No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

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

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE BLACK STUDENT ALLIANCE AT THE UNIVERSITY OF TEXAS AT AUSTIN, THE BLACK EX-STUDENTS OF TEXAS, INC., AND THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DEBO P. ADEGBILE
ACTING DIRECTOR-COUNSEL
Counsel of Record
ELISE C. BODDIE
DAMON T. HEWITT
LETICIA V. SMITH-EVANS
RACHEL M. KLEINMAN
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 965-2200
dadegbile@naacpldf.org

JOSHUA CIVIN
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 I Street, NW, 10th Floor
Washington, DC 20005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authorities

INTERESTS OF AMICI[1]

Amici Black Student Alliance at the University of Texas at Austin (BSA) and the NAACP Legal Defense & Educational Fund, Inc. (LDF) have participated in this litigation from the outset and presented oral argument in the court of appeals. JA 7a, 10a, 14a; Pet. App. 116a, 118a. Amici also include the Black Ex-Students of Texas, Inc. (BEST), many of whose participants were undergraduates in the period pertinent to this case.

Founded during the 1980-81 school year, the BSA serves as the leadership voice for African-American students at the University of Texas at Austin (hereinafter UT or the University). BSA members have a strong interest in preserving the University's efforts to promote diversity through the inclusion of race as one factor among many in UT's holistic review process. Although they recognize that the campus is more inclusive than it has been in the past, many BSA members still experience racial isolation in their classes, extracurricular activities, and other informal settings across the campus.

Founded in 1998, BEST brings together UT alumni to assist in recruiting, retaining, and supporting African-American students at UT. BEST also aims to increase awareness of issues facing Afri-

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

can-American students, faculty, and staff at the University, and provides networking opportunities for its alumni members. Many BEST participants experienced firsthand significant racial isolation as UT students during the period between 1997 and 2004 when the University did not consider race in its admissions policies. All too often they were the only, or one of a very few, African-American students in their classes. Professors and fellow students frequently looked to them to give the "Black perspective" on particular issues. Some experienced acute incidents of racial hostility, which undermined their sense of belonging within the campus community. Accordingly, BEST participants aspire to help create an educational environment at the University in which African-American students no longer bear the crushing burden of tokenism and racial stereotypes and where they no longer struggle to develop and define themselves as individuals on their own terms.

LDF is a non-profit legal organization that has worked for more than seven decades to dismantle racial segregation and ensure equal educational opportunity for all students. In groundbreaking cases, LDF has represented African-American students and applicants, as parties and amici, seeking to expand access and opportunity—both at UT, *see, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), and at other universities throughout the nation, *see, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *United States v. Fordice*, 505 U.S. 717 (1992); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex*

rel. Gaines v. Canada, 305 U.S. 337 (1938); *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983); *Geier v. Bredesen*, 453 F. Supp. 2d 1017 (M.D. Tenn. 2006). In addition, while he was in private practice prior to becoming LDF's sixth President and Director Counsel, the late John Payton served as counsel to the University of Michigan in *Grutter* and *Gratz* and argued the latter case before this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court has repeatedly stressed, diversity's educational benefits go to the heart of our democracy: "[N]othing less than the '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.'" *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (internal citation and quotation marks omitted)). The educational benefits that flow from diverse colleges and universities are no less apparent today than they were three decades ago when Justice Powell cast the deciding vote in *Bakke*, nine years ago when the Court decided *Grutter*, or five years ago, when it reaffirmed this *Grutter* principle in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 722-23 (2007).

The Court's conceptualization of the educational benefits of diversity did not spring from whole cloth. It arose out of a particular historical context in which UT played a significant and distinctive role. *See, e.g.*, *Sweatt v. Painter*, 339 U.S. 629 (1950) (mandating admission of Heman Marion Sweatt,

whose application to UT Law School had been denied based solely on his race). This "[c]ontext matters," *Grutter,* 539 U.S. at 327, in the nation's ongoing efforts to transcend its exclusionary past and chart a more socially cohesive and racially inclusive future. To ensure continued progress in these efforts, colleges and universities must be free to create environments where people of diverse backgrounds can come together in ways that foster respect for the distinctive talents and contributions that each offers. This is particularly significant in light of the special role that higher education plays in opening pathways to civic, political, and economic leadership and opportunity. *See id.* at 331-32.

Fully realizing the educational benefits of diversity, however, depends on another important predicate. There must be a "meaningful representation"—or, to use *Grutter*'s shorthand, "a critical mass"—of underrepresented minority students. *Id.* at 329-30. Such a critical mass is necessary because "[b]y virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to [a university's] mission, and less likely to be admitted in meaningful numbers [based] on criteria that ignore those experiences." *Id.* at 338.

Amici write separately to highlight several reasons why critical mass is essential to the full realization of diversity's educational benefits. First, critical mass promotes individual dignity by creating an educational environment that encourages both underrepresented minority students and their fellow students to explore and define their own unique identities. Second, critical mass facilitates students'

exposure to diversity *within* and *among* the racial groups that are underrepresented in classrooms and across the university campus. Third, because colleges and universities open pathways to leadership and opportunity in the larger sphere of public life, the critical mass inquiry must pay some attention to whether the University is fulfilling its mission of serving the broader community.

