study of racial isolation in its classrooms. *See* UT Austin, Office of Admissions, *Diversity Levels of Undergraduate Classes at the University of Texas*

at Austin, 1996-2002 (2003) [hereinafter the Diversity Study]; *Fisher*, 645 F. Supp. 2d at 593. The Diversity Study confirmed that while UT Austin was prohibited from considering race in its admissions process, students were denied a key educational benefit of diversity—the opportunity to engage in richer and more enlightened discussions both in and out of the classroom with students of varied racial backgrounds and experiences. *Id.* at 602-03.

Appellants assert that classroom diversity is a constitutionally irrelevant metric. Appellants' Br. 44-45. To the contrary, *Grutter* specifically emphasizes the benefits of diversity at the classroom level: "These [educational] benefits [of diversity] are 'important and laudable,' because '*classroom discussion* is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" *Grutter*, 539 U.S. at 330 (emphasis added) (internal quotations and citation omitted); *see also* Appellees' Br. 48-49. The Court endorsed the University of Michigan Law School's effort to attain a level of diversity that "encourages underrepresented minority students to participate in the classroom" and ensures that such students "do not feel isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 318, 319. Classroom

diversity is also necessary to diminish the notion that there is “some characteristic minority viewpoint on any issue.” *Id.* at 333 (quotation and citation omitted).⁴

The district court therefore properly took account of the Diversity Study in upholding UT Austin’s 2004 decision to use race as one factor among many in its holistic admissions program. *Fisher*, 645 F. Supp. 2d at 607. Appellants nevertheless contend that UT Austin “cherry-picked” statistics supporting the lack of classroom diversity by focusing on small classes. Appellants’ Br. 45. But the Diversity Study revealed that racial isolation was pervasive across the curriculum and regardless of class size. Indeed, it was undisputed that, overall, “79 percent of UT classes had zero or one African-American students.” *Fisher*, 645 F. Supp. 2d at 607. Furthermore, racial isolation in the classroom *increased* during the period when the University was banned from considering race in its admissions process, even after the Top Ten Percent Plan was put into effect. Diversity Study at 5.

⁴ Recent research confirms the findings in *Grutter* that for students of every racial group, the classroom is an important forum for positive cross-racial interactions. See, e.g., Victor B. Saenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 Res. Higher Educ. 1, 35 (2007). The lack of diversity in UT Austin classrooms from 1997-2004 severely limited the powerful educational benefits that such diversity can produce. See Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 Res. Higher Educ. 529, 535-36 (2004) [hereinafter Chang et al., *Consequences, Causes*] (finding that cross-racial classroom interactions had significant positive effects on intellectual ability, social ability, and civic interests). For instance, researchers have found that inclusion of African-American participants in small group discussions leads to greater levels of complex thinking among white students. See Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 Psychol. Sci. 507, 509 (2004).

C. Racial Tension Exacerbated the Harms of Racial Isolation for African-American Students at UT Austin.

UT Austin's evaluation of classroom and campus diversity was not the only relevant context for the University's 2004 decision to reintroduce race as a factor in its holistic admissions program. In 2003, the same year the Diversity Study was conducted, a series of racially charged incidents on campus prompted the University to establish a Task Force on Racial Respect and Fairness to make recommendations on how to improve the campus environment. *See* UT Austin, *Report of the Task Force on Racial Respect and Fairness* 3 (2004) [hereinafter the Task Force Report]. The Task Force Report specifically focused on the need to increase the recruitment, retention, and advancement of underrepresented minority students to address racial climate and diversity concerns. *See id.* at 5, 15-17.

In response, Larry Faulkner, then President of UT Austin, noted that the "major innovation for the near term is the reinstallation of race-sensitive admissions at the undergraduate, graduate, and professional levels." UT Austin, Office of the President, *Comments on the Report of the Task Force on Racial Respect and Fairness* ¶ 41, May 10, 2004 [hereinafter Faulkner Response]. The University also held campus meetings, spearheaded student discussion groups on race and diversity, and later hosted a national diversity summit to "explore ways that universities can better prepare students for life in a diverse society." UT Austin, *Former Virginia Gov. Wilder to Keynote Diversity Summit and*

Symposium, Jan. 15, 2004, http://www.utexas.edu/news/2004/01/15/nr_diversity/; see also Task Force Report at 20; Ajai Raj, *UT Lacks Diversity, USC Professor Says*, *The Daily Texan*, Mar. 9, 2005 (describing a campus workshop to “mak[e] ethnic and minority students feel like they matter”). Ultimately, the University concluded that increasing the numbers of underrepresented minorities on campus was a necessary component of any plan to create a more tolerant campus environment. See Task Force Report at 5, 15-17; Faulkner Response at ¶ 41.

