

TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iv

Introduction and Summary of Argument 1

Interest of Amici 3

Argument 5

I. From 1997 to 2004, the Court-Imposed Ban on the Consideration of Race in Admissions at UT Austin Resulted in Pervasive Racial Isolation 5

 A. Applications, Admissions, and Enrollment of African American Students Plummeted Following the *Hopwood* Decision 6

 B. Reduced African American Enrollment Also Resulted in Widespread Racial Isolation in UT Austin Classrooms..... 8

 C. Racial Tension on Campus Led to the Establishment of a Task Force on Racial Respect and Fairness..... 9

II. Consideration of Race Within UT Austin’s Holistic Admissions Program is Vital to Creating a Broadly Diverse Student Body..... 10

 A. For African American Students, the Race-Conscious Holistic Admissions Program is an Important Supplement to the Top Ten Percent Plan..... 10

 B. African Americans and Latinos Should Be Considered Separately for Purposes of Determining Critical Mass 10

 C. UT Austin’s Race-Conscious Holistic Admissions Program Permits Consideration of Diversity Beyond Academic Measures 12

III. A Critical Mass of African American Students Opens Pathways to Leadership, Combats Racial Isolation, and Promotes the Educational Benefits of Diversity..... 14

 A. UT Austin’s Race-Conscious Holistic Admissions Program Ensures an Open Path to Leadership for African Americans in Texas 14

 B. UT Austin’s Race-Conscious Holistic Admissions Program is Necessary to Combat the Harms of Racial Isolation..... 16

TABLE OF CONTENTS (continued)

C.	Low Levels of African American Enrollment Deprive All Students of the Benefits of a Diverse Educational Environment.....	18
D.	In Light of the Extensive Segregation of Texas High Schools, a Diverse Student Body is an Even More Critical Goal for UT Austin.....	20
	Conclusion	20

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs do not contest the Supreme Court's ruling that it is constitutional for universities to consider race as one factor among many in a holistic admissions process. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, ___, 127 S. Ct. 2738, 2753 (2007). But make no mistake: Plaintiffs seek to eviscerate these Supreme Court holdings with respect to the University of Texas at Austin ("UT Austin" or the "University"). In direct contravention of *Grutter*, Plaintiffs would replace the University's judgment about the level of minority student enrollment – or "critical mass" – necessary for its educational mission with their own restrictive view of what critical mass means. They would impose a cap that would restrict the University to the low level of diversity it could achieve with race-blind admissions. No precedent supports that position.

There is no need to speculate about the devastating effect that a ban on race-conscious admissions at UT Austin would have on African American, and, as a consequence, all students. In 1997-2004, the period following the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (the "post-*Hopwood* period"), UT Austin was prohibited from considering race in its admissions process. Notwithstanding its efforts to take full advantage of "race-neutral" alternatives, including the Top Ten Percent Plan, House Bill 588, Tex. Educ. Code § 51.803 (1997), African Americans never exceeded 4.5% of the freshman class.

In 2003, the *Grutter* decision overruled *Hopwood*. After thorough review and deliberation, starting with the freshman class of 2005, the University reinstated race as one among many factors it considered to provide context to those applications reviewed under an individualized, holistic admissions process (the "race-conscious holistic admissions program"). As a result, the number of African American freshmen increased. Yet, African American

students still account for just 5.6% of the freshman class who enrolled in the fall of 2008. It is Amici's view that UT Austin needs to do *more*, not less, to ensure that African Americans enroll in greater numbers to achieve the educational benefits of diversity: to promote interactions between students of different racial backgrounds that heighten cross-racial understanding, break down stereotypes, and enrich students' understanding of perspectives and experiences different than their own. *See Grutter*, 539 U.S. at 332. Increased enrollment of African American students will also help to alleviate the racial isolation experienced by these students at UT Austin. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part) (“[A] compelling interest exists in avoiding the harms of racial isolation[.]”).

