

No. 11-345

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IN THE  
**Supreme Court of the United States**

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ABIGAIL NOEL FISHER,  
*Petitioner,*

v.

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

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

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**BRIEF OF THE  
AMERICAN ASSOCIATION FOR  
AFFIRMATIVE ACTION  
AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENTS**

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## **QUESTION PRESENTED**

Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions.

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**BRIEF OF THE  
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**IDENTITY AND INTEREST  
OF *AMICUS CURIAE***

The American Association for Affirmative Action (“AAAA”) respectfully submits this brief *amicus curiae* in support of the Respondent University of Texas at Austin (“UT-Austin”).<sup>1</sup>

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<sup>1</sup> Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief’s preparation or submission. Letters from the parties consenting to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court.

AAAA is a national nonprofit association of professionals managing affirmative action, equal opportunity, diversity, and other human resource programs. AAAA is dedicated to the promotion of affirmative action as an instrument to fulfill the nation's promise of equal opportunity. Its mission is to nurture understanding of and offer advice on affirmative action to enhance access, equity, and diversity in employment, economic, and educational opportunities.

Founded in 1974, the AAAA was created primarily by equal opportunity professionals working for colleges and universities. In 2012, AAAA has approximately 1,000 organizational and individual members throughout the United States including members employed in higher education, the private sector, federal, state, and local government, business, social services, the legal profession, and human resources. Approximately one-half of the current membership works for institutions of higher education.

AAAA members are individuals charged with responsibility for compliance with the laws enacted to promote equal opportunity. AAAA is, therefore, uniquely suited to opine on the importance of diversity programs. Further, given its mission and the composition of its membership, AAAA has an exceptional understanding of both (1) the need for diversity on campus in order to ensure that students receive the best possible education and graduate with the skills and experiences necessary to succeed as citizens, workers, and leaders and (2) the importance of diversity on campus to employers who, in order to remain competitive, must hire qualified workers reflecting the increasingly diverse communities and markets in which their businesses now operate.

### SUMMARY OF ARGUMENT

The attack on UT-Austin's admissions process relies upon a number of false premises: that race and ethnicity no longer matter in America; that we can never consider differences in race or ethnicity in a positive way; that we must completely ignore race and ethnicity in order to enforce the Constitution's mandate of equal protection; and that we can perfectly measure academic credentials with race- or ethnic-blind criteria. As an alternative to these false premises, AAAA offers the following arguments in support of UT-Austin's program. First, because race and ethnicity are often important components of identity, barring UT-Austin from ever considering race and ethnicity burdens those applicants who must then be assessed on incomplete information and deprives UT-Austin of the ability to achieve meaningful diversity in the educational setting. Second, Texas has a compelling interest (perhaps even more so than the interest upheld in *Grutter*, due to changing demographics) in obtaining the educational and workplace benefits that flow from a diverse student body. Finally, the purported race- and ethnicity-blind alternatives proposed by opponents to UT-Austin's program are themselves biased. Considering such factors without taking any account of race or ethnicity would fail to advance UT-Austin's compelling interest in achieving a diverse student body.



**ARGUMENT****I. CONSIDERATION OF RACE AS A FACTOR IN ADMISSIONS MUST NOT BE SUBJECTED TO A STANDARD OF REVIEW THAT IS STRICT IN THEORY BUT FATAL IN FACT.****A. The Constitution Permits and Protects the University of Texas at Austin's Holistic Consideration of Each Applicant's Complete Identity as Part of an Admissions Process Intended to Achieve Diversity in the Educational Setting.****1. The Importance of "Identity."**

What determines who a person "really is" and how each person perceives herself and is perceived by others (what could collectively be called a person's "identity") is a complicated matter. A person's time and place of birth, experiences, and innate abilities are all important elements of identity. So are the communities into which one is born and with which one associates. No student of American history could deny the importance or relevance to personal identity of being, for example, Irish or Italian, Jewish or Catholic, or African-American or Hispanic, depending on the era.

When college admissions officers review applications, they are, first and foremost, trying to figure out the identity of the applicant: who is this person, what will she add to the campus community, how will she benefit from what we offer, and what return will she make to our institution and to society?

Weighing the potential and relative worth of 17- and 18-year olds is neither an art nor a science. While one certainly can look at test scores and class rank as indicators of how a high school student may perform in college in terms of future grades and future test scores, such data do not necessarily shed light on how that individual student and the student's family and community will benefit from her time on campus, nor how the student's identity will benefit her classmates and new community.

As an example of the difficulty in quantifying the benefits of higher education, consider the experience of Steven Jobs who has spoken of the important role Reed College played in his life and how classes there influenced his later work at Apple. *See* Steven Jobs, Stanford University Commencement Address (Jun. 12, 2005), *available at* <http://news.stanford.edu/news/2005/june15/jobs-061505.html>. In hindsight, no one would question the wisdom of Reed's decision to admit Mr. Jobs. Yet, based on the arguments asserted by the Pacific Legal Foundation *et al.* in its *amicus curiae* brief in support of the Petitioner, the admission of Mr. Jobs must have been a mistake because he dropped out after six months. Brief of the Pacific Legal Foundation *et al.*, as *Amici Curiae* Supporting Petitioner, *Fisher v. Univ. of Tex. at Austin* at 20-24, (May 29, 2012) (No. 11-345).

For all of these reasons, it makes little sense to think of the admissions process as an effort to identify the "best" candidates in any hierarchical or quantitative sense. To the contrary, institutions of higher education are trying to assemble a mix of people with a wide variety of characteristics in the hope that when they have the opportunity to learn from each other interesting and important things will

happen. When this process is repeated year after year, across thousands of institutions throughout the country, it ends up working well. See Warren W. Willingham *et al.*, *SUCCESS IN COLLEGE: THE ROLE OF PERSONAL QUALITIES & ACADEMIC ABILITY*, College Board Publications (1985); see also, *e.g.*, William Sedlacek, *BEYOND THE BIG TEST: NONCOGNITIVE ASSESSMENT IN HIGHER EDUCATION*, Jossey-Bass (2004).