The Task Force Report also reflected the concern that students who are isolated in the classroom and on campus often find themselves at the center of attention because of their race, and their race alone. See Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 *Chicano-Latino L. Rev.* 15, 27 (2002). The Task Force Report recommended that minority students be allowed to exempt themselves from class photo rosters and that UT Austin “[i]nstitute a photo roster privacy policy that would protect students of color who are the only members of their racial/ethnic group in classes.” Task Force Report at 12. “The concern is that these students are repeatedly called on by well-intentioned instructors hoping to be inclusive, but the result is often discomfort for the students.” *Id.*; see also Carole J. Buckner, *Realizing Grutter v. Bollinger’s “Compelling Educational Benefits of Diversity” – Transforming Aspirational Rhetoric Into Experience*, 72 *UMKC L.*

Rev. 877, 893 (2004) (when underrepresented minorities are isolated in the classroom, they “are called upon by instructors to ‘testify’ for all members of their race”).

Racial hostility and other stresses that African-American students face when attending predominantly white institutions, such as UT Austin, can also have concrete academic consequences. *See, e.g.*, Sharon L. Fries-Britt & Bridget Turner, *Facing Stereotypes: A Case Study of Black Students on a White Campus*, 42 J.C. Student Dev. 420 (2001), Doc. 103-3 at 7-12. Such stresses “undermine students’ academic confidence as well as their academic and social integration,” and can eventually lead African-American students to “contemplate[] dropping out.” *Id.* at 3; *see also* Alberto F. Cabrera et al., *Campus Racial Climate and the Adjustment of Students to College: A Comparison Between White Students and African-American Students*, 70 J. Higher Educ. 134, 147 (1999) (perceptions of prejudice on campus impact African-American students’ institutional commitment). By contrast, cross-racial interactions, achieved through increased diversity on campus and in the classroom, help enhance a sense of belonging among underrepresented minority students. *See* Sylvia Hurtado et al., *Predicting Transition and Adjustment to College: Biomedical and Behavioral Science Aspirants and Minority Students’ First Year of College*, 48 Res. Higher Educ. 841, 878 (2007).

The Task Force Report, together with the Diversity Study and other record evidence, clearly demonstrates that UT Austin engaged in “serious, good faith consideration” of race-neutral measures that it had utilized in 1997-2004 and thoroughly reviewed their impact on classroom and campus diversity before determining that it was necessary to supplement these measures with a race-conscious holistic admissions program. *See Grutter*, 539 U.S. at 339.

II. Consideration of Race Within UT Austin’s Holistic Admissions Program is Vital to Creating a Broadly Diverse Student Body.

UT Austin’s race-conscious holistic admissions program is an essential supplement to the Top Ten Percent Plan and other race-neutral efforts. Pursuant to Texas law, the vast majority of each entering class at UT Austin is filled through the Top Ten Percent Plan. *See Tex. Educ. Code. § 51.803.* Yet, in the years after the University’s 2004 decision to use race as one factor among many in its holistic admissions program, a significant number of African-American students have enrolled at UT through that program. Moreover, UT Austin’s race-conscious holistic admissions program affords the University flexibility to admit students who will contribute to broad diversity on campus and in the classroom, even if they did not rank at the very top of their high school class.

A. For African-American Students, the Race-Conscious Holistic Admissions Program Is an Important Supplement to the Top Ten Percent Plan.

Appellants contend that the University's race-conscious holistic admissions program has "only a negligible effect, at best, on the enrollment of underrepresented minorities." Appellants' Br. 52. Yet, as the district court concluded, "it is undisputed in the record before the Court that the consideration of race in admissions does increase the level of minority enrollment." *Fisher*, 645 F. Supp. 2d at 610 n.14.⁵

Moreover, African-American students admitted through UT Austin's holistic admissions program—rather than the Top Ten Percent Plan—constitute a significant and meaningful addition to the African-American student population at UT Austin. In the first four entering classes after UT Austin's 2004 decision to use race-conscious admissions, there were a total of 1,544 African-American students. Of these students, 435 were admitted through the holistic admissions program—a full 28% of the African-American first-year students enrolled. *Id.* at 8.⁶

⁵ In any event, the magnitude of the impact of race-conscious holistic admissions on a university's student enrollment is of no legal significance in the constitutional analysis under either *Grutter* or *Parents Involved*. See Appellees' Br. 56-58.