Furthermore, UT Austin is the state's flagship university, and it plays a particularly critical role in providing a pathway to and preparing students to engage in the civic and political life of an increasingly diverse state and nation. *Grutter*, 539 U.S. at 330-32. It is imperative that the University be “visibly open to talented and qualified individuals of every race and ethnicity.” *Id.* at 332. The continued consideration of race as a factor in its holistic admissions program is therefore a critical component of the University's efforts to “cultivate a set of leaders with legitimacy in the eyes of the citizenry.” *Id.*

“Nothing 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.” *Id.* at 324 (internal quotations and citation omitted). The wide exposure the Court contemplates African American and other students should have to one other could not be achieved if Plaintiffs' views were allowed to replace the University's educational judgment. If Plaintiffs prevail, the

educational mission of UT Austin and, as a consequence, the education of all its students would suffer irreparable damage.¹

INTEREST OF AMICI

Amici are the NAACP Legal Defense & Educational Fund, Inc. (“LDF”), the UT Austin Black Student Alliance, and seven African American students who either are currently enrolled or seek to enroll at UT Austin in the future. The Court has authorized Amici to file this brief. *See* Order (Aug. 11, 2008), Doc. 58.

The Black Student Alliance (“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 representative voice of the Black student body.” UT Austin Black Student Alliance Organization, *About Us*, <http://studentorgs.utexas.edu/texasbsa/> (last visited Apr. 10, 2009). To achieve its goal of “better representation of African Americans and other minority groups on campus,” the BSA conducts both recruitment and retention programs for African American students. *Id.*

Each individual Amici has a strong interest in the preservation of efforts to promote diversity and address racial isolation at UT Austin. Amici Chad Stanton and Anthony D. Williams are African American students currently enrolled at UT Austin. Stanton, a fourth year student, served as president of the Black Student Alliance in 2007-2008, and as an at-large representative for UT Austin’s student government in 2008-2009. In his experience, there are generally only two or three African American students in a class, which translates into a very isolating academic experience. He has to take the initiative to get to know people of other races,

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

because they will not automatically reach out and talk to him. For instance, if he wants to join a study group, or take part in an academic conversation, he has to initiate the contact. His academic performance has ultimately been affected because he does not want to invite himself where he is not wanted, and therefore typically prepares for exams and studies alone. He believes an increased African American presence on campus would help students overcome their prejudices and stereotypes.

Williams, a fifth-year student, was the 2006-2007 president of the Black Student Alliance. Williams has seen that diversity on the UT Austin campus matters not just in recruiting students, but also in retaining them. He has also observed that many African American students lack a sufficient support network and find UT Austin to be an isolating environment. Williams knows that efforts to increase campus diversity are complicated by the unwillingness of current students to recruit and welcome new students into what they consider to be a difficult environment.

Amici Ariel Cecil Barrett, C.J. Davis, Devon Robinson, Trenton Stanton, and Eric Tre Stanton are all African American Texas high school students interested in attending UT Austin. They are concerned that the relief sought by Plaintiffs may limit access for African American students and result in an educational environment even less diverse and not as welcoming.

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 litigated numerous cases to promote diversity and reduce racial isolation in higher education, including *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007);

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).

ARGUMENT

I. From 1997 to 2004, the Court-Imposed Ban on the Consideration of Race in Admissions at UT Austin Resulted in Pervasive Racial Isolation