While petitioner purports to accept both the educational benefits of diversity and the importance of a critical mass of underrepresented minority students to achieve those benefits, Pet. Br. 26, her arguments, if accepted, would turn established precedent upside down. Distorting beyond recognition the Court's prohibition on racial quotas, petitioner proposes to cap enrollment of underrepresented minority students at the level achieved prior to *Grutter* through race-neutral means alone. Petitioner's unduly rigid conception of critical mass, Pet. Br. 26-30, is both inconsistent with this Court's teachings and would severely impair UT's ability to achieve its educational mission.

There is no need to speculate about the devastating impact that petitioner's proposed cap would have on the enrollment of African Americans and other underrepresented minority students. Between 1997 and 2004, a ban on race-conscious admissions was in place, as a result of the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). During that period, UT took full advantage of race-neutral measures, including expanded outreach, scholarships, and 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 (1997) (amended 1999, 2007 & 2009) [hereinafter the Top Ten Percent Plan]. UT also instituted individualized review for applicants not admitted through the Top Ten Percent Plan. *See* JA 374a-381a. From 1997 through 2004, that whole-file review included the socio-economic status of applicants' families, extracurricular activities, community service, leadership qualities, and multiple other factors—but it did not consider race. *Id.*

Despite all of these race-neutral efforts, African-American student enrollment remained unacceptably low. Only 3.4% of the students in the freshman class that entered UT in 2002—shortly before *Grutter* was decided—were African Americans, and at no point between 1997 and 2004 did African-American students comprise more than 4.5% of the entering first-year class. Pet. App. 20a; JA 127a.[2]

In June 2003, *Grutter* overturned *Hopwood*. Thereafter, the University Board of Regents "authorized institutions within the University of Texas system to examine whether to consider an applicant's race and ethnicity in admissions in accordance with the standards enunciated in *Grutter*." Pet. App. 21a (internal quotation marks and citation omitted). UT then conducted an extensive review of its admissions policies and ultimately concluded that it had failed to achieve a critical mass of African Americans and

---

[2] This brief primarily focuses on the detrimental consequences of petitioner's arguments for African Americans, but amici also believe that UT's consideration of race as one factor in its holistic review of all applicants, including other underrepresented minority students, is similarly constitutional.

other underrepresented minority students using only race-neutral measures. SJA 1a-39a.

The University's educational judgment is fully supported by the results of its multi-year experiment with race-neutral alternatives and the review that it conducted of its admissions policies in 2003-04. Resp. Br. 41. In addition, amici highlight other contemporaneous evidence—specifically the proceedings of the University's Task Force on Racial Respect and Fairness, which developed recommendations (including necessary admissions reforms) to address notable incidents of racial hostility that occurred on campus during the same period that UT was reviewing its admissions policies.

Contrary to petitioner's claims, the modest race-conscious component that UT added to its admissions process, beginning with its review of applicants for the 2005 freshman class, is an essential supplement to the Top Ten Percent Plan. The vast majority of UT students are admitted through the Top Ten Percent Plan, but race-conscious holistic review has resulted in meaningful increases in the overall level of African-American enrollment. Equally critical, holistic review provides flexibility to enhance diversity *among* UT's African-American students.

Petitioner's proposal to eliminate race from the holistic review process could, if accepted, send a message to minority students that a critical element of their identity is irrelevant to, or even unwelcome at, UT. "The enduring hope is that race should not matter; the reality is that too often it does." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). Pretending

that race plays no role in students' construction of their own identities does not make it so. For African-American students, especially at UT, racial isolation, tokenism, the ever-present threat of racial stereotypes, and even overt prejudice can profoundly alter their experiences in ways that have a lasting and, often damaging, impact. UT's pursuit of broader diversity and the educational benefits that flow from it help to mitigate these dangers and, thus, improve the quality of all students' college experiences.

ARGUMENT

I. Meaningful representation of African-American students is necessary to achieve the full educational benefits of diversity.

As petitioner acknowledges, "critical mass is defined by reference to the educational benefits that diversity is designed to produce." Pet. Br. 26 (quoting *Grutter*, 539 U.S. at 330). For UT, as for the University of Michigan Law School in *Grutter*, those benefits include enhanced "cross-racial understanding, . . . break[ing] down racial stereotypes," enabling students "to better understand persons of different races," and creating "a path to leadership" that is "visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 330, 332 (internal quotation marks and citations omitted); SJA 1a-3a, 16a-17a.

There is no quota, target, or predetermined percentage of undergraduate enrollment that automatically produces these benefits; nor could there be, as this Court has directed repeatedly. *See Grutter*, 539 U.S. at 329-30, 334. For this reason, critical mass

cannot be defined by simple numerical calculations alone. Rather, critical mass depends on the quality, as much as the quantity, of individual students' cross-racial interactions, as well as the context and community in which the particular university is situated.

A. A critical mass of underrepresented minority students helps break down stereotypes and allows all students to explore, develop, and express their individuality.

Obtaining a critical mass of underrepresented minority students is in no way inconsistent with promoting the individual dignity of all students. An important function of higher education is to provide students with an environment that helps them develop their full potential through wide exposure to diverse individuals, ideas, and viewpoints. Indeed, this is one of the key educational benefits of diversity endorsed in *Grutter*, 539 U.S. at 324.