The consideration of race in the college admissions process must be understood in this context. What a person is capable of over a lifetime can hardly be judged at the age of 17 or 18. In the necessarily inexact process of assembling a college class, one can rarely say that one applicant is “better” than another. The applicants are simply different. Accordingly, selective colleges holistically assess candidates for admission. In light of this meritocratic fallacy, the consideration of race as one of multiple factors that may be relevant to a candidate’s “identity” is not pernicious. The purported concerns of those who oppose any consideration of race in connection with college admissions are driven in large measure by a misperception that applicants are and should be admitted on the basis of a cardinal ranking in terms of worth.<sup>2</sup> If candidates were so ranked, then changing the ranking based on race would be subject to the strongest criticism. However, since such a ranking is neither possible nor desirable, nor is there

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<sup>2</sup> Such a hypothetical ranking would necessarily overlook the fact that universities consider a litany of other factors in determining an applicant’s worth to the school including socio-economic status, athleticism, geographic diversity, extracurricular activities, and legacy status to name a few.

any evidence that this happened to Petitioner in this case, the argument is simply a straw man.

## **2. The Relevance of Race.**

In the United States in 2012, race and ethnicity still influence how people see themselves and are seen. William A. Cunningham *et al.*, *Rapid Social Perception is Flexible: Approach and Avoidance Motivational States Shape P100 Responses to Other-Race Faces*, 6 FRONTIERS IN HUMAN NEUROSCIENCE 140 (May 2012). To a great extent, Americans continue to live in segregated communities. Huge segments of our children grow up in communities and are educated in schools where one racial or ethnic group dominates. Jonathan Kozol, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA*, 10-12 (2006).

For many of these young people, going to college will offer the first opportunity to live and work in a diverse setting. One cannot underestimate the impact of this experience on the student's own sense of identity and on her understanding of the way other people from different backgrounds view themselves and the world. Steve Graham & Irv Cockriel, *A Factor Structure for Social and Personal Development Outcomes in College*, 34 J. STUDENT AFF. RES. & PRAC. 199-216 (Spring 1997). Nor can one underestimate our national interest in making such opportunities possible as we continue to make our way as an increasingly diverse country in an increasingly interconnected and competitive world. See Scott L. Thomas, *Globalization, College Participation & Socioeconomic Mobility in GLOBALIZATION AND HIGHER EDUCATION*, 104-30 (Jaishree Kak Odin & Peter T. Manicas eds., 2004). Given the facts, it

would be odd, indeed, for admissions officers not to give some consideration to race.

Some consideration of race and ethnicity is also relevant because cultural or other differences between some groups may result in certain traditional admissions criteria favoring some groups over others even though such criteria do not meaningfully predict which students will most benefit from admission. See John L. Hoffman & Katie E. Lowitzki, *Predicting College Success with High School Grades and Test Scores: Limitations for Minority Students*, 28 REV. HIGHER EDUC. 455-74 (2005). In other words, college admissions officers must make sure that biases in the process do not result in a failure to properly assess students from minority communities whose ability to benefit an institution or to benefit from an institution may manifest itself in ways that are different from how such abilities are manifested by individuals in communities with which the admissions officer is more familiar or comfortable. Sylvia Hurtado & Christine Navia, *Reconciling College Access & the Affirmative Action Debate in AFFIRMATIVE ACTION'S TESTAMENT OF HOPE: STRATEGIES FOR A NEW ERA IN HIGHER EDUCATION* 113 (Mildred Garcia ed., 1997).

AAAA completely agrees that no one should ever be granted or denied admission to a college or university *because of her race*. But taking all of the above considerations into account, it is untenable to argue that admissions officers should be permitted to consider an applicant's every characteristic and experience *except* race and ethnicity.

Recognizing these realities, this Court has repeatedly held that it is permissible for educational institutions to consider the racial makeup of their classes and to adopt general policies to encourage a diverse

student body, one aspect of which is its racial composition. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring); *Grutter*, 539 U.S. at 328. At the same time, recognizing the risks involved in considering race as part of any process of decision, this Court has held that such policies must be subjected to strict scrutiny. *Johnson v. California*, 543 U.S. 499, 505 (2005); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

Logic and precedent would seem to leave this Court, in deciding the question here presented, with three choices. One choice would be to hold that the Constitution is, indeed, color blind; that it requires – as Justice Kennedy reads the plurality opinion in *Parents Involved* to argue – that schools must ignore the problem of *de facto* segregation and accept “the status quo of racial isolation in schools.” 551 U.S. at 788. This view, Justice Kennedy wrote, is “profoundly mistaken.” *Id.* This view also relies upon an interpretation of the Constitution and the Amendment at issue which is unsupported by the history of the applicable texts or their interpretation by this Court. *See* Andrew Kull, *THE COLOR-BLIND CONSTITUTION* 124, 130 (Harvard University Press 1992). The second choice would be for this Court to substitute its policy preferences for the judgment exercised by the State of Texas in establishing admissions policies for UT-Austin consistent with this Court’s holding nine years ago. As discussed below, this is an unwise option. The third, and proper choice, would be to review UT-Austin’s program in accordance with the precedent established by *Grutter* and affirm the decisions of the courts below.

**B. Strict Scrutiny Must Mean Something Different From Substituting the Justices' Policy Preferences for Those of the State.**

Racial classifications are rightfully suspect and should be subject to strict scrutiny. However, given the deeply serious problems that racial classifications are intended to address, it is equally essential that the Court's review not be strict in theory but fatal in fact.

Thus, while this Court has an obligation to strictly scrutinize UT-Austin's admissions policies, such scrutiny must mean something different from simply substituting the policy preferences of a plurality of the Justices for the policy preferences of UT-Austin's administration. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. \_\_\_, \_\_\_ (slip op. at 6) (2012). ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments.").

Where there is clear record evidence supporting the State's determination that the consideration of race serves a compelling interest and evidence that the State's use of race is narrowly tailored for the purpose of accomplishing that interest, this Court must defer to the State's determination. Under such circumstances, it is not for this Court to decide whether the State's policy is sound. *Cf., id.* at \_\_\_ (slip op. at 2).

**C. The Fifth Circuit Properly Deferred to the University of Texas at Austin's Careful Crafting of Admissions Policies.**

This Court has traditionally given a degree of deference to a university's academic decisions within

constitutionally prescribed limits. *Grutter*, 539 U.S. at 328. Such decisions are based on “complex educational judgments in an area that lies primarily within the expertise of the university.” *Id.* Educational autonomy is grounded in the First Amendment, and it includes the freedom of a university to make its own judgments as to the selection of its student body. *Id.*, (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)). The majority in *Grutter* thus held specifically, “[t]he Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.” *Id.*

The Fifth Circuit, carefully applying *Grutter*, found precisely the right balance between strict scrutiny and deference to the factual determinations of UT-Austin as to what admissions policies would best support its reasonable and appropriate objectives of providing all of its students with an excellent education, serving the state’s population, and training the next generation of leaders. Judge Higginbotham’s decision below is clear and convincing and requires no elaboration here. However, AAAA does wish to address two points raised by Judge Garza in his separate concurring opinion.