Plaintiffs urge this Court to curtail the constitutionally permissible consideration of race in admissions at UT Austin. In their estimation, the University can obtain a combined percentage of African American and Latino student enrollment that exceeds 20% *without* using race-conscious measures, and that level of students is sufficient to constitute a critical mass. *See* Pls.' Mot. Summ. J., Doc. 94 at 25. Plaintiffs are mistaken. Under *Grutter*, critical mass is not a rigid, universally applicable percentage of African American or other minority students. Rather, critical mass is the level of enrollment at which African American and other minority students are "meaningfully represent[ed]" and encouraged "to participate in the classroom and not feel isolated." *Grutter*, 539 U.S. at 318 (quotations and citation omitted). Critical mass is achieved when African American and other minority students can participate in a learning environment free of racial stereotypes and hostilities, *see, e.g.*, Daniel Solorzano, et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 Chicano-Latino L. Rev. 15, 29 (2002) (hereinafter "Solorzano, et al., *Racial Microaggressions*") (defining "a positive campus racial climate" to include six elements, including "[t]he absence of racial conflict on campus"), and when students of different backgrounds can engage with, learn from, and understand one another so that they are all prepared to enter an increasingly diverse workforce and world. *See Grutter*, 539 U.S. at 330-33.

There is not real question about what would happen to African American student enrollment at UT Austin if the University returned to race-blind admissions. The evidence is

clear. When the Fifth Circuit's 1996 decision in *Hopwood* compelled UT Austin to eliminate consideration of race from its admissions process, enrollment of African American students plummeted. As a result, African American students were isolated both on campus and in the classroom, and racial hostility increased. The number of African Americans at UT Austin in the post-*Hopwood* period certainly did not constitute a "critical mass," and UT Austin's subsequent efforts to enroll a more racially diverse class should be strongly supported, not curtailed.

A. Applications, Admissions, and Enrollment of African American Students Plummeted Following the *Hopwood* Decision

From the early 1980s through 1994, UT Austin employed an admissions program that took account of an applicant's race among other factors (the "pre-*Hopwood* admissions program"). The University abandoned that program after the Fifth Circuit's ruling in *Hopwood*, 78 F.3d at 962. Although the Supreme Court's 2003 *Grutter* decision overruled *Hopwood*, the post-*Hopwood* and pre-*Grutter* experience at UT Austin was devastating for African Americans.

In UT Austin's fall 1995 freshman class – the last class admitted prior to *Hopwood* – 4.9% of enrolled students were African American. See UT Austin, Office of Institutional Research, *Application/Admission/Enrollment Information for First-Time Freshmen by Ethnicity, Fall 1995*. Following *Hopwood*, African American fall freshman enrollment dropped precipitously to 4.1% in 1996, and to 2.7% in 1997. See UT Austin, Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin* (Dec. 6, 2007) (hereinafter "Dec. 2007 Results of HB 588"), Doc. 96-11 (Lavergne Aff. Ex. A) at 9.

The University and the Texas Legislature took a number of steps to address the significant decrease in the enrollment of African American and other minority students in the post-*Hopwood* period. In 1997, the Legislature enacted what has become known as the Top Ten

Percent Plan, which requires UT Austin to admit any Texas student in the top ten percent of her high school graduating class. Tex. Educ. Code § 51.803 (1997). UT Austin also created scholarship programs, conducted significant outreach to minority students and communities, and adjusted its holistic admissions process to include consideration of “special characteristics” of applicants not admitted through the Top Ten Percent Plan. *See* Defs.’ Facts, Doc. 96-3 at ¶¶ 27, 83, 102-118. Race was not among these factors. *See id.* at ¶ 27, 83, 84.

Despite these efforts, African American enrollment remained low and African American students continued to experience 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”). Between 1998 and 2004, African American enrollment in UT Austin’s freshman class gradually increased from 3.0% to 4.5%. Dec. 2007 Results of HB 588 at 9. But at no point in the post-*Hopwood* period were there more than 309 African American freshmen in a class of nearly 7,000. *See id.*

Research demonstrates that the Top Ten Percent Plan and UT Austin’s recruitment efforts during the post-*Hopwood* period were not primarily responsible for the gradual increase in African American students between 1998 and 2004. Rather, the increase is largely attributable to the fact that African American and Hispanic students “represent a much larger percentage of the college-eligible population” than they did when the Top Ten Percent Plan was developed. Marta Tienda, *Diversifying the College Campus*, *Contexts Magazine*, Fall 2008. By 2008, “less than half of Texas high school graduates [we]re white[.]” *Id.*