For many students, college is the first time they have meaningful opportunities to interact and problem-solve with people from vastly different backgrounds. "Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole." *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment). The lack of diversity at the neighborhood level contributes to the persistent "problem of *de facto* resegregation in schooling" at the K-12 level in Texas and throughout the nation. *Id.* at 788; *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, 318-19 (2006); Resp. Br. 8. When students who have been "'surrounded only by the likes of themselves'" reach college, they often hold perspectives shaped by the limits of their formative experiences. *Bakke*, 438 U.S. at 312 n.48 (opinion of Powell, J.) (quoting William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). Too often, they are not even aware of the full extent of their lack of knowledge about others. These gaps in awareness and understanding permit racial stereotypes to flourish in ways that have far-reaching social consequences, from the classroom to the broader campus and beyond.

Racial stereotypes stifle the educational environment. They inhibit students of all races from engaging in the atmosphere of "speculation, experiment and creation—so essential to the quality of higher education." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (internal quotation marks and citation omitted). Not only can racial stereotypes irreparably harm students who are targeted by such false assumptions, but they also diminish individual growth and self-realization for students who live their lives based on narrow and incomplete views about other people. *See Grutter*, 539 U.S. at 333.

Absent a critical mass, racial stereotypes are likely to remain entrenched for at least two reasons. First, having insufficient numbers of underrepresented minority students reduces the likelihood of meaningful cross-racial interaction. Colleges and universities provide important opportunities to transcend the restricted social patterns that many stu-

dents have previously experienced—with long-term positive consequences. *See, e.g.*, Nicholas A. Bowman et al., *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J.C. Student Dev. 729 (2011) (finding that cross-racial interactions in college are positively related to personal growth, purpose in life, recognition of racism, and volunteering behavior among college graduates in their mid-30s); Amicus Br. of Am. Educ. Res. Ass'n et al. at 14-16. In the absence of such intervention, racially segregated social patterns are likely to persist. The lack of cross-racial interactions also diminishes educational opportunity. Conversely, "encountering unfamiliar and novel situations, people, and experiences" fosters personal growth because it requires us to grapple with "uncertainty, instability, and possibly anxiety" that stimulate individual learning and development. Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 Rev. Higher Educ. 185, 189-90 (2007). Hence, critical mass both reduces racial stereotypes and enriches the educational environment as a whole—in classrooms, extracurricular activities, dining halls, and more informal settings. *Cf. Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2999 (2010) (Kennedy, J., concurring) ("Extracurricular activities . . . facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self.").

Second, underrepresented minority students may not feel comfortable expressing their individuality when they are relegated to token status. Rather,

they may be pressured, even by well-meaning teachers and fellow students, to serve as "spokespersons for their race." *Grutter*, 539 U.S. at 319. When this happens, minority students may suppress their own distinctive and, perhaps unexpected, idiosyncratic, or contradictory views. *Id.* at 319-20, 330. In this way, stereotyping inhibits individuals and affects their ability to discover and develop their distinctive character. *Cf. Lawrence v. Texas*, 539 U.S. 558, 574 (2003) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.") (internal quotation marks and citation omitted).

By contrast, having a meaningful representation of underrepresented minority students reduces the likelihood that that they will feel isolated or compelled to conform to a forced social script. In such circumstances, "nonminority students learn there is no minority viewpoint but rather a variety of viewpoints among minority students." *Grutter*, 539 U.S. at 320 (internal quotation marks and citation omitted).[3]

Thus, enrolling a critical mass of underrepresented minority students offers them more freedom to define their own individual identities, rather than

---

[3] Exposure to diverse individuals also helps foster improved cognitive skills, civic engagement, and other benefits. *See generally* Amicus Br. of Am. Educ. Res. Ass'n et al. As numerous researchers have shown, when individuals learn to work together in diverse teams, they produce better, more creative results. *See, e.g.*, Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Society* 131-238 (2007) (discussing how diversity produces collective benefits).

being defined by others or defining themselves through the lens of racial stereotypes. Moreover, having a critical mass of under-represented minorities encourages *all* students to grow and flourish as individuals by "diminishing the force of [racial] stereotypes" on campus and in the classroom. *Grutter*, 539 U.S. at 333.[4]

The point here is not that critical mass, by itself, solves all of the lingering effects of racial isolation in schools, neighborhoods, and the daily lives of many Americans. Rather, critical mass creates the conditions for substantial educational benefits in the distinctive contexts of our nation's colleges and universities, which can result in individual growth, greater cross-racial understanding, and, ultimately, social progress.

---

[4] In assessing whether it was helping students break down stereotypes, it was particularly appropriate for UT to take account of classroom diversity as a "benchmark for critical mass." Pet. Br. 30. As this Court recognized in *Grutter*, the educational benefits that diversity is designed to produce are particularly salient at the classroom level. *See* 539 U.S. at 330; Resp. Br. 39. Indeed, the record developed by the University of Michigan Law School in *Grutter* included a similar assessment of diversity at the classroom level. *See* Resp. Br., *Grutter v. Bollinger*, 539 U.S. 306 (No. 02-241), 2003 WL 402236, at *6 n.7. Petitioner's critique of UT's focus on small classes, Pet. Br. 43-44, overlooks the pervasive racial isolation of African-American students across the curriculum, regardless of class size. *See* SJA 66a-150a; Resp. Br. 10, 39, 43-44. Overall, "79 percent of [all] UT [undergraduate] classes had zero or one African-American students." Pet. App. 156a; *cf. Int'l Bhd of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) (recognizing that an "inexorable zero" can be probative evidence of racial inequity) (internal quotation marks and citation omitted).