First, Judge Garza asks “whether the University’s use of race, which is a ‘highly suspect tool,’ as part of the Personal Achievement Index (“PAI”) score contributes a statistically significant enough number of minority students to affect critical mass at the University of Texas” and concludes that it does not. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 261 (5th Cir. 2011) (Garza, J., concurring). This may be a fair question, but Judge Garza underestimates the



impact of UT-Austin's program by focusing only on 2008 admissions data.

In *Hopwood v. Texas*, 78 F.3d 932 (1996), the Fifth Circuit struck down the admissions process then in use by UT-Austin. The Texas legislature responded by passing an act requiring UT-Austin to guarantee admission to all Texas high school students in the top 10 percent of their class. *Fisher*, 631 F.3d at 224. While the 10 percent rule resulted in increased minority enrollment, it also had a negative impact on UT-Austin's educational program and proved less effective in achieving true diversity than a system in which the PAI score is used to select a greater percentage of each class. *Id.* at 240-45; Supplemental Joint Appendix ("SJA") 30a-31a; *see also Grutter*, 539 U.S. at 340.

Responding to UT-Austin's concerns, the Texas legislature agreed to relax the obligation to admit Top 10% students commencing in 2011. TEX. EDUC. CODE § 51.803(a-1). However, the new legislation will not apply should this Court substitute its judgment for the Texas legislature by barring UT-Austin from continuing to fine tune its admissions processes. *Id.* § 51.803(k)(1). If the legislation is permitted to take effect and UT-Austin is allowed to continue to consider race in admissions, the PAI score can be expected to contribute more significantly to UT-Austin's efforts to affect critical mass.

Second, Judge Garza begins the concluding section of his concurring opinion with a moving plea to end race as a divisive facet of American life. *Fisher*, 631 F.3d at 264 (Garza, J., concurring). We are in whole hearted agreement with Judge Garza with one exception. While conceptions of race and ethnicity have become more complicated, they have not become un-

important.<sup>3</sup> The truth is that the color of one's skin continues to matter. It matters when people seek housing and healthcare, it matters in the quality of available early childhood education, it matters when the police engage in racial profiling, it matters when people enter the criminal justice system, it is evident in popular culture, it is evident in differences in outlooks and perceived avenues of opportunity, and it manifests itself in every possible statistical measure of wellbeing. *See, e.g.,* Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. Times, July 12, 2012, at B3; Amy Farrell *et al.*, *Massachusetts Racial and Gender Profiling Study*, Northeastern University Institute on Race & Justice (2004); *Reducing Racial Disparity in the Criminal Justice System*, Sentencing Project (2008); Sarah Staveteig & Alyssa Wigton, *Racial and Ethnic Disparities: Key Findings from the National Survey of America's Families*, Urban Institute No. B-5 (2000) (examining data collected by the National Survey of American Families to determine statistical measure of wellbeing), available at <http://www.urban.org/publications/309308.html>.

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<sup>3</sup> In her opinion dissenting from the Fifth Circuit's decision to deny rehearing en banc, Chief Judge Edith Jones, argues that the social and cultural differences between people belonging to the same racial or ethnic group are so great as to make meaningless any consideration of race in the admissions process. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 304 (5th Cir. 2011) (Jones, C.J., dissenting). That there are significant differences within larger racial or ethnic groupings is true. Such differences, in fact, drive the need for a critical mass of all types of students to reflect that diversity of experience. Any concerns in this regard are fully resolved through UT-Austin's consideration of race only as part of a holistic process of assessment.

The fact that race *should* not matter does not mean that it no longer *does* matter. Given this reality, judicial intervention to withhold from the states the tools necessary to resolve serious and continuing issues relating to race in America would forestall any resolution of the inequalities in our society. Such a decision would ensure that race will, in fact, remain a divisive facet of American life far into the future.

As noted in *Grutter*, the need to engage in race-based decision making should and will end one day. But that day will come only after we have addressed existing inequalities. There is no better place to address these inequalities than on the campuses of our colleges and universities. This Court should not become the ultimate barrier to progress.

## **II. TEXAS HAS A COMPELLING INTEREST IN SECURING THE EDUCATIONAL AND WORKPLACE BENEFITS THAT FLOW FROM DIVERSITY IN HIGHER EDUCATION.**

In *Grutter*, this Court held that Michigan had a compelling interest in obtaining the educational benefits that flow from a more diverse student body. 539 U.S. at 329-33. Texas has no less a compelling interest in obtaining these benefits than Michigan did in 2003. In fact, in light of demographic trends in Texas, the state may well have an even greater interest than Michigan.

Unlike Michigan in 2003, Texas has been a “majority-minority” state (i.e., a state where the population of minorities is greater than the population of non-minorities) since 2004. Window on State Government, *Texas in Focus: A Statewide View of Opportunities*, [www.window.state.tx.us/specialrpt/tif/](http://www.window.state.tx.us/specialrpt/tif/)

population.html. Because the percent of minorities in Texas today significantly exceeds the percent of minorities in Michigan in 2003, Texas has an even greater need for the cross-racial understanding and the breaking down of racial stereotypes recognized as compelling interests in *Grutter*. Diversity in higher education represents a critical means for Texas to achieve this compelling interest.

In addition to its compelling interest in obtaining the educational benefits that flow from a more diverse student body, Texas also has a compelling interest in the economic benefits that flow from diversity on campus. When businesses in the state succeed, Texas and its citizens enjoy higher tax revenue, greater employment opportunities, and other benefits. This Court has already recognized that the benefits to business of diversity are “not theoretical but real.” *Grutter*, 539 U.S. at 330. Diversity on campus is a necessary predicate to diversity in the workplace.

Recognizing the importance of diversity to success, employers prefer to recruit at colleges with diverse student bodies. Brief for 65 Leading American Businesses’ as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, Nos. 02-241 & 02-516, at 9. Thus, achieving diversity on campus satisfies the twin goals of better employment opportunities for all students<sup>4</sup> and directly meets businesses’ demand for well-qualified, diverse workers.

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<sup>4</sup> AAAA notes that increased on-campus recruiting by employers makes UT-Austin more attractive to the most qualified and talented applicants, which further increases the overall quality and desirability of the admissions class.