The post-*Hopwood* period also had a “chilling effect” on the rate of applications filed by African American high school students. Angel L. Harris & Marta Tienda, *Minority Higher Education Pipeline: Consequences of Changes in College Admissions Policy in Texas* 11 (Texas Higher Educ. Opp. Proj., Working Paper, 2009). This is unsurprising in light of the racial isolation discussed above. If the African American application rate had remained at pre-*Hopwood* levels, the increase in African American high school graduates would have resulted in a much higher number of African American applications to UT Austin than were actually received. *See id.* at 8-10.

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

In 2003, after seven years of experience with race-blind admissions, UT Austin conducted an extensive study examining racial isolation within its classrooms and student population. *See* UT Austin, Office of Admissions, *Diversity Levels of Undergraduate Classes at the University of Texas at Austin, 1996-2002* (Nov. 20, 2003) (hereinafter “Diversity Study”), Doc. 96-11 (Lavergne Aff. Ex. B) at 37. The University concluded that, “during the fall of 2002, nearly 90% of UT undergraduate classes with five to twenty-four students had *no or only one* African American to contribute their experiences or perspectives to a class discussion.” *Id.* at 37 (emphasis added). As compared to pre-*Hopwood* enrollment, by 2002, “at the classroom level diversity ha[d] not improved. Indeed, the percentage of classes with none or only one African American and, separately, the percentage of classes with none or only one Hispanic [was] up noticeably,” exacerbating racial isolation in the classroom. *Id.*; *see also id.* at 40 (showing an increase between 1996 and 2002 from 86% to 90% in the number of classes of 5-24 students with one or no African American students).

Racial isolation was pervasive across a wide range of class sizes. In 2002, over 70% of

UT Austin classes with 25-49 students, 46% of classes with 56-74 students, and 43% of classes with 75-99 students had one or no African American students.² *Id.* at 107.

C. Racial Tension on Campus Led to the Establishment of a Task Force on Racial Respect and Fairness

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 (“Task Force”) 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 “Task Force Report”). The Task Force was not UT Austin’s only attempt to address campus race relations during this period. The University also initiated oversight and diversity evaluation of police practices, held campus meetings and spearheaded student discussion groups on race and diversity, and later hosted a national diversity summit. *Id.* at 20; *see also* UT Austin, *Former Virginia Gov. Wilder to Keynote Diversity Summit and Symposium*, Jan. 15, 2004.

The Task Force Report specifically focused on the need to increase the recruitment, retention, and advancement of underrepresented students to address diversity and racial climate concerns. *See* Task Force Report at 5, 15-17. In response, then UT Austin President Larry Faulkner 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* (hereinafter “Faulkner’s Response”) ¶ 41 (May 10, 2004). As the Task Force Report and Faulkner’s Response demonstrate, UT Austin faced a significant challenge in creating a tolerant

² Given the token numbers of African Americans over a range of class sizes, Plaintiffs are simply mistaken that the University “cherry-picked” statistics supporting the lack of classroom diversity at UT Austin. *See* Pls.’ Reply, Doc. 98 at 23.

campus environment given low minority enrollment in the post-*Hopwood* period.³

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

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

For the freshman class of 2005, UT Austin reinstated race as one factor among many in its admissions review of those students who did not apply through the Top Ten Percent Plan. African American enrollment only began to increase significantly after UT Austin employed this race-conscious holistic admissions program. Since 2005, between 4% and 7% of students not admitted through the Top Ten Percent Plan have been African American, and the freshman African American student population has risen to between 5% and 6%. *See* UT Austin, Office of Admissions, *Implementation and Results of the Texas Automatic Admissions Law (HB 588)* (Oct. 28, 2008), Doc. 94-13 at 8.