B. Critical mass cannot be assessed by lumping together underrepresented minorities.

In assessing whether it was providing the wide exposure to different viewpoints necessary to break down stereotypes and promote individual autonomy, UT appropriately considered the very low level of African-American students who matriculated during its 1997-2004 experiment with exclusively race-neutral admissions. During this period, UT enrolled an average of approximately 7,000 students in each freshman class. Yet, at most, there were only 309 African Americans in any freshman class. JA 127a. And at no point between 1997 and 2004 did African Americans constitute more than 4.5% of any first-year class. *Id.*[5]

That low level of African-American enrollment is insufficient to obtain the educational benefits of diversity described in Section I.A *supra*, especially at a university, such as UT, with a very large student body and a sprawling campus. *See* Resp. Br. 4. *Grutter* permits a university to take such enrollment levels into consideration in its critical mass inquiry: "'[S]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." *Grutter*, 539 U.S. at 336 (quoting *Bakke*, 438 U.S. at 323 (appendix to opinion of Powell, J.)) (alteration in original). Petitioner does not

---

[5] Such persistent and comparatively low levels of African-American enrollment had a domino effect. Low levels of admissions meant lower levels of enrollment; these patterns, in turn, discouraged others from applying and matriculating. *See* 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, 66-67, 77-78 (2010).

contest the importance of devoting some attention to numbers in the critical mass inquiry, but she ignores these low levels of African-American enrollment and instead lumps all underrepresented minority students together and treats them as fungible. *Cf.* Pet. Br. 3, 4, 5, 26, 35. In petitioner's view, a university would be precluded from taking any additional race-conscious measures if the aggregate enrollment of all underrepresented minority student groups reached a particular level—even if 99% of such students were African Americans and only 1% were Latinos, or vice versa. No precedent supports this position.

To the contrary, in *Parents Involved*, the Court sharply criticized the Seattle School District for lumping together students of different racial backgrounds. 551 U.S. at 723-24. 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." *Id.* at 724 (emphasis added). The Court found it "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.* (quoting *Grutter*, 539 U.S. at 329).

Petitioner's exclusive focus on aggregate minority enrollment is equally flawed. *See* Resp. Br. 41-42. As the court of appeals recognized, "African-American and Hispanic students, for example, are not properly interchangeable for purposes of determining critical mass." Pet. App. 67a. Paraphrasing this Court's insight in another context, "[s]ometimes

the grossest discrimination can lie in treating [individuals who] are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

Petitioner's unwillingness to disaggregate Latino and African-American enrollment is reason enough for this Court to reject her challenge to UT's determination that it did not achieve a critical mass of underrepresented minorities through race-neutral admissions alone. Equally important, however, petitioner fails to acknowledge that the critical mass inquiry "must be sensitive to important distinctions *within* these broad groups" of Latino and African-American students. Pet. App. 67a (emphasis added).

For instance, this Court has criticized Texas for ignoring the fact that Latino populations in different parts of the state have "divergent needs and interests." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006). Similarly, Justice Powell recognized in *Bakke* that university admissions policies could consider "the variety of points of view, backgrounds and experiences of blacks in the United States." *Bakke*, 438 U.S. at 323 (appendix to opinion of Powell, J.).

Thus, in its assessment of whether it has achieved a critical mass of underrepresented minority students, UT should be permitted—and, indeed, encouraged—to take into account whether its campus and classrooms are meaningfully representative of the rich diversity *within* and *among* underrepresented minority groups. *See* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330,

360 (2002) ("Diversity enables students to perceive differences both within groups and between groups. . . ."). For the alumni and students who participate in amici BEST and BSA, the benefits of exposure to such "diversity within diversity," Resp. Br. 34, is particularly important to their learning process.

C. Because the benefits of diversity extend well beyond campus borders, the critical mass inquiry must ensure open paths to leadership and opportunity.

As part of the justification for its proposal to include race as one factor among many in its holistic review process, UT expressed concern 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." SJA 24a (emphasis added). During UT's multi-year experiment with race-neutral admissions, as explained in Section I.B *supra*, African-American enrollment in incoming freshman classes never exceeded 4.5%, whereas African-American Texans then constituted over 10% of the state's workforce and approximately 12-13% of its high school graduates. Pet. App. 127a; JA 127a; SJA 3a. This significant discrepancy, in UT's view, resulted in a "less-than-realistic environment" on campus and in the classroom that was "not conducive to training the leaders of tomorrow." SJA 24a-25a.[6]

---

[6] It bears emphasis that UT's consideration of such demographics "took place only when the University first studied whether a race-conscious admissions program was needed to attain critical mass." Pet. App. 47a. As the court of appeals

This legitimate concern about significant racial disparities does not in any way suggest—as petitioner claims—that UT's pursuit of critical mass was designed to achieve "demographic proportionality." Pet. Br. 27. At UT, as the court of appeals recognized, "[t]he need for a state's leading educational institution to foster civic engagement and maintain visibly open paths to leadership . . . requires a degree of attention to the surrounding community." Pet. App. 50a. Indeed, "[a] university presenting itself as open to all may be challenged when the state's minority population grows steadily but minority enrollment does not," as has been the case in Texas over the past decade. *Id*.