The importance of diversity to success in business is supported by multiple studies showing that a diverse workforce provides significant business benefits. Specifically, increasing racial diversity in the workplace increases sales revenue, increases the number of customers, increases market share, and, ultimately, increases profits. Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208 (2009). Increased racial diversity leads to increased employee productivity and performance, decreased lawsuits, increased market opportunities, increased recruitment, increased creativity, and a healthier business image. Katharine Esty *et al.*, WORKPLACE DIVERSITY. A MANAGER'S GUIDE TO SOLVING PROBLEMS AND TURNING DIVERSITY INTO A COMPETITIVE ADVANTAGE 9-10 (1995); *see also Grutter*, 539 U.S. at 330 (“[T]he skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”); Karen A. Jehn *et al.*, *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 ADMIN. SCI. Q. 741 (1999) (an increase in racial diversity in the workplace increases employee morale); Thomas Kochan *et al.*, *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUM. RESOURCE MGMT. 18 (2003) (“Organizations that invest their resources in taking advantage of the opportunities that diversity offers should outperform those that fail to make such investments.”).

The changing demographics in Texas make these workplace benefits even more significant.<sup>5</sup> As the minority population in Texas continues to grow, consumers will expect the workforce of Texas businesses to reflect this change. Likewise, companies will want their workforces to reflect the surrounding population in order to connect with their potential customers and increase sales.<sup>6</sup> In so doing, Texas businesses will look to local institutions like UT-Austin for diverse candidates to fill their workforce. Additionally, the managers of these businesses will need to have skills and experience that can be acquired only through exposure to diverse cultures and ideas in order to relate to increasingly diverse employees. Businesses will again turn to the local public institutions of higher education like UT-Austin to afford the youth of Texas this exposure.

Third, states have a compelling interest in seeing their businesses succeed, providing higher levels of employment for their residents, and generating greater tax revenue to spend on programs for their citizenry. See TEX. TAX CODE ANN. §§ 171.001(a) (2012) (“A franchise tax is imposed on each taxable entity that does business in this state or that is chartered or organized in this state.”); 151.051(a) (“A tax is imposed on each sale of a taxable item in this

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<sup>5</sup> From 2000 to 2010, the percent of Texas’ Hispanic population grew 42 percent and the African-American population grew 22 percent whereas the White population grew just 4.2 percent; by 2020, “Blacks and Hispanics will comprise over half of Texas’s workforce.” Marta Tienda, *Harnessing Diversity in Higher Education: Lessons from Texas*, FORD POLICY FORUM at 53 (2006), <http://net.educause.edu/ir/library/pdf/ff0612S.pdf>.

<sup>6</sup> Of course, it is not suggested that changing demographics could ever justify the goal of proportional representation.

state.”). The importance of a diverse workforce has been confirmed by some of the biggest names in American business including American Airlines, Inc. and Shell Oil Co. – both based in Texas:

Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from themselves.

Brief for *Amici Curiae* 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, Nos. 02-241 and 02-516, at 5. If for no other reason than ensuring the success of businesses based in Texas, the state has a compelling interest in providing highly educated individuals of a diverse background for those companies to employ.

### **III. THE UNIVERSITY OF TEXAS AT AUSTIN’S PLAN IS NARROWLY TAILOR-ED AND NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST.**

#### **A. Race-Blind Admissions Processes Are Not Race-Neutral.**

Petitioner alleges that UT-Austin abridged her right to equal protection by rejecting her application despite “academic credentials that exceeded those of many admitted minority candidates.” Brief for Petitioner at 2. Even if this were factually correct,<sup>7</sup>

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<sup>7</sup> The truth of this allegation seems to have been presumed for purposes of Respondent’s summary judgment motion, but it is false. Petitioner’s achievement index (“AI”) of 3.1 was too low to

Petitioner’s argument rests on the false premise that “academic credentials” would be perfectly measured by race-blind admissions criteria. Her argument disregards the deep and well-known racial biases in numerical assessments such as test scores.

**1. Admissions Criteria Such as Test Scores Have a Significant Adverse Impact on African-American and Hispanic Students.**

UT-Austin’s primary measure of academic potential is an AI calculated from the applicant’s class rank percentile and two test score components from either the SAT or the ACT. African-American and Hispanic students score significantly lower than their White counterparts on every portion of the AI formula. Among more than 3,500 high school students surveyed by the Texas Higher Education Opportunity Project (“THEOP”), the mean self-reported class rank percentile was approximately 75 for Whites, 66 for African-Americans, and 69 for Hispanics. Blanca Plazas Snyder, *The Role of Pre-College Factors and the Texas Top 10% Law on College Attendance*, (unpublished Ph. D. dissertation, University of Houston) at 153 (Table 24) (2008).<sup>8</sup> Discrepancies in SAT and ACT scores are even wider.

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gain admission regardless of her PAI, which is the only admission criterion for which race was considered. Joint Appendix (“JA”) at 415a-416a; *see also* Appendix the Petition for Certiorari (“App”) at 30a (“Without a sufficiently high AI and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.”).

<sup>8</sup> Mean percentiles were calculated by assuming that the group of respondents in each decile ranked, on average, at the midpoint within each decile – i.e., the 95th percentile for the top decile, the 85th percentile for the second decile, and so on.



For 2008, the year in which Petitioner sought admission, mean SAT scores for White test-takers were 528 in Critical Reading and 537 in Mathematics. African-Americans, by contrast, averaged only 430 in Critical Reading and 426 in Mathematics, while the mean Critical Reading and Mathematics scores for Hispanics were 455 and 461 respectively. The College Board, *2008 College-Bound Seniors: Total Group Profile Report* 7 (Table 8), <http://professionals.collegeboard.com/data-reports-research/sat/cb-seniors-2008>. Racial disparities in test scores have been widening with the 2008 class producing the largest deficit between White and African-American test takers in two decades. *The Racial Scoring Gap on the SAT College Admission Test Is Now Wider Than It Has Been in 20 Years*, 61 J. BLACKS IN HIGHER ED. 74 (2008).

Having already gained proportionately fewer admissions under the Top 10% rule, which relies solely upon class rank,<sup>9</sup> minority candidates suffer even greater deficits in non-Top 10% admissions due to the preeminence of test scores in UT-Austin's AI criteria. Aspiring African-American liberal arts, communications, fine arts, social work, and education students rank an average of 0.4 points lower on the four-point AI scale. Hispanic applicants to those same programs face an average shortfall of 0.3 points. See Appendix to Brief of *Amicus Curiae* AAAA, *infra* at Table 1. Greater racial divides infect other programs, with discrepancies ranging as high as 0.7 points for

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<sup>9</sup> In the THEOP sample, 26.0% of White respondents reported that they were ranked in the top 10% of their Texas high school class compared to only 12.3% of African-Americans and 19.9% of Hispanics. Snyder, *supra* at 153 (Table 24).