For the years 2005-2008, of the 1,544 African American students who enrolled at UT Austin, 435 were *not* admitted through the Top Ten Percent Plan: a full 28% of African American students. *Id.* Thus, contrary to Plaintiffs’ contention that the University admissions program has “only a minimal impact” upon students, *see* Pls.’ Mot. for Summ. J. at 26, the non-Top Ten Percent African American students are a significant and meaningful addition to the African American student population at UT Austin.

B. African Americans and Latinos Should Be Considered Separately for Purposes of Determining Critical Mass

Plaintiffs entirely ignore the low enrollment and racial isolation that African American

³ Since the issuance of the Task Force Report, UT Austin has continued to experience racial incidents. *See, e.g.,* David Kassabian, *Officials Talk Camera Upgrades: New Technology Would Detect Suspicious Acts Around MLK Statue*, Daily Texan, Aug. 27, 2004 (discussing repeated vandalism of the campus Martin Luther King statue); Andrew Freidenthal, *Shameful Graffiti Paints Larger Picture*, Daily Texan, Sept. 22, 2008 (drawing posted in a campus bathroom stall depicting President Obama lynched and hanging from a tree).

students have experienced at UT Austin. *See* Pls.’ Mot. for Summ. J. at 25. In their assessment of critical mass, they focus instead on the combined enrollment of African American and Latino students. *See id.* Yet, nothing in *Grutter* demands that UT Austin lump African Americans and Latinos together. Moreover, in *Parents Involved*, the Supreme Court cautioned *against* considering all minorities as one group. 127 S. Ct. at 2754. The Court criticized the Seattle school district for lumping together students of different racial backgrounds in its efforts to promote diversity, such that 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.* 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.*

Similarly, in rejecting a challenge to the University of Washington Law School’s race-conscious admissions policy, the Ninth Circuit observed that it may be a mistake to treat even members of one ethnic group as homogenous. *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, back-grounds and languages, and thus would bring different experiences to the educational environment.” *Id.*

There is evidence, moreover, that same-race peers have a positive effect on student academic achievement. A 2007 study of UT Austin freshmen showed that a ten-person increase in the size of a student’s same-race peer network was associated with a statistically significant boost in the student’s first semester GPA and a one percentage point increase in the likelihood

that the student would remain in attendance. *See* Jason M. Fletcher & Marta Tienda, *High School Peer Networks and College Success: Lessons From Texas*, University of Kentucky Center for Poverty Research Discussion Paper Series, DP2008-07 Tex., 20-21 (Dec. 19, 2008); *see also* Jeffrey F. Milem, *Educational Benefits of Diversity: Evidence from Multiple Sectors*, in *Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities* 126, 138 (M. J. Chang, et al., eds., 2003) (concluding that “African American students experienced positive learning outcomes when they were exposed to close friends of their own race,” and that, “for African American students to fully benefit from diversity, they must have contact with diverse peers as well as interactions with same-race peers”).

In any event, *Grutter* made clear that “context matters” in a university’s efforts to shape its admissions plan to further its educational mission. *Grutter*, 539 U.S. at 327. Because critical mass is not a one-size-fits-all requirement, UT Austin was entitled to take into account its distinctive role as a flagship university in an increasingly diverse state when it decided to reinstitute the consideration of race in admissions. *See infra* Part IIIA; *see also Fisher v. Texas*, 556 F.Supp.2d 603, 608 (W.D. Tex. 2008) (“Universities throughout the United States serve vastly different communities and constituencies in various geographic areas and pursue different missions, goals, and programs.... The University of Hawaii or University of Wisconsin may have significantly different diversity needs depending on each school’s circumstances than the University of Georgia or the University of Texas at Austin.”).