Opening pathways to leadership and opportunity is particularly critical for African-American students because they were excluded from the University for much of its history—first by law and then in effect. *See Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994) ("Discrimination against blacks in the state system of higher education is well documented in history books, case law, and the State's legislative history."), *rev'd on other grounds*, 78 F.3d 932; *Sweatt*, 339 U.S. at 634; Resp. Br. 3-4; *see generally* Dwonna Goldstone, *Integrating the 40 Acres: The Fifty—Year Struggle for Racial Equality at the University of Texas* (2006) (charting halting progress towards integration from *Sweatt* through *Hopwood*). As UT candidly concedes, it is "painfully aware" that "vestiges of *de jure* segregation" have persisted in

---

recognized, "[t]he summary judgment record shows that demographics are not consulted as part of any individual admissions decision." *Id*.

the decades after this Court's decision in *Sweatt*. Resp. Br. 4 (citing SJA 14a and *Sweatt*, 339 U.S. 629).[7] This history has a continuing corrosive impact on the current makeup of Texas leadership, and the way in which African-American students and their families perceive the University today. Accordingly, UT has a strong imperative "to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain" in order to ensure "that opportunity is not denied on account of race." *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment). For these reasons, it was permissible for UT to stress the importance of "sending a message that people of all stripes can succeed at UT." Pet. App. 50a; Resp. Br. 4; *cf.* Pet. Br. 28.

UT's interest in visibly open paths to leadership is fundamentally pedagogical—"focused on enhancing the university experience" for its students. Pet. Br. 26. Yet this interest is not exclusively "inward-facing," as petitioner alleges. *Id.* To the contrary, UT acknowledges that its relationship with—and reliance upon the support of—the community it serves is critical to its ultimate success in fulfilling its educational mission of training tomorrow's leaders. As

---

[7] After the Court forced UT Austin to open its law school to African Americans, change occurred slowly. Beginning in the 1970s, the federal government undertook a court-ordered investigation of Texas's higher education system and found that the state had failed to eliminate vestiges of its formerly segregated system. *See Hopwood*, 861 F. Supp. at 555-57 (chronicling this investigation and Texas's subsequent efforts to come into compliance). To date, the federal government has yet to announce that Texas has satisfied its obligations under federal civil rights law.

the Court explained in *Grutter*, "[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." 539 U.S. at 332. Indeed, UT's leaders have long recognized that "[p]ublic confidence is the only real endowment of a state university." University of Texas System Administration, *Standards of Conduct Gui*de 3 (2012) (quoting H.Y. Benedict, UT President (1927-37)), *available at* http://www.utsystem.edu/systemcompliance/SOCcombined.pdf.

For many decades, this Court has understood the dynamic relationship between higher educational institutions and the communities that they serve, especially in the context of UT. When the Court struck down UT Law School's policy of racial segregation in *Sweatt*, it did so in part based on its recognition that a law school "cannot be effective in isolation from the individuals and institutions with which the law interacts." 339 U.S. at 634. The Court strongly endorsed this premise by citing it in *Grutter*. *See* 539 U.S. at 332 (quoting *Sweatt*, 339 U.S. at 634). Thus, petitioner's purported dichotomy between "inward-facing" and "outward-facing" concepts of diversity, Pet. Br. 26, is not only a demonstrably inaccurate assessment of the University's interests in diversity, but it also is premised on a fundamental misreading of settled law.[8]

---

[8] In any event, regardless of whether *Grutter*'s conception of diversity is inward-facing, outward-facing, or both, UT had not attained a critical mass of African Americans when it decided to reinstitute race-conscious admissions in 2004. *See* Section I.B, *supra*, and Section II, *infra*.

II. The University's Task Force on Racial Respect and Fairness provided additional evidence that UT's race-neutral efforts did not yield meaningful African-American representation when race-conscious admissions were banned in 1997-2004.

In the eight years between *Hopwood* and *Grutter*, UT engaged in "serious, good faith consideration" and robust implementation of race-neutral alternatives, *Grutter*, 539 U.S. at 339, and found them insufficient to provide a "critical mass" of underrepresented minority students, *id*. at 329-30. The University's experiences with race-neutral alternatives, as well as the data produced in its subsequent review of admissions in 2003-04, provide ample evidence to support UT's educational judgment that consideration of race as one factor in its individualized review is necessary to fully obtain the educational benefits of diversity. *See* Resp. Br. 41.[9]

As discussed above, "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330. Those benefits are qualitative as well as quantitative. *See* Section I *supra*. Thus, it was entirely proper for UT to rely on student surveys in which

---

[9] Petitioner contends that UT should be compelled to satisfy a "strong basis in evidence" standard to demonstrate the need for promoting diversity. *See* Pet. Br. 31-33. For the reasons articulated by UT and the court of appeals, *see* Resp. Br. 49-50; Pet. App. 37a-42a, that standard, derived from the context of reviewing laws to remedy past or present discrimination, is inapplicable to the diversity interest asserted here. At any rate, the evidence relied upon by UT fully satisfies that "strong basis" standard.

