

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

Abigail Noel Fisher and Rachel Multer)	
Michalewicz)	
Plaintiffs-Appellants,)	
)	
v.)	No. 09-50822
)	
University of Texas at Austin, et al.,)	
Defendants-Appellees.)	
)	

**UNOPPOSED MOTION BY THE BLACK STUDENT ALLIANCE AT THE
UNIVERSITY OF TEXAS AT AUSTIN AND THE NAACP LEGAL
DEFENSE & EDUCATIONAL FUND, INC. FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF OPPOSING APPELLANTS’ PETITION FOR
REHEARING EN BANC**

Amici Curiae the Black Student Alliance at the University of Texas at Austin (BSA) and the NAACP Legal Defense and Educational Fund, Inc. (LDF) move this Court for leave to file an *amicus* brief opposing Appellants’ petition for rehearing *en banc* in the above-captioned case. A copy of the *amicus* brief is attached to this motion. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this *amicus* brief.

Amicus BSA, a membership organization that serves as the leadership voice of African-American students on campus, has a strong interest in preserving UT Austin’s efforts to promote diversity and address the extreme racial isolation that BSA members and other underrepresented minority students experienced during

the period between 1997 and 2004 when the University utilized exclusively race-neutral admissions policies. *Amicus* LDF also has a substantial stake in ensuring that UT Austin, as Texas’s flagship public university, provides a pathway to leadership in an increasingly diverse state and nation that is “visibly open to talented and qualified individuals of every race and ethnicity.” *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003). For seven decades, LDF has worked to dismantle racial segregation and ensure equal educational opportunities at our nation’s colleges and universities, including through litigation in this Court and the Supreme Court of the United States regarding the policies of UT Austin. *See Sweatt v. Painter*, 339 U.S. 629 (1950); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). *Amici* have participated in every stage of this case, including oral argument before a panel of this Court.

In light of the unique perspective and arguments that the BSA and LDF bring to this appeal, *amici* respectfully request that this Court grant leave to file the attached *amicus* brief in opposition to Appellants’ petition for rehearing *en banc*.

Respectfully submitted,

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March 1, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2011, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also certify that the following counsel for the parties were additionally served by electronic mail:

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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

**BRIEF OF *AMICI CURIAE* THE BLACK STUDENT ALLIANCE AT THE
UNIVERSITY OF TEXAS AT AUSTIN AND
THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
OPPOSING APPELLANTS' PETITION FOR REHEARING *EN BANC***

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**SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES,
CORPORATE DISCLOSURE STATEMENT, AND
STATEMENT OF PARTY PARTICIPATION**

No. 09-50822

Fisher v. University of Texas at Austin

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 possible 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.
5. Debo P. Adegbile
6. Joshua Civin
7. Kimberly Liu
8. Terry O. Tottenham
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Counsel is unaware of any other persons with an interest in this *amicus* brief.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that *amicus* NAACP Legal Defense & Educational Fund, Inc. is a

non-profit 501(c)(3) corporation, is not a publicly held company that issues stock, and has no parent corporation. Counsel further certifies that *amicus* Black Student Alliance at the University of Texas at Austin is an unincorporated entity that is registered as a student organization at the University of Texas at Austin.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the undersigned counsel states that no counsel for any party had a role in authoring this *amicus* brief and that no party, counsel for any party, or person—other than *amici*, their members, and their counsel—contributed money that was intended to fund preparing or submitting this *amicus* brief.

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INTERESTS OF AMICI

Amici are the Black Student Alliance at the University of Texas at Austin, a membership organization that serves as the leadership voice of African-American students on campus, and the NAACP Legal Defense & Educational Fund, Inc., a non-profit legal organization that has worked for over seven decades to ensure equal educational opportunity for all Americans. *Amici* have participated in every stage of this litigation, including oral argument before a panel of this Court. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this *amicus* brief.

ARGUMENT

Eight years ago in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court confirmed that universities may constitutionally adopt race-conscious admissions policies, so long as they are narrowly tailored to foster civic engagement, visibly open leadership pathways, and other compelling educational benefits that flow from a critical mass of diverse students. That principle was reaffirmed in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), and faithfully applied by a unanimous panel of this Court to uphold UT Austin's consideration of race as one factor among many in the holistic process that it uses to review applicants who are not admitted through the statutorily mandated Top Ten Percent Plan. *See* Tex. Educ. Code § 51.803.