C. UT Austin’s Race-Conscious Holistic Admissions Program Permits Consideration of Diversity Beyond Academic Measures

The Top Ten Percent Plan admits students exclusively based upon their class rank, and is

therefore inadequate to create a campus that is “broadly diverse.”⁴ *Grutter*, 539 U.S. at 329; *Parents Involved*, 127 S. Ct. at 2754. Without the ability to consider race in its holistic admissions program, UT Austin would be handicapped in evaluating the diversity and distinctive perspectives that students could contribute to the school. For example, the University could not take account of race in the context of an African American applicant who was president of the student body in her majority-white high school. See Walker Dep. (Oct. 7, 2008), Doc. 94-12 at 11. Yet, this type of student could bring a unique perspective to UT Austin.

Moreover, singling out race as the only aspect of a student’s background that may not be considered in admissions could send a message to students that an element of their identity that may well be crucial to their life experiences is wholly irrelevant to UT Austin. See *Grutter*, 539 U.S. at 333 (“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.”).

UT Austin has not expressed an interest “in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,” but rather seeks out a “far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” *Parents Involved*, 127 S. Ct. at 2753 (internal citations and quotations omitted). Requiring the University to excise race from its admissions program would force it “to become a much different institution and sacrifice a vital component of its educational mission.” *Grutter*, 539 U.S. at 340.

⁴ The preservation of UT Austin’s flexibility is especially important because the state legislature has authority to change the Top Ten Percent Program at any point and in ways that may affect racial diversity on campus. See Janet Elliott, *Bill Changing Top 10 Percent Law in House’s Hands*, Houston Chron., Mar. 30, 2009.

III. A Critical Mass of African American Students Opens Pathways to Leadership, Combats Racial Isolation, and Promotes the Educational Benefits of Diversity

As the University determined, addressing racial isolation and ensuring a critical mass of minority students is essential to its mission because it has far-reaching benefits for all students.

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

UT Austin is Texas’ flagship university and a key pathway to leadership in the state and nationwide. As former UT Austin Provost Sheldon Ekland-Olson noted in 2003, the “University of Texas must be a training ground for the leaders of the State of Texas.” UT Austin, *University of Texas at Austin Proposes Inclusion of Race as a Factor in Admissions Process*, Nov. 24, 2003. Many of Texas’ most prominent leaders were educated at UT Austin. For example, 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.⁵ Half of the 60 active and retired federal district court judges in Texas, and six of the 13 active and retired Fifth Circuit judges who sit in Texas, attended UT Austin for college and/or law school.⁶ The list of distinguished alumni honored since 1958 by Texas Exes, UT Austin’s alumni association, includes Texas business leaders, philanthropists, musicians, actors, scientists, university presidents, and elected officials. See Texas Exes: UT Austin Alumni Association, *Distinguished Alumni Awards* (2008), <http://www.texasexes.org/involved/daa.aspx>.

For African Americans, UT Austin’s pathway to leadership has never been entirely open.

⁵ Statistics derived from material available at: Texas House of Representatives, *Biographical Data: House of Representatives*, Jan. 21, 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 Apr. 10, 2009).

⁶ Statistics derived from material available at: United States District Court, Northern District of Texas, *Judges*, <http://www.txnd.uscourts.gov/judges/index.html> (last visited Apr. 10, 2009); United States District Court, Western District of Texas, *Judges’ Contact and Biography Information*, <http://www.txwd.uscourts.gov/general/judges> (last visited Apr. 10, 2009); Federal Judicial Center, *Biographical Directory of Federal Judges*, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Apr. 10, 2009).

As this Court has recognized, for much of its history, UT Austin was formally closed to African American students. *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. Discrimination against blacks in the state system of higher education is well documented in history books, case law, and the State’s legislative history.”).⁷ This 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.”); *cf. Grutter*, 539 U.S. at 332 (recognizing the importance of a university’s efforts to “cultivate a set of leaders with legitimacy in the eyes of the citizenry.”).