"[m]inority students reported feeling isolated, and a majority of all students felt there was 'insufficient minority representation' in classrooms for 'the full benefits of diversity to occur.'" Pet. App. 22a (citation omitted). As many participants in amicus BEST and former members of amicus BSA can attest, substantial racial isolation was an unavoidable aspect of campus life for those who attended UT during the post-*Hopwood*, pre-*Grutter* period (1997-2004).

In addition, there is other contemporaneous evidence that provides relevant "[c]ontext" that "matters," *Grutter*, 539 U.S. at 327, for the University's decision to reintroduce race as a factor in its holistic admissions program. *Cf. Tennessee v. Lane*, 541 U.S. 509, 524-25 (2004) (cataloguing pre-enactment evidence that was part of the historical "backdrop" for government action). During the same period that UT was undergoing a thorough review of its admissions policies, a number of racially charged incidents occurred on campus. For instance, a complaint was lodged alleging racial profiling by the campus police, including an incident where an officer demanded that an African-American member of student government show his identification in the student union; one majority-white fraternity was suspended and another was sanctioned for sponsoring parties where attendees dressed in "blackface" and derided African Americans; and vandals egged the campus's statue of Martin Luther King, Jr. on the national holiday celebrating the civil rights leader's birth. *See* Todd Ackerman, *UT Task Force Calls for Greater*

Racial Sensitivity, Houston Chron., Jan. 21, 2004, at A17.[10]

These incidents were not the first, nor were they the last, episodes of racial hostility on campus; but in combination, they sparked student protests and prompted the University to convene a Task Force on Racial Respect and Fairness in March 2003, consisting of students, faculty, and staff. *Id.* UT charged the Task Force with making recommendations for improvements to the campus climate. *See* University of Texas at Austin, *Report of the Task Force on Racial Respect and Fairness*, at 3 (2004), *available at* http://www.utexas.edu/news/attach/2004/2262_report_respect.pdf [hereinafter the Task Force Report].

After ten months of study and meetings, the Task Force issued a report in January 2004, while the University's review of its admissions policies was still pending. The Task Force proposed a variety of interventions. For instance, supporting the necessity of visibly open pathways to leadership described in Section I.C *supra*, the Task Force Report recommended that UT "emphasize often and unequivocally the University's commitment to serve all Texas resi-

---

[10] At the time, the Martin Luther King Jr. statue was the only monument commemorating a person of color on a campus that had a number of statues of Confederate generals, and even a building named after a Ku Klux Klan leader. That building was subsequently renamed after significant advocacy. *See* Thomas D. Russell, *"Keep Negroes Out of Most Classes Where There Are a Large Number of Girls": The Unseen Power of the Ku Klux Klan and Standardized Testing at the University of Texas, 1899-1999*, 52 S. Tex. L. Rev. 1, 35 (2010); Destinee Hodge, *Simkins Hall Renamed in Unanimous Decision*, Daily Texan, July 15, 2010.

dents, particularly those who have been historically excluded from higher education in the state of Texas." Task Force Report at 6.

The Task Force also recommended that UT "[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" and permit them to "request that their photo not be included." *Id.* at 12. "The concern [was] that these students [were] repeatedly called on by well-intentioned instructors hoping to be inclusive, but the result [was] often discomfort for the students" who felt as if they were under a microscope as spokespersons for their race. *Id.* Just a few months before the Task Force issued its report, this Court underscored the same concern—that racially isolated students may feel compelled to be "spokespersons for their race" in the classroom. *See Grutter*, 539 U.S. at 319. And that concern also was one of the grounds for the University's conclusion that it had not achieved a critical mass of underrepresented minority students. As UT's review of its admissions policies revealed, the vast majority of undergraduate classes had zero or only one African-American or Latino students. *See* SJA 66a-150a; *see also supra* at n.4.

Equally relevant for purposes of this case, the Task Force concluded that the need to increase the recruitment, retention, and advancement of underrepresented minority students was a necessary component of any plan to create a more inclusive campus environment. *See* Task Force Report at 5, 15-17. In his response to the Task Force Report, Larry Faulkner, then President of UT, made explicit the connection between improving campus climate and achiev-

ing a critical mass of underrepresented minority students: As a "major innovation for the near term," he referenced the pending proposals for "the reinstallation of race-sensitive admissions at the undergraduate, graduate, and professional levels." University of Texas at Austin, Office of the President, *Comments on the Report of the Task Force on Racial Respect and Fairness* ¶ 41, May 10, 2004, *available at* http://www.utexas.edu/president/speeches/rrf_051004.pdf.[11] Affirming the pressing need to implement these proposals, there were additional incidents of racial hostility in the months after the Task Force issued its report, including another act of vandalism targeting UT's Martin Luther King, Jr. statue. *See* David Kassabian, *Officials Talk Camera Upgrades: New Technology Would Detect Suspicious Acts Around MLK Statue*, Daily Texan, Aug. 27, 2004.