African-Americans and 0.4 points for Hispanics seeking admission to the School of Business. *See id.*

Under a system in which swings of as few as 0.8 AI points can spell the difference between automatic admission and nearly certain rejection,<sup>10</sup> race-based scoring deficits of 0.3 to 0.7 AI points can have devastating consequences. The extent of the adverse impact is obvious from UT-Austin's global 2008 admissions statistics. UT-Austin received a total of 29,501 applications for the Class of 2008, of which 14,038 came from White candidates, 4,344 from Asian-Americans, 2,245 from African-Americans, and 6,081 from Hispanics. SJA at 156a. Setting aside applicants who qualified under the Top 10% program, the group of non-Top 10% candidates included 9,598 Whites, 2,600 Asian-Americans, 1,652 African-Americans, and 3,863 Hispanics. *Id.* at 158a (figures calculated by subtracting Top 10% admissions in Table 2 from total applications in Table 1). Admission rates from this non-Top 10% group were 22.3% for Whites (2,142 of 9,598) and 21.7% for Asian-Americans (565 of 2,600) but only 8.8% for African-Americans (146 of 1,652) and 10.4% for Hispanics (403 of 3,863). *Id.* (non-Top 10% admissions calcu-

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<sup>10</sup> Non-top 10% applicants for many UT-Austin programs who achieve specified minimum AI scores are placed in an "A" group and offered admission based solely on their AI. "A" group scoring standards range from a high of 3.9 in Liberal Arts to a low of 3.4 in UT-Austin's Special Education and Bilingual Education programs. On the other end of the spectrum, applicants with AI scores below 2.6 are relegated to a "C" group rendering their admission "highly unlikely." JA at 410a. The full span between guaranteed "A" group admission and the almost hopeless "C" group classification thus is only 0.8 to 1.3 points depending upon the program in question.

lated by subtracting Top 10% admissions from total admissions in Table 2).

In short, even with the benefit of UT-Austin's modest consideration of race for non-Top 10% applicants, acceptance rates for White and Asian-American applicants more than doubled the rates for African-American and Hispanic candidates. The likelihood that such a huge gap could occur by random chance is less than 1 in 24 novemvigintillion ( $2.4 \times 10^{91}$ ) representing a disparity exceeding 20 standard deviations.<sup>11</sup>

## **2. Lower Standardized Test Scores Do Not Mean that Minorities Are Academically Inferior.**

Such enormous admission rate disparities could only be justified by extremely compelling evidence that African-American and Hispanic students lag behind in collective academic prowess by similarly gaping margins. As a starting point, any contention that members of a certain race are inherently less capable of success in their chosen field should be approached with extreme skepticism. *See Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) (“[I]ncreased opportunities have produced an ever-increasing number of demonstrations that members of disadvantaged races are entirely capable not merely of competing on an equal basis, but also of

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<sup>11</sup> The reported probability was calculated by applying a two-tailed Fisher's Exact Test to a distribution of 549 successful and 4,966 unsuccessful African-American and Hispanic applicants and 2,707 successful and 9,491 unsuccessful White and Asian-American applicants. The standard deviation value was calculated by evaluating this probability under a standard normal distribution.

excelling in the most demanding professions.”). The deeply-flawed tests used to evaluate college admission candidates do not come close to rebutting the presumption of equal capability. To the contrary, surveys of SAT and ACT data produce such weak correlations between scores and college performance that the findings would fall short of minimum validation standards established for selection tests under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The most current validation study for the SAT, which applies to a majority of UT-Austin applicants,<sup>12</sup> was released in 2008. Jennifer L. Kobrin *et al.*, *Validity of the SAT® for Predicting First-Year College Grade Point Average*, College Board Research Report 2008-5 (2008). That study assesses validity through a “correlation coefficient” that quantifies the relationship between test scores and first year grade point averages. *Id.* at 5. Correlation coefficients are reported on a scale from -1.0 to 1.0 with the former indicating a perfectly negative relationship and the latter indicating a perfectly positive relationship between test scores and college success. *Williams v. Ford Motor Co.*, 187 F.3d 533, 540 (6th Cir. 1998). Courts generally require correlation coefficients of at least 0.3 to establish test validity. *See, e.g., Brunet v. City of Columbus*, 1 F.3d 390, 410 (6th Cir. 1993), *cert. denied sub nom.*; *Brunet v. Tucker*, 510 U.S. 1164 (1994); *Clady v. Los Angeles County*, 770 F.2d

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<sup>12</sup> See Gary M. Lavernge & Bruce Walker, *Developing a Concordance Between the ACT Assessment and the SAT I: Reasoning Test for The University of Texas at Austin*, University of Texas Office of Admissions Research, at 4 (July 30, 2001) (“Historically, . . . UT-Austin receives far more SAT than ACT score reports.”).

1421, 1431-32 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986).<sup>13</sup> When a test has adverse impact against specific groups, this threshold increases. *Clady*, 770 F.2d at 1432 (“As a general principle, the greater the test’s adverse impact, the higher the correlation which will be required.”) (citing *Guardians Ass’n of the New York City Police Dep’t v. Civil Service Comm’n*, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981)).

The unadjusted correlation coefficients for the SAT critical reading and mathematics tests are 0.29 and 0.26, respectively. *Kobrin et al.*, *supra*, at 5. These correlations do not even reach the minimum validity threshold of 0.3 before any further compensation for the SAT’s substantial adverse impact on minority groups such as African-Americans and Hispanics.

The minuscule proportion of SAT score variability that is linked to true academic ability leaves ample room for strong non-academic influences. Not surprisingly, therefore, research reveals many factors unrelated to academic potential that disproportionately depress the average scores of specific minority groups. A seminal article by research psychologist Roy O. Freedle concludes that cultural and statistical biases contribute significantly to poorer outcomes for African-Americans, evidenced by the fact that scoring differences are narrower for harder questions and wider for easier items that are more likely to be

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<sup>13</sup> Although a correlation coefficient less than 0.3 can be statistically significant, it is not usually considered “practically significant” because so little of the variation in success is correlated with test scores in comparison to the much larger proportion of the distribution that is randomly scattered. See *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 161 (D. Mass. 2006).

tainted by cultural differences in reactions to verbal cues. Roy O. Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 HARV. ED. REV. 1 (2003). Psychological factors such as “stereotype threat” also lead non-Asian minorities to underperform as compared to Whites and Asians with similar cognitive and academic abilities. See, e.g., Charles A. Scherbaum *et al.*, *Examining the Effects of Stereotype Threat on Test-Taking Behaviors*, 14 SOC. PSYCHOL. ED. 361 (2011). Differences in test preparation appear to contribute further to racial disparities. See Aleksander Ellis & Ann Marie Ryan, *Race and Cognitive-Ability Test Performance: The Mediating Effects of Test Preparation, Test-Taking Strategy Use and Self-Efficacy*, 33 J. APPLIED SOC. PSYCHOL. 2607 (2003).