In seeking *en banc* review, Appellants assert that “the panel opinion conflicts sharply with *Grutter*,” Pet. v, but they do not substantiate their claim. Instead, they rehash arguments regarding the application of *Grutter* to the details of this case, which involves a limited dispute over the admissions process that UT Austin employed when the two Appellants applied for the first-year class entering in the fall of 2008. None of Appellants’ highly fact-specific challenges to the panel’s application of binding Supreme Court authority merit the “extraordinary nature” of *en banc* review. 5th Cir. R. 35.1 & I.O.P. Indeed, it is clear from Appellants’ petition that their fundamental quarrel is with *Grutter* itself. Yet, as both Judge Higginbotham’s opinion and Judge Garza’s concurrence recognized, it is not within the province of this Court to revisit controlling Supreme Court precedent, which has proven a workable standard for colleges and universities throughout the nation. *See* Panel Op. 4, 56; *id.* at 58 (Garza, J., concurring).

I. The panel faithfully applied strict scrutiny as prescribed by *Grutter*.

By “presum[ing]” that UT Austin “acted in good faith” when it decided to use race as one factor among many in its holistic admissions program, the panel was simply following *Grutter*’s express command. Panel Op. 28-29 (citing *Grutter*, 539 U.S. at 329). *Grutter*’s “good faith” presumption played a key role in the Supreme Court’s application of both the compelling interest and narrow-tailoring prongs of strict scrutiny, in light of the deference due to universities’

“complex educational judgments” in formulating admissions policies. *Grutter*, 539 U.S. at 328; *see also id.* at 333-34, 339; Panel Op. 28-33, 52.

Grutter's deference is not, however, “a rubber stamp.” Pet. 8. Appellants give short shrift to the panel's extensive and careful analysis, as well as the deliberative review that the University undertook in 2003-2004 before determining that it had failed to attain a critical mass of African Americans and other underrepresented minorities using only race-neutral measures. The panel emphasized the “serious good faith consideration” that UT Austin devoted to race-neutral alternatives, Panel Op. 32, 55, which even Appellants concede is “one part of the narrow tailoring component of strict scrutiny” under *Grutter*, Pet. 4 (citing *Grutter*, 539 U.S. at 339), precisely because this component was central to Appellants' challenge. Although it was decisively rejected by the panel, Appellants' main argument has always been that the Top Ten Percent Plan is a workable race-neutral alternative. *See* Panel Op. 52-55; Pet. 11, 15; Appellants' Panel Br. 3 (issues presented).

II. *Grutter* permits a university to consider appropriately the demographics of the populations it seeks to serve.

UT Austin's interest in the educational benefits of diversity is no less compelling because it “acknowledg[ed] that the significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission.” Panel

Op. 18 (quoting UT Austin, *Proposal to Consider Race and Ethnicity in Admissions* 24 (2004)). The panel recognized that a university “need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account.” Panel Op. 40. Contrary to Appellants’ argument, Pet. 13-14, this is not an endorsement of the “outright racial balancing” prohibited by *Grutter*. 539 U.S. at 330. As the panel noted, “[b]oth *Grutter* and *Bakke* recognized that ‘there is of course “some relationship between numbers and achieving the benefits to be derived from a diverse student body.’”” Panel Op. 37 (quoting *Grutter*, 539 U.S. at 336 (quoting *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 323 (1978) (opinion of Powell, J.))).

In UT Austin’s considered educational judgment, admitting a critical mass of individuals from underrepresented minority backgrounds was particularly likely to advance the several “distinct educational objectives served by the diversity [*Grutter*] envisioned.” Panel Op. 6; *accord Grutter*, 539 U.S. at 316, 330-33, 338. As the panel determined, “[i]dentifying *which* backgrounds are underrepresented, in turn, presupposes some reference to demographics.” Panel Op. 38.

One key benefit of a diverse university is “[p]reparing students to function as professionals in an increasingly diverse workforce.” *Id.*; *accord Grutter*, 539 U.S. at 330-32. Accordingly, the panel credited UT Austin’s concern that, during the 1997-2004 period when it relied exclusively on race-neutral admissions, it

provided a “less-than-realistic environment” for training future leaders of a state as racially diverse as Texas. Panel Op. 39 (quoting UT Austin, *Proposal to Consider Race and Ethnicity in Admissions* 24 (2004)).