The Task Force Report and President Faulkner's response belie petitioner's claim that President Faulkner rushed to judgment when he issued a statement, on the day *Grutter* was decided, express-

---

[11] This connection also is supported by research findings that more diverse colleges typically have more racially inclusive campus climates. *See, e.g.*, Rebecca L. Stotzer & Emily Hossellman, *Hate Crimes on Campus: Racial/Ethnic Diversity and Campus Safety*, 27 J. of Interpersonal Violence 644, 654-55 (2012) (finding that reported hate crimes are lower on campuses with higher percentages of African-American and Latino students); Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1199 (2010) ("Underrepresented minority students in states that *permit* affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states.").

ing his view that race-conscious admissions were a necessary supplement to the Top Ten Percent Plan and other race-neutral alternatives. *Cf.* Pet. Br. 5. His suggestion was grounded in the context of the Task Force's proceedings, as well as UT's prior, eight-year experience with race-neutral admissions post *Hopwood*.

III. Consideration of race in UT's holistic admissions process is vital to create a broadly diverse student body.

UT's race-conscious holistic admissions program is an essential supplement to the Top Ten Percent Plan and other race-neutral efforts. While this component of the admission program is "modest" in its approach, *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting), its impact is meaningful. Pursuant to Texas law, the vast majority of available slots in each entering class at UT are filled automatically through the Top Ten Percent Plan. Tex. Educ. Code § 51.803 (1997) (amended 1999, 2007 & 2009). Yet, in the years between 2004 (when the University decided to use race as one factor among many in the holistic component of its admissions policy) and 2008 (when petitioner applied for admission), a sizable percentage of UT's African-American student population has enrolled through the holistic process. *See* SJA 156a-157a. Moreover, UT's race-conscious holistic admissions process affords the University enhanced flexibility to admit students of all races who will contribute to broad diversity on campus and in the classroom, even if they were not ranked at the very top of their high school class. In particular, the race-conscious, individualized review process provides the opportunity to obtain the educational bene-

fits of diversity both *within* and *among* underrepresented minority student communities.

A. Race-conscious holistic review is an important supplement to the Top Ten Percent Plan.

Although petitioner contends that UT's race-conscious holistic admissions program has only "an infinitesimal impact on critical mass in the student body as a whole," Pet. Br. 21 (quoting Pet. App. 107a (Garza, J., specially concurring)), "it is undisputed in the record before the Court that the consideration of race in admissions does increase the level of minority enrollment," Pet. App. 163a n.14. Comparing the incoming freshman class for the 2004-2005 school year (the last class admitted exclusively through race-neutral admissions) with the incoming freshman class for the 2008-2009 year (the class to which Fisher applied), total African-American enrollment increased by 21.4%. Moreover, in the first four entering classes after UT's 2004 decision to use race-conscious admissions, 435 out of the total of 1,544 African-American students—a full 28%—were admitted through the holistic admissions program. *See* SJA 156a-157a.

These raw numbers only begin to tell the story. Research confirms that increases in the enrollment of African-American students, even on a relatively small scale, have a multiplier effect. A recent study of selective universities found that even "a one percentage point increase in the share of [ ]students [of color] 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*];[12] *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) (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").[13]

---

[12] While some of petitioner's amici rely on this study, s*ee, e.g.*, Amicus Br. of Cal. Ass'n. of Scholars, et al. at 26–27, they ignore important findings, like the one described in the text, and misconstrue others. Notably, this study also provides evidence demonstrating that, on a nationwide scale, percentage plans would be even less effective than UT's Top Ten Percent Plan in ensuring meaningful representation of African-American students. *See* Espenshade & Radford, *No Longer Separate* at 362-64; *cf.* Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. Labor Econ. 113, 116 (2010) (predicting that African-American and Latino enrollment at the most selective colleges and universities would decline 10.2% if race-neutral admissions were mandated nationwide).

[13] Even if petitioner were correct that UT's race-conscious program had only a small impact on enrollment, that would not doom the constitutionality of the policy. *Cf.* Pet. Br. 40-41. Although *Parents Involved* questioned the necessity of a K-12 student assignment plan that had minimal statistical impact, the Court noted that this plan involved rigid, binary racial classifications that could be "determinative standing alone." 551 U.S. at 723; Pet. App. 69a-70a. In *Parents Involved*, the Court distinguished the type of individualized review, at issue

Notwithstanding these meaningful increases in African-American enrollment, UT acknowledges that it has not yet achieved a critical mass of underrepresented minorities. While UT has taken strides to promote a more welcoming and inclusive campus climate, racial hostility directed towards African-American students has not entirely abated.[14] Moreover, African-American students are still represented at mere token levels in too many classrooms and other settings on campus. In the face of these challenges, members of amicus BSA and other current African-American students along with alumni participants in amicus BEST—like the prior generations that fought to integrate UT—are committed to improving the campus community. For instance, one current student recently founded an online newspaper aiming to feature the voices of African-American

---

in *Grutter* and here, where race is considered "as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'" *Parents Involved*, 551 U.S. at 723 (quoting *Grutter*, 539 U.S. at 330); *see also id.* at 793 (Kennedy, J., concurring in part and concurring in the judgment) (distinguishing Seattle's "rigid criteria" from the University of Michigan Law School's holistic review).