⁶ In their efforts to minimize the significance of UT Austin's race-conscious holistic admissions program, Appellants conveniently ignore that the total number of students who were *not* admitted under the Top Ten Percent Plan dramatically declined between 2004, the last entering class for which the University used solely race-neutral admissions, and 2008, the entering class for which Appellants applied. Appellants' Br. 17. In fact, the percentage of students admitted outside the Top Ten Percent Plan who were African American increased from

Increases in the enrollment of African-American students, even on a relatively small scale, have a positive effect on their social and academic integration into campus life. A recent study of UT Austin students indicates that a ten-person increase in the size of a student’s same-race peer network is associated with an increase in both first semester GPA and the likelihood that the student will remain in attendance—and these benefits appear even greater for African-American students than for white students. *See* Jason M. Fletcher & Marta Tienda, *High School Classmates and College Success*, 82 *Soc. of Educ.* 287, 302, 307 (2009).

These findings from UT Austin are confirmed by other research. While peer groups are significant for all students, there is evidence that they “take[] on an even greater level of significance” for African-American students. Fred A. Bonner II & Kevin W. Bailey, *Enhancing the Academic Climate for African American College Men*, in *African American Men in College* 24, 26 (Michael J. Cuyjet ed., 2006). African-American students who have the support of same-race peers are better able to integrate into the academic and social fabric of the university. *See, e.g.*, Shaun R. Harper, *Peer Support for African American Male College Achievement*, 14 *J. Men’s Studies* 337, 352 (2006) (“[T]he participants

3.3% in 2004 to 4.4% in 2008. *See* Implementation and Results at 7; Appellants’ Record Excerpts 65-67, 70-71 (Plaintiffs’ Statement of Facts ¶¶ 79, 103).

unanimously cited support from their African American peers as essential to their success in college.”).

Modest increases in the enrollment of underrepresented minority students can also benefit the entire student body. A recent study of selective universities’ admissions programs found that even “a one percentage point increase in the share of nonwhite students in the entering freshman cohort is associated with a 3 or 4 percent increase in the odds of interacting with students of different racial backgrounds.” Thomas J. Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 199 (2009) [hereinafter Espenshade & Radford, *No Longer Separate*]; see also Sylvia Hurtado, *Benefits and Barriers: Racial Dynamics of the Undergraduate Experience*, in *The Next Twenty-Five Years: Affirmative Action in Higher Education in the United States and South Africa* 196, 197 (David L. Featherman et al. eds., 2010) [hereinafter Hurtado, *Benefits and Barriers*] (finding that “white students from predominately white environments who attended universities with relatively higher percentages of students of color tended to report frequent positive cross-race interactions”).

Higher levels of cross-racial interaction are linked to greater cognitive development, increased civic interest, and growth in leadership skills, tolerance, and cultural awareness among *all* students. See Chang et al., *Consequences*,

Causes at 530. Indeed, “even those students who have very little cross-racial interaction yet are part of a student body that has high average levels of interaction tend to report greater individual gains in openness to diversity than do those who have the same level of interaction but are a part of a student body that has low average levels.” Mitchell J. Chang et al., *The Educational Benefits of Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Educ. 430, 450 (2006). And when solving problems, diversity along many different lines “may matter as much, or even more than, individual ability.” Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 173 (2007).

Given the lack of opportunities for cross-racial interaction in the state’s elementary and secondary schools, UT Austin plays an especially critical role in providing Texas residents with “exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter*, 539 U.S. at 330. Due to residential segregation patterns in Texas, “black students are relatively scarce in predominantly white schools,” and “white students are quite scarce in predominantly minority schools.” See Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 Am. L. & Econ. Rev. 312, 324 (2006). Indeed, Texas’s African-American students are less integrated with white students at the high school level than students of any other

racial group. *See id.* at 323-24. To prepare students in Texas to succeed as part of an “increasingly diverse workforce and society,” *Grutter*, 539 U.S. at 330 (internal quotations and citation omitted),⁷ UT Austin appropriately recognizes that they must have the opportunity for meaningful cross-racial interactions at the university level.

B. Race-Conscious Review of Non-Top-Ten-Percent Applicants Permits UT Austin to Admit Students Likely to Promote the Educational Benefits of Diversity.