As the panel further recognized, another benefit of diversity is “civic engagement.” *Id.* at 7-8, 39-40. In *Grutter*, the Supreme Court emphasized 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.” 539 U.S. at 332. Drawing on this passage from *Grutter*, the panel correspondingly held that, in UT Austin’s context, “[t]he need for a state’s leading educational institution to foster civic engagement and maintain visibly open paths to leadership also requires a degree of attention to the surrounding community.” Panel Op. 39.

Thus, to attain the several distinct and compelling educational benefits of diversity endorsed by *Grutter*, UT Austin was fully entitled to “devote[] special attention to those minorities,” including African Americans and Latinos, who “were most significantly underrepresented on its campus.” *Id.* at 41.

III. The panel’s narrow-tailoring analysis is consistent with *Grutter*.

Appellants also reassert their arguments that UT Austin’s race-conscious admissions policy is not narrowly tailored because it “has failed to yield a meaningful increase in minority enrollment,” Pet. vi, and “the race-neutral

admissions process it previously used has proven to work about as well,” *id.* at 1. The panel correctly rejected these assertions.

The undisputed factual record contradicts Appellants’ claims regarding the efficacy of UT Austin’s 1997-2004 experiment with race-neutral admissions. *Id.* at 6-7, 11. Even after the Top Ten Percent Plan was enacted, African-American students experienced severe racial isolation. At no point during this period did they constitute more than 4.5% of the first-year class, which is far below the portion of Texas high school graduates who are African-American. Panel Op. 13-16; *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 594 (W.D. Tex. 2009).

Although *amici* believe that UT Austin could do even more to ensure a critical mass of Texas’s underrepresented minority students, the University’s race-conscious holistic admissions program does provide an essential supplement to the Top Ten Percent Plan by meaningfully contributing to minority student enrollment. *See* Panel Op. 18-19, 26. For instance, in the first four entering classes after UT Austin’s 2004 decision to consider race as one factor in its holistic admissions program, 435 of the 1,544 African-American students enrolled—a full 28%—were admitted through that program. *See* UT Austin, *Implementation and Results of the Texas Automatic Admissions Law (HB 588)* 6-7 (2008).¹

¹ Recent research confirms that even modest increases in minority enrollment have a positive effect on classroom and campus integration for all students. *See, e.g.*, Thomas J.

In any event, the magnitude of the impact of race-conscious admissions on university enrollment does not drive the narrow-tailoring inquiry under *Grutter*. And, contrary to Appellants' claim, Pet. 12, *Parents Involved* does not alter this analysis. See Panel Op. 54-55. While the Supreme Court questioned the necessity of a K-12 student assignment plan that had minimal statistical impact, it made clear that its critique was limited to rigid, binary racial classifications that could be "determinative standing alone." *Parents Involved*, 551 U.S. at 723; see also *id.* at 734-35. *Parents Involved* expressly distinguished the type of individualized, holistic review that was endorsed by *Grutter* and that is at issue here, where race is considered "as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'" *Id.* at 723 (quoting *Grutter*, 539 U.S. at 330); see also *id.* at 790 (Kennedy, J., concurring in part); Panel Op. 54-55.

The University's use of race-conscious holistic admissions to supplement the Top Ten Percent Plan also helps achieve its goal of ensuring, consistent with *Grutter*, that its campus and classrooms are "broadly diverse." *Grutter*, 539 U.S. at 329 (quotation mark and citation omitted).² 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 applicant who was president of his

Espenshade & Alexandria Walton Radford, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* 199 (2009).

² It bears emphasis that Appellants did not challenge either the constitutionality or the wisdom of the Top Ten Percent Plan. Panel Op. 2; see also *id.* at 57 (King, J., concurring).

majority-African-American high school, or vice versa. *See* Appellants' Record Excerpts 90 (Deposition of Bruce Walker, UT Austin Vice Provost and Director of Admissions, Doc. 94-12 at 11); Panel Op. 36. Yet, these individuals are precisely the type of students who can help the University promote its goals of increasing cross-racial understanding and breaking down racial stereotypes. As the panel recognized, *Grutter* sanctions such "individualized assessments . . . to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.'" Panel Op. 42 (quoting *Grutter*, 539 U.S. at 340).

CONCLUSION

For the foregoing reasons and those stated by UT Austin in its response to Appellants' petition, this Court should deny *en banc* review.

Dated: March 1, 2011

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I certify, pursuant to Fed. R. App. P. 25(d), that this *amicus* brief was timely filed with the Clerk of the Court on March 1, 2011, via CM/ECF and by sending twenty paper copies to the Office of the Clerk, as addressed below, via UPS Next Day Air Delivery:

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