[14] *See, e.g.*, Ahsika Sanders, *Racial Conflicts Tarnish History of Roundup*, Daily Texan, Apr. 13, 2012 (connecting a recent incident of hostility to the history of racial tensions between fraternity members and African-American students at annual spring fraternity parties); Ralph K.M. Haurwitz, *UT Student Paper Issues Apology for Cartoon*, Austin American-Statesman, Mar. 28, 2012 (discussing apology issued by Daily Texan for racialized editorial cartoon about the fatal shooting of Trayvon Martin); Andrew Freidenthal, *Shameful Graffiti Paints Larger Picture*, Daily Texan, Sept. 22, 2008 (reporting on a drawing posted in a campus bathroom stall depicting President Obama lynched and hanging from a tree).

students so that they do not feel invisible on campus. As she explained, "I just think there are a lot of issues involving the black community at UT . . . that don't really get reported about." Bobby Blanchard, *New UT Publication Brings Different Perspectives to 40 Acres*, Daily Texan, May 2, 2012. Contrary to petitioner's claim that critical mass should be capped at the level obtained through race-neutral means, amici firmly believe that—consistent with *Grutter*—UT can and, indeed, should do *more*, not less, to ensure that all students fully attain the educational benefits of diversity.

B. Race-conscious holistic review admits students likely to promote the educational benefits of diversity.

Race-conscious holistic review helps the University achieve its goal of ensuring that its student body 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. The University's holistic admissions process provides flexibility to identify and admit students who bring a set of other 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.

Meaningful representation of African Americans among *both* Top Ten Percent and non-Top Ten Percent students is critical to achieving the educational benefits of diversity. In particular, race-conscious holistic review yields uniquely qualified students who otherwise may have been overlooked. Students admitted through the holistic review process

contribute to the vibrancy and diversity of the overall UT student community and also enhance the degree of diversity *within* the African-American community at UT.

Petitioner's proposed race-neutral approach might preserve some racial diversity through Top Ten Percent Plan admissions, on the one hand, but it would likely prevent any improvement in the racial diversity in holistic review admissions, on the other—with significant adverse consequences for UT's educational mission. During UT's eight-year experiment with race-neutral admissions, the percentage of African-American students who were *not* admitted through the Top Ten Percent Plan stagnated at 3-4%. SJA 157a. Between 2005 and 2008, however, after UT reintroduced race as one factor in its individualized review, African-American enrollment as a percentage of non-Top Ten Percent enrollees increased. *Id.*

Of course, as UT emphasizes, it is not just underrepresented minorities who can benefit from consideration of race as one factor among many in UT's holistic review process. Pet. App. 46a-47a. Without the ability to consider race in its holistic admissions process, UT could not decide, for instance, that a non-Top Ten Percent "white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective." *Id.* at 46a. 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, breaking down racial

stereotypes and, ultimately, creating an educational environment where students feel free to develop their individuality.

C. Excluding race from individualized review would demean many students' individual dignity.

Petitioner seeks an admissions policy in which virtually *any* aspect of students' experience, background, and identity can be considered, except for their race. Singling out this one factor, among so many others, contradicts *Grutter*'s requirement that a university's individualized review must be "'flexible enough to consider all pertinent elements of diversity[.]'" 539 U.S. at 337 (quoting *Bakke*, 438 U.S. at 318) (opinion of Powell, J.). Moreover, it sends a message to minority students that a critical element of their identity is irrelevant to, or even unwelcome at, UT.[15] That result is neither constitutionally compelled nor pedagogically advisable in a state and on a campus where race remains a salient factor in students' experiences. *See Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) ("Much remains to be done to

[15] Taken to an extreme, a purely race-neutral holistic review process could result in "a form of viewpoint discrimination" insofar as it would require admissions officials to scrub all references to race from students' essays and every other aspect of their application files before they are evaluated. *See* Gerald Torres, Fisher v. University of Texas*: Living in the Dwindling Shadow of LBJ's America*, 65 Vand. L. Rev. En Banc 97, 110 (2012). Moreover, a race-neutral process may encourage admissions officials to make stereotypical assumptions about applicants' race based on purportedly race-neutral aspects of application files—for example, surnames—that may or may not say anything about their experiences or identities in our increasingly multi-cultural society.

ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions.").

Negotiating life as an underrepresented minority can fundamentally affect the way an individual views the world: "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." *Grutter*, 539 U.S. at 333. Yet, the University does not premise its need for a broadly diverse student body on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. To the contrary, individualized race-conscious review helps to overcome stereotypes suggesting that all students of color (or any students for that matter) think alike. As explained in Section I.A *supra*, the presence of different types of students of various races, with unique perspectives and viewpoints, is the hallmark of UT's push for broader diversity.

For these reasons, requiring the University to exclude consideration of race from its holistic admissions program would force it "to become a much different institution and sacrifice a vital component of its educational mission," as this Court recognized in *Grutter*, 539 U.S. at 340. Percentage plans, by themselves, "may be a race-neutral means of increasing minority enrollment," but "they are not a workable alternative—at least in a constitutionally significant sense—because 'they may 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.'" Pet. App. 54a (quoting *Grutter*, 539 U.S. at 340); *see also* Resp. Br. 31-36. While the Top Ten Percent Plan did achieve some progress, it should not limit UT's ability to do more to expand opportunities for students of all races.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted,

DEBO P. ADEGBILE
ACTING DIRECTOR COUNSEL
Counsel of Record
ELISE C. BODDIE
DAMON T. HEWITT
LETICIA V. SMITH-EVANS
RACHEL M. KLEINMAN
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200
dadegbile@naacpldf.org

JOSHUA CIVIN
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I St., NW, 10th Floor
Washington, DC 20005

Counsel for Amici Curiae

August 13, 2012