UT Austin’s race-conscious holistic admissions program helps the University achieve its goal of ensuring that the campus is “*both* exceptionally academically qualified *and* broadly diverse.” *Grutter*, 539 U.S. at 329 (emphasis added) (internal quotations and citation omitted); *cf. Parents Involved*, 551 U.S. at 722. Whereas the Top Ten Percent Plan selects students solely based upon their class rank, the holistic admissions program allows for a student’s experiences and background to provide important context to his or her admissions file. *See*

⁷ Recent research confirms that “students who were not exposed to diversity during college were less likely than their peers to be prepared to function in a diverse world.” Hurtado, *Benefits and Barriers* at 200; *see also* Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. Issues 17, 24-26 (2004) (finding that students experienced tangible educational benefits from interracial dialogue, including significantly greater motivation to take account of the perspective of others); Somnath Saha et al., *Student Body Racial and Ethnic Composition and Diversity-Related Outcomes in US Medical Schools*, 300 JAMA 1135, 1135 (2008) (finding that white students who attended more racially diverse medical schools were more likely to consider themselves highly prepared to care for minority populations and to have strong attitudes endorsing equitable access to care).

Appellants' Record Excerpts 90 (Deposition of Bruce Walker, Vice Provost and Director of Admissions at UT Austin, Doc. 94-12 at 11).

The University's holistic admissions program provides flexibility to identify and admit students who bring a set of talents and leadership skills that are important to realizing the benefits of diversity, even if they are not in the top ten percent of their high school class. As the University's director of admissions noted, without the ability to consider race in its holistic admissions program, UT Austin could not decide, for instance, that it should admit a non-Top-Ten-Percent white student who was president of his majority-African-American high school. *Id.* Yet, such individuals—along with African Americans and Latinos who are, for example, talented debaters or musicians—are precisely the type of students who can help the University promote its goals of increasing cross-racial understanding and breaking down racial stereotypes.

In addition, singling out race, and only race, as the sole component of an applicant's experience and background that the University is prohibited from considering would send a message to underrepresented minority students that a critical element of their identity is irrelevant to, or even unwelcome at, UT Austin. As the Supreme Court has repeatedly recognized, race matters: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a

racial minority in a society, like our own, in which race unfortunately still matters.” *Id.* at 333; *cf. Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring) (“The enduring hope is that race should not matter; the reality is that too often it does.”).

Appellants’ demand that UT Austin return to a system where any aspect of a student’s background can be considered except for his or her race, Appellants’ Br. 25, 29, 48-55, is also inconsistent with *Grutter*. The Supreme Court mandated “highly individualized, holistic” review of applicants in those circumstances where universities seek to take account of race as a factor in their admissions decisions. *Grutter*, 539 U.S. at 337; *see also Parents Involved*, 551 U.S. at 722.

Finally, requiring the University to exclude any race-conscious consideration from its holistic admissions program would force it “to become a much different institution and sacrifice a vital component of its educational mission.” *Grutter*, 529 U.S. at 340. For this reason, *Grutter* rejected the contention that a university must adopt a percentage plan prior to, or in lieu of, pursuing a race-conscious admissions program. The Court explicitly recognized that percentage plans improperly “preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.” *Id.*; *see also Appellees’ Br.* 50-52. Thus, UT Austin’s decision to adopt a race-conscious

holistic admissions program—as a limited supplement to the Top Ten Percent Plan and other race-neutral efforts—fits squarely within *Grutter*.⁸

III. UT Austin’s Race-Conscious Admissions Program Ensures an Open Path to Leadership for African Americans in Texas.

In *Grutter*, the Supreme Court recognized that “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be *visibly* open to talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 332 (emphasis added). Appellants are therefore wrong that *Grutter*’s concept of diversity is exclusively “inward-looking,” focusing only on the campus-based impact of diversity. Appellants’ Br. 33. Instead, the Court found that the benefits that result from a university’s pursuit of educational diversity affect “[a]ll members of our heterogeneous society.” *See Grutter*, 539 U.S. at 332.⁹

A key rationale for UT Austin’s decision to return to race-conscious admissions was its determination that, as a flagship institution in an increasingly diverse state, it played a particularly critical role in ensuring a more diverse

⁸ On a nationwide scale, percentage plans would be even less effective than the Top Ten Percent Plan has been at UT Austin in enrolling a critical mass of African-American students. *See, e.g.*, Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. Labor Econ. 113, 116 (2010); Espenshade & Radford, *No Longer Separate* at 268, 362-64.