As part of its comprehensive review of its admissions policies in 2003-2004, UT Austin took account of the need to advance minorities in key occupations and leadership roles both in Texas and nationwide. UT Austin recognized that “[i]n most occupations in Texas, as in the nation, minorities are underrepresented,” with “the fraction of Blacks well below their overall representation in the labor force.” UT Austin, *Proposal to Consider Race and Ethnicity in Admissions* (June 25, 2004) (hereinafter “2004 Proposal”), Doc. 96-14 (Walker Aff. Ex. A) at 8. This is particularly the case for occupations requiring a college degree. 2004 Proposal at 8. In determining whether to reinstitute race as a factor within its holistic admissions plan, the University properly considered the fact that there was “not yet a visibly diverse set of leaders in

⁷ From the mid-1800s through the 1950s, UT Austin refused to admit African American students. Even after the Supreme Court forced UT Austin to open its law school to African Americans, *see Sweatt v. Painter*, 339 U.S. 629 (1950), things were slow to change. In 1981, the U.S. Department of Education’s Office for Civil Rights (“OCR”) found that Texas had failed to eliminate vestiges of its formerly segregated higher education system. *See Adams v. Bell*, No. 3095-70 at 5 (D.D.C. Mar. 24, 1983). OCR has continued to investigate, and has yet to announce that Texas has satisfied its obligations under federal civil rights law. *See Hopwood*, 861 F. Supp. at 556-57.

[many] occupations that require a college degree.” *Id.* at 9-10.

To create a diverse pipeline of leaders and demonstrate that its pathway to leadership is open to all, UT Austin recognized the need to increase the enrollment of African Americans, who constitute over 10% of Texas’ workforce and 14% of Texas’ high school graduates. *See id.* at 9-10; W. Interstate Comm’n for Higher Educ., *Knocking at the College Door: Projections of High School Graduates by State and Race/Ethnicity, 1992-2022* (2008). While Plaintiffs criticize UT Austin for giving any consideration to Texas demographics in determining what constitutes a critical mass on its campus, *see* Pls.’ Reply, Doc. 98 at 17-19, such an inquiry is necessary to achieve one of the benefits of diversity recognized in *Grutter*: instilling confidence that the pathways to leadership are open to all qualified students, no matter their race or background. *See Grutter*, 539 U.S. at 332. As former UT Austin President Faulkner observed in 2004, “The University has made substantial, consistent improvement in the inclusiveness of its freshman classes and its first-year law classes since the nadir after the *Hopwood* decision. However, we are 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.

B. UT Austin’s Race-Conscious Holistic Admissions Program is Necessary to Combat the Harms of Racial Isolation

Without a critical mass, African American students are racially isolated, often called upon to speak for all African Americans, and expected to represent a stereotypical African American viewpoint. *See Grutter*, 539 U.S. at 319-20. In such an environment, racial misunderstanding can arise. *Id.* at 330. Increased diversity can help to combat these harms.

Students who are isolated in class often find themselves at the center of attention because of their race, and their race alone. *See Solorzano, et al., Racial Microaggressions* at 27. On campuses where minority students are isolated, they “are called upon by instructors to ‘testify’

for all members of their race.” Carole Buckner, *Realizing Grutter v. Bollinger’s “Compelling Educational Benefits of Diversity” – Transforming Aspirational Rhetoric Into Experience*, 72 UMKC L. Rev. 877, 893 (2004). Issues arising from such racial isolation can lead minority students to feel as if they are “‘guests in someone else’s house.’” Shaun R. Harper & Sylvia Hurtado, *Nine Themes in Campus Racial Climates and Implications for Institutional Transformation*, in *Responding to the Realities of Race on Campus: New Directions for Student Services* 7, 13, 20 (S. R. Harper & L. D. Patton, eds., 2008) (citation omitted).

In light of the racial isolation in UT Austin’s classrooms, the Task Force Report recommended that minority students be allowed to exempt themselves from class photo rosters and that the University “[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.* When only one or two minorities are in a classroom, universities are impeded in their role in “diminishing the force of [racial] stereotypes.” *Grutter*, 529 U.S. at 333. Furthermore, when minority students experience discomfort, or are reluctant to speak out, *all* students are deprived of the educational benefits that hearing their viewpoints would impart. *See id.* at 318-20.