The faulty presumption that UT-Austin is admitting less qualified African-Americans and Hispanics to the detriment of more qualified Whites, which rests so heavily on unreliable test scores, infects virtually every aspect of the arguments put forward by Petitioner and supporting *amici*. Petitioner argues, for example, that UT-Austin’s policy “places an unwarranted badge of inferiority on the thousands of Hispanic and African-American applicants who are admitted to UT-Austin each year based on merit and achievement,” Petitioner’s Brief at 42, as if student peers would be “warranted” in placing a “badge of inferiority” on minority students with marginally lower test scores who gain admission after UT-Austin’s very limited consideration of race.<sup>14</sup> Simi-

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<sup>14</sup> If students are truly treating African-American and Hispanic colleagues as “inferior” without knowledge of their individual circumstances, they are engaging in blatant race discrimination. The proper remedy for this is education to alter

larly, the Pacific Legal Foundation *et al.* assert that race-conscious policies harm minority students by creating an “academic mismatch” with the institutions to which they gain admission, Brief *Amicus Curiae* of the Pacific Legal Foundation *et al.* at 20-21, but the alleged “mismatch” is measured by the faulty metric of “test scores.” *Id.* at 21 (quoting Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 2 U. TOL. L. REV. 377, 384 (1970); see also Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 415 (2004) (cited in Brief *Amicus Curiae* of the Pacific Legal Foundation *et al.* at 20) (defining “mismatches” using an “admissions index” giving 60% weight to LSAT scores and 40% weight to undergraduate grade point average).

**B. Socioeconomic Status Is Not a Proxy for Race in Higher Education Admissions.**

AAAA posits that there are no alternatives that are truly and effectively “race-neutral.” However, in any “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks,” *Grutter*, 539 U.S. at 339, socioeconomic status cannot serve as a proxy for race.

Race continues to matter in America. *Id.* at 333. Segregation patterns in housing,<sup>15</sup> persistent racial

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these attitudes, not admissions policies that exclude qualified minority students from environments that have the potential to turn hostile.

<sup>15</sup> John Iceland *et al.*, United States Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980-2000*, at 3-4 (Oct. 31, 2002), available at [http://www.census.gov/hhes/www/housing/housing\\_patterns/pdftoc.html](http://www.census.gov/hhes/www/housing/housing_patterns/pdftoc.html)

disparities in unemployment rates,<sup>16</sup> the vast wealth gap between racial minorities and non-minorities,<sup>17</sup> inequalities in elementary and secondary education,<sup>18</sup> disparities in sentencing and arrests,<sup>19</sup> hate crimes,<sup>20</sup> and the thousands of race discrimination charges filed every year,<sup>21</sup> serve as ample indicators of the continuing problem of the “color line” in the 21st

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<sup>16</sup> Bureau of Labor Statistics, *The Employment Situation – June 2012*, at Table A-2 (Jul. 6, 2012), <http://www.bls.gov/news.release/empstat.nr0.htm>; see also, Emily Jane Fox, *African-American Jobless Rate Surges*, CNN Money (Jul. 6, 2012), <http://money.cnn.com/2012/07/06/news/economy/black-unemployment-rate/index.htm>

<sup>17</sup> See Hope Yen, *Wealth Gap Widens Between Whites, Minorities*, Associated Press (Jul. 26, 2011), <http://news.yahoo.com/wealth-gap-widens-between-whites-minorities-040224418.html>

<sup>18</sup> See, e.g., Children’s Defense Fund, “Elementary and Secondary Education,” <http://www.childrensdefense.org/policy-priorities/elementary-high-school-education/> (last visited Aug. 6, 2012); Jonathan Jacobson *et al.*, *Educational Achievement and Black-White Inequality*, U.S. Department of Education, National Center for Education Statistics (July 2001), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2001061>

<sup>19</sup> See, e.g., *Reducing Racial Disparity in the Criminal Justice System*, Sentencing Project. See, e.g., *10 Years Later, Dragging Death Changes Town*, Associated Press (Jun. 6, 2008), [http://www.msnbc.msn.com/id/25008925/ns/us\\_news-life/t/years-later-dragging-death-changes-town/](http://www.msnbc.msn.com/id/25008925/ns/us_news-life/t/years-later-dragging-death-changes-town/)

<sup>20</sup> See, e.g., *10 Years Later, Dragging Death Changes Town*, Associated Press (Jun. 6, 2008), [http://www.msnbc.msn.com/id/25008925/ns/us\\_news-life/t/years-later-dragging-death-changes-town/](http://www.msnbc.msn.com/id/25008925/ns/us_news-life/t/years-later-dragging-death-changes-town/)

<sup>21</sup> U.S. Equal Employment Opportunity Commission, *Race-Based Charges FY 1997 - FY 2011*, <http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm> (last visited Aug. 6, 2012). In FY 2011, 35,395 charges of race-based discrimination were filed with the EEOC; in FY 1997, 29,199 charges were filed. For National Origin discrimination, 11,833 charges were filed compared with 6,712 in FY 1997.



Century. W.E.B. Du Bois, *THE SOULS OF BLACK FOLK* 1 (Oxford University Press 2007) (1903) (“The problem of the Twentieth Century is the problem of the color-line.”). One study of “ethnic sounding names” serves as a cautionary tale for those who would suggest that race is no longer an issue. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991-1013 (2004), available at <http://www.aeaweb.org/articles.php?doi=10.1257/0002828042002561>.

It has been argued, nevertheless, that institutions of higher education should replace race as a factor in admissions with alternatives such as socioeconomic status (“SES”) or class. According to this view, SES serves as a proxy for race and is a more desirable alternative to race. Advocates of this alternative suggest that the consideration of race in admission decisions has a stigmatizing effect and perpetuates stereotypes against those who are the beneficiaries of such programs. They further suggest that a socioeconomic model would make the beneficiaries less visible and susceptible to isolation and stigma and less inclined to self-segregate. Richard H. Sander, *Class in American Legal Education*, 88 DEN. UNIV. L. REV. 631, 668 (2011).