⁹ In any event, regardless of whether *Grutter*’s conception of diversity is inward-looking or outward-looking, UT Austin had not attained a critical mass of African Americans when it decided to reinstitute race-conscious admissions in 2004. *See* Parts I & II *supra*.

pipeline of business, political, and cultural leaders. *See Fisher*, 645 F. Supp. 2d at 602-03. As then-President Faulkner observed in 2004, prior to the return to race-conscious admissions, the University was “not yet approaching the scale of leadership development that Texas needs for its future from the African-American and Hispanic communities.” Faulkner’s Response at ¶ 39; *see also* UT Austin, *Proposal to Consider Race and Ethnicity in Admissions 2* (2004) (concluding that there is “not yet a visibly diverse set of leaders in [many] occupations that require a college degree”).

UT Austin’s importance as a pathway to state leadership is illustrated by the prominence of its alumni. For instance, more Texas legislators—21 members of the state house of representatives and five senators—received their undergraduate degrees from UT Austin than from any other school.¹⁰ Twenty-eight of the 59 active and retired federal district court judges in Texas attended UT Austin for college and/or law school.¹¹ Since 1958, the UT Austin Alumni Association, Texas Exes, has honored countless other distinguished UT Alumni, including Texas business leaders, philanthropists, ambassadors, scientists, elected officials, university presidents, and several mayors. *See* Texas Exes: UT Austin Alumni

¹⁰ These statistics are drawn from: Texas House of Representatives, *Biographical Data: House of Representatives*, Nov. 19, 2009, <http://www.house.state.tx.us/members/pdf/biodata.pdf> and Texas Senate, *Texas Senators of the 81st Legislature*, <http://www.senate.state.tx.us/75r/senate/Members.htm> (last visited Mar. 10, 2010).

¹¹ These statistics are drawn from: Federal Judicial Center, *Biographical Directory of Federal Judges*, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Mar. 10, 2010).

Association, *Distinguished Alumni Awards* (2008),
<http://www.texasexes.org/involved/daa.aspx>.

Grutter plainly supports UT Austin's determination that the race-neutral admissions process in place from 1997 to 2004 failed to provide an open pathway to Texas leadership for the 13% of Texas high school graduates who are African American. *See* 645 F. Supp. 2d at 594. *Grutter* authorized universities to consider race in order to pursue a critical mass of minorities who are "underrepresented." 539 U.S. at 333. As the district court correctly observed, "[t]he mere concept of an 'underrepresented' minority group . . . necessarily involves the comparison of a minority group's representation at a university to its representation in society." *Fisher*, 645 F. Supp. 2d at 606-07; *see also* Appellees' Br. 39-40.

The University's recognition of the need to diversify the path to state leadership does not constitute an effort at racial balancing or a "representational" rather than an educational interest, as Appellants allege. *See* Appellants' Br. 32. Rather, under *Grutter*, UT Austin was entitled to consider whether it is adequately ensuring that "the diffusion of knowledge and opportunity through public institutions of higher education [is] *accessible* to all individuals regardless of race or ethnicity." *Grutter*, 539 U.S. at 331 (emphasis added); *see also* Marta Tienda & Sigal Alon, *Diversity and the Demographic Dividend: Achieving Educational Equity in an Aging White Society*, in *The Price We Pay: Economic and Social*

Consequences of Inadequate Education 48, 70 (Clive R. Belfield & Henry M. Levin eds., 2007) (“Unless policy strategies are successful in weakening the link between group membership and pathways to social mobility, Americans risk reifying class divisions along race and ethnic lines, short-circuiting the nation’s ability to maintain its international competitiveness.”).

Opening UT Austin’s pathways to leadership is particularly critical for African-American students because the University was formally closed to them for much of its history. *See Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994) (“Texas’ system of higher education has a history of state-sanctioned discrimination.”). The history impacts both the current makeup of Texas leadership, and how African-American students and their families perceive the University today. *See, e.g.*, Task Force Report at 6 (recommending that the University “emphasize often and unequivocally the University’s commitment to serve all Texas residents, particularly those who have been historically excluded from higher education in the state of Texas.”).

CONCLUSION

For the reasons stated above, Amici request that this Court affirm the district court's judgment.

Dated: March 12, 2010

Respectfully submitted,

s/ Joshua Civin

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I hereby certify that two true and correct copies of this amicus brief, along with an electronic PDF version of the brief on a CD-ROM, were served via FedEx Next Day Air Delivery, on March 12, 2010, to the following counsel of record:

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