As demonstrated by UT Austin’s experience, in the absence of a critical mass of minority students, racial misunderstanding and incidents of racial hostility can also arise. Such incidents impact the subjective experience of minority students and their willingness to remain in school. *See, e.g.*, Sharon Fries-Britt & Bridget Turner, *Facing Stereotypes: A Case Study of Black Students on a White Campus*, 42 J.C. Student Dev. 420 (2001) (predominantly white campuses can produce negative social stigma for students of color); Alberto 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).

C. Low Levels of African American Enrollment Deprive All Students of the Benefits of a Diverse Educational Environment

Higher levels of cross-racial interaction are linked to greater cognitive development, growth in leadership skills, tolerance, and cultural awareness, and higher levels of civic interest among *all* students. *See, e.g.*, Jim Sidanius, et al., *The Diversity Challenge: Social Identity and Intergroup Relations on the College Campus* (2008); Mitchell J. Chang, et al., *Cross Racial Interaction Among Undergraduates: Some Consequences, Causes and Patterns*, 45 Res. in Higher Educ. 529, 530 (2004) (hereinafter "Chang, et al., *Consequences, Causes*"). "These findings support a well-established premise regarding student development, namely, that students' interpersonal interaction with peers is one of the most powerful educational resources in higher education." *Id.* 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(3) J. of Higher Ed. 430, 450 (2006).

Such benefits plainly help all UT Austin students as they prepare to enter and assume leadership roles in an "increasingly diverse workforce and society." *Grutter*, 539 U.S. at 330; *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 Belfield & Henry 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.”).

Studies confirm that exposure to a range of viewpoints enables students to engage more readily in an increasingly diverse society. See Patricia Gurin, et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. Issues 17 (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(10) 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).

These benefits cannot be achieved with only “token” levels of diversity at UT Austin. *Grutter*, 539 U.S. at 333. As discussed *supra* Part I, a significant number of classrooms had only one or no African American students in the post-*Hopwood* period, significantly reducing the types of cross-racial interactions that result in powerful educational benefits. See Chang, et al., *Consequences, Causes* at 535 (finding that classroom interactions had significant effects on intellectual ability, social ability, and civic interactions); see also Anthony Antonio, et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15(8) Psychol. Sci. 507, 509 (2004) (finding that inclusion of minority participants in small group discussions led to greater levels of complex thinking among white students).

The Supreme Court has endorsed the achievement of a level of diversity that “encourages underrepresented minority students to participate in the classroom” and, notwithstanding

Plaintiffs' assertions to the contrary, *see* Pls.' Reply at 22-23, explicitly recognized 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 318 (citations omitted).

D. In Light of the Extensive Segregation of Texas High Schools, a Diverse Student Body is an Even More Critical Goal for UT Austin

For UT Austin students, the importance of learning to understand and cooperate with people of different backgrounds in college is even more critical given the lack of opportunities for such cross-racial interactions in Texas elementary and secondary educational environments.

As this Court has recognized, "[t]he problem of segregated schools is not a relic of the past." *Hopwood*, 861 F. Supp at 554. High levels of both residential and school segregation persist throughout Texas. *See* Marta Tienda & Sunny Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 Am. L. & Econ. Rev. 312, 312, 324 (2006) ("[B]lack students are relatively scarce in predominantly white schools," and "white students are quite scarce in predominantly minority schools."). Overall, African American students are less integrated with whites in Texas secondary schools than students of any other racial group. *See id.* at 323. To the extent cross-racial understanding can be gained "in institutions ranging from Boy Scout troops to public-school kindergartens," *see Grutter*, 539 U.S. at 395 (Scalia, J., dissenting), African American and white students in Texas have had far too few opportunities for such interaction.

CONCLUSION

For the reasons stated above, Amici request that this Court grant Defendants' Motion for Summary Judgment and deny Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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