These individuals also argue that a system based on SES would be fairer because it would avoid giving disadvantaged minorities greater preferences than others, including low income White students. *Id.* at 633. While the Court has held that public institutions of higher education must consider race-neutral alternatives before using race as a factor in admissions, *amicus* submits that “class” or SES, as a

proposed race-neutral alternative, cannot serve as a proxy for race and should not be considered a suitable substitute. Research shows that Whites outperform underrepresented minorities in standardized testing within income groups. Carson Byrd *et al.*, *Class-Based Policies Are Not a Remedy for Racial Inequality*, CHRON. OF HIGHER EDUC. (Sept. 25, 2011), <http://chronicle.com/article/Class-Based-Policies-Are-Not-a/129097/>. The consideration of class or SES cannot compensate for these deficiencies:

When we assume that class-based affirmative-action policies will automatically help low-income minority students get into college, we also assume that poor minority students are just as prepared as poor White children for higher education, which is not the case. . . . Low socioeconomic status has not been the basis for systematic exclusion of students from higher education; race and ethnicity have.

*Id.*

The contribution of minorities to SES diversity is modest. “Eliminating a number of high SES Blacks to take up more slots for low SES White students is not going to make much of a difference because their numbers are simply too small to have a large impact.” Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DEN. UNIV. L. REV. 732-33 (2011). By removing the higher income minority students, an SES-based admission system would also result in a loss of students whose performance more closely resembles that of their White peers. This would lead to a drop in overall African-American student performance and an increase in stigma. *Id.* at 734.

In defending its limited consideration of race and ethnicity as part of a holistic process, UT-Austin is being whipsawed between those who claim that affirmative action significantly burdens Whites or Asians and those who claim (like Petitioner) that the use of racial classifications is unconstitutional precisely because it has only a “minimal impact” on those it intends to benefit. Petitioner’s Brief at 38. Clearly both claims cannot be true; and, in fact, they are both wrong.

First, the burden of affirmative action programs on Whites or Asians is actually small. As Professor Goodwin Liu reminds us:

Using 1989 data from a representative sample of selective schools, former university presidents William Bowen and Derek Bok showed in their 1998 book, “The Shape of the River,” that eliminating racial preferences would have increased the likelihood of admission for White undergraduate applicants from 25 percent to only 26.5 percent.

Goodwin Liu, *The Myth and Math of Affirmative Action*, Washington Post, Apr. 14, 2002, at B1, available at <http://www.vpcomm.umich.edu/admissions/statements/liu.html>. Second, the positive impact on the beneficiaries of affirmative action and on the college community as a whole is actually immense. Even a small number of diverse candidates can have an outsized impact on the overall diversity of an admissions class by furthering UT-Austin’s important goals of promoting cross-racial understanding, helping to break down racial stereotypes, promoting learning outcomes, better preparing students for an increasingly diverse workforce and society, and enabling students to better understand persons of

different races. *See Grutter*, 539 U.S. at 330. There is little numeric difference in a political science class of 30 individuals between one and two Hispanic students. However, when those additional Hispanic students present views that are different not only from the White students, but from each other, the impact of a diverse class becomes self-evident.

The challenges of disadvantaged minorities attending institutions of higher education persist in the 21st century. Although the share of African-American students participating in postsecondary education increased from 51 percent to 53 percent between 1994 and 2005, their shares in the more competitive colleges<sup>22</sup> declined in relation to their increasing share of the high school class. Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access Is Increasing Inequality, and What to Do About It*, in REWARDING STRIVERS 133-134 (Richard D. Kohlberg ed., 2010). Hispanic students have also lost ground relative to their growing population. The rate of college attendance among Hispanics has not kept up with their population, and Hispanics who do pursue postsecondary education are overrepresented in community colleges and underrepresented in more selective institutions. *Id.* at 134-35.

While there may be good reason to increase the emphasis on SES-based affirmative action, this does not mean that there are good empirical reasons to abandon race-based or ethnically-based affirmative

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<sup>22</sup> Research has shown that the more selective the school, the more beneficiaries achieved after graduation both in terms of earnings and leadership in community and social service organizations. Derek Bok & William G. Bowen, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 281-82 (1998).

action, either as a separate strategy or as a factor in class-based affirmative action. *Id.* at 166. The disadvantages of low socioeconomic status are more “onerous” for minorities, especially African-Americans. *Id.* “Socioeconomic differences, when combined with race, have more powerful disadvantaging effects, and overcoming those effects is more difficult for the minority student.” *Id.* Abandonment of race considerations in favor of SES, moreover, would worsen the racial divide in higher education. Indeed, even Professor Richard Sander, the leading advocate of the SES alternative, concedes that a substitution of SES for race in the admissions process would result in a diminution of racial and ethnic diversity. Sander, *supra* at 664 n.90. Thus, while public institutions of higher education must consider race-neutral alternatives before using race as a factor in admissions, neither class nor SES can effectively serve as a proxy for race or as a substitute approach to achieve the compelling need for diversity in higher education.

### CONCLUSION

As this nation becomes increasingly diverse, institutions of higher education cannot abandon race-based programs of inclusion. As equal opportunity professionals working in higher education and other sectors, AAAA members are on the front lines of the diversity debate. From our perspective, colleges and universities need to allow for the fullest productivity in order to be internationally competitive. The United States is being surpassed by China, India, and other nations that are investing in their students, particularly in science, technology, engineering, and mathematics. This is a matter beyond just national interest; it is a matter of national security.

We are also concerned that a disaffected class may be created when opportunities are foreclosed from identifiable groups. The Court in *Grutter* articulated the importance of legitimacy of our institutions. 539 U.S. at 332 (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”). With changing demographics, this legitimacy becomes a serious concern. This nation must be – in theory and in fact – as inclusive as possible.

As compliance officers, AAAA members know that the laws enacted to promote equal opportunity in education and employment enable us to encourage our colleagues to match behavior with thought and policy. We need those tools to remain in place; otherwise we are left with rhetoric and pragmatism and little progress. The color line remains an issue. We have few minorities at the highest levels as chancellors and presidents. We continue to observe racism and racial stereotyping on our campuses, and we have witnessed the isolation of students of color. The community at large is reflected on campus, and we are a microcosm of that community.

As professionals representing major employers, AAAA members have also seen the importance of recruiting top notch talent and understand the relationship between graduating excellent students of all races and employing outstanding, qualified members of the workforce. Many of AAAA’s members are responsible for preventing and investigating acts of discrimination against students and employees, and therefore have a dual responsibility to promote equal education opportunity as well as equal employment

opportunity. We know that students in non-diverse classrooms are unprepared to go to work whether as educators, physicians, or sales people sent out to serve a community that is diverse.

This is the wrong case in which to overturn all of the Court's prior decisions by holding that the Constitution, without exception, bars all racial classifications. Such a major change in the Court's jurisprudence should not be based upon the unusual facts in this case, particularly when there are real doubts as to whether this petitioner has even presented a case or controversy sufficient to support the Court's exercise of jurisdiction and without any other federal circuit having considered the issues before the Court. This is also the wrong case in which to substitute the Justices' policy preferences for those of state officials. The record demonstrates that UT-Austin designed and implemented its program in strict compliance with the Court's holding in *Grutter*.

The State of Texas has offered many compelling reasons for considering race holistically, as one factor among many, as part of a carefully constructed admissions process. These reasons are supported by empirical evidence and shared by an overwhelming majority of educational institutions. This Court can only find UT-Austin's admissions procedure to be unconstitutional by substituting its judgment for the judgment of the State of Texas. Respectfully, it should not do so.

As Justice Blackmun wrote in *Bakke*, "[i]n order to get beyond racism, we must first take account of race. There is no other way." 438 U.S. at 407 (Blackmun, J., concurring). Some holistic consideration of race as a factor in higher education admissions is an essential link to ensuring equal education *and* equal

employment opportunity. The Framers of the Fourteenth Amendment would agree that the intended beneficiaries of this law should not be the ones foreclosed from its reach.

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## **APPENDIX**

**Table 1: Differences in Average AI Score by Race and Program<sup>1</sup>**  
**African-American Applicants Submitting SAT Scores,**  
**Compared to White Applicants:**

<b>Program(s)</b>		<b>Verbal</b>	<b>Math</b>	<b>Rank</b>	<b>Total</b>
Liberal Arts,					
Communications,	Regression Coefficient	.00142000	.00191000	.01459000	
Fine Arts,	Average Race Deficit	98	111	9	
Social Work,	Impact on AI	.13916000	.21201000	.13131000	.48248000
and Education					
Nursing,	Regression Coefficient	.00088166	.00230000	.02416000	
Natural Sciences,	Average Race Deficit	98	111	9	
and Architecture	Impact on AI	.08640268	.25530000	.21744000	.55914268
	Regression Coefficient	.00072937	.00313000	.02285000	
Engineering	Average Race Deficit	98	111	9	
	Impact on AI	.07147826	.34743000	.20565000	.62455826
	Regression Coefficient	.00157000	.00229000	.03419000	
Business	Average Race Deficit	98	111	9	
	Impact on AI	.15386000	.25419000	.30771000	.71576000

<sup>1</sup> Regression Coefficients are reproduced from App. at 372a-373a (Defendants' Statement of Facts). Average Race Deficits are the reported differences in average White test scores or rank percentiles and comparable figures for African-Americans or Hispanics, as applicable. SAT data were taken from The College Board, *supra*, at 7 (Table 8); ACT data were taken from Susan Aud *et al.*, *Status and Trends in the Education of Racial and Ethnic Groups* 85 (National Center for Education Statistics) (2010) (Table 15.2b, data for 2008); and class rank percentile data were taken from Snyder, *supra*, at 153 (Dec. 2008) (Table 24). Impact on AI was calculated by multiplying each Average Race Deficit by the corresponding Regression Coefficient and adding them to produce a total. Adverse impacts reported in this brief were rounded down to the nearest tenth and, to that extent, are potentially underestimated.

***African-American Applicants Submitting ACT Scores,  
Compared to White Applicants:***

<b><i>Program(s)</i></b>	<b><i>Verbal</i></b>	<b><i>Math</i></b>	<b><i>Rank</i></b>	<b><i>Total</i></b>
Liberal Arts,				
Communications,	Regression Coefficient .02513000	.04577000	.01351000	
Fine Arts,	Average Race Deficit 5.6	4.8	9	
Social Work,	Impact on AI .14072800	.21969600	.12159000	.48201400
and Education				
Nursing,	Regression Coefficient .00824000	.05007000	.02199000	
Natural Sciences,	Average Race Deficit 5.6	4.8	9	
and Architecture	Impact on AI .04614400	.24033600	.19791000	.48439000
Engineering	Regression Coefficient .01074000	.07335000	.02708000	
	Average Race Deficit 5.6	4.8	9	
	Impact on AI .06014400	.35208000	.24372000	.65594400
Business	Regression Coefficient .02892000	.05405000	.03409000	
	Average Race Deficit 5.6	4.8	9	
	Impact on AI .16195200	.25944000	.30681000	.72820200

**Hispanic Applicants Submitting SAT Scores,  
Compared to White Applicants:**

<b>Program(s)</b>	<b>Verbal</b>	<b>Math</b>	<b>Rank</b>	<b>Total</b>
Liberal Arts,				
Communications,	Regression Coefficient .00142000	.00191000	.01459000	
Fine Arts,	Average Race Deficit 73	76	6	
Social Work, and Education	Impact on AI .10366000	.14516000	.08754000	.33636000
Nursing,				
Natural Sciences, and Architecture	Regression Coefficient .00088166	.00230000	.02416000	
	Average Race Deficit 73	76	6	
	Impact on AI .06436118	.17480000	.14496000	.38412118
Engineering				
	Regression Coefficient .00072937	.00313000	.02285000	
	Average Race Deficit 73	76	6	
	Impact on AI .05324401	.23788000	.13710000	.42822401
Business				
	Regression Coefficient .00157000	.00229000	.03419000	
	Average Race Deficit 73	76	6	
	Impact on AI .11461000	.17404000	.20514000	.49379000

***Hispanic Applicants Submitting ACT Scores,  
Compared to White Applicants:***

<b><i>Program(s)</i></b>	<b><i>Verbal</i></b>	<b><i>Math</i></b>	<b><i>Rank</i></b>	<b><i>Total</i></b>
<b>Liberal Arts,</b>				
Communications,	Regression Coefficient .02513000	.04577000	.01351000	
Fine Arts,	Average Race Deficit 4	2.8	6	
Social Work, and Education	Impact on AI .10052000	.12815600	.08106000	.30973600
<b>Nursing,</b>				
Natural Sciences, and Architecture	Regression Coefficient .00824000	.05007000	.02199000	
	Average Race Deficit 4	2.8	6	
	Impact on AI .03296000	.14019600	.13194000	.30509600
<b>Engineering</b>				
	.01074000	.07335000	.02708000	
	Average Race Deficit 4	2.8	6	
	Impact on AI .04296000	.20538000	.16248000	.41082000
<b>Business</b>				
	Regression Coefficient .02892000	.05405000	.03409000	
	Average Race Deficit 4	2.8	6	
	Impact on AI .11568000	.15134000	.20454000	.47156000