No. 11-345

# IN THE
# Supreme Court of the United States

ABIGAIL NOEL FISHER,
*Petitioner*,
v.
UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF FOR *AMICI CURIAE* CURRENT AND FORMER FEDERAL CIVIL RIGHTS OFFICIALS IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

*Amici Curiae* are present and former federal civil rights officials, including appointees and officials at the level of Senior Executive Service up to and including a former U.S. Attorney General, as well as present and former members of federal civil rights advisory committees. Collectively, for the past four decades, *amici* have served in the federal agencies charged with the primary responsibility for administering diversity policies in higher education, including the U.S. Civil Rights Commission, the U.S. Department of Education, and the U.S. Department of Justice. *Amici* support innovative and race-neutral approaches to achieving the educational benefits of diversity in higher education and believe that racial preferences are generally unnecessary in light of the race-neutral alternatives available. A complete list of *amici* can be found in the Appendix at page 1a.

## SUMMARY OF ARGUMENT

The Court has consistently applied strict scrutiny when assessing whether governmental actors seriously considered race-neutral alternatives to race-conscious affirmative action programs. This requirement consists of both a procedural element and a substantive element. First, a governmental actor must establish, subject to strict scrutiny, that it seriously considered race-neutral alternatives before implementing a race-conscious program. Second, it must demonstrate, also subject to

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[1] No counsel for any party has authored this brief in whole or in part. No person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk of this Court.

strict scrutiny, that there were no race-neutral alternatives that would have advanced the relevant compelling governmental interest about as well as the race-conscious program.

The Court has repeatedly declined to differentiate between school admissions and other contexts in its jurisprudence on race-neutral alternatives. There is no basis to do so, and the Court has regularly relied on non-admissions precedents in admissions cases. In the school admissions context, the Court has recognized that there may be a compelling governmental interest in the educational benefits of diversity, but not in racial balancing for its own sake.[2] Consequently, an analysis of race-neutral alternatives must focus on educational benefits, rather than simple racial statistics, to measure correctly the efficacy of those alternatives.

Both schools and courts have well-developed tools at their disposal to conduct the constitutionally mandated analysis of race-neutral alternatives in university admissions. After *Grutter v. Bollinger*, 539 U.S. 306 (2003), both government agencies and non-governmental entities created an intellectual framework for evaluating race-neutral alternatives in an academic setting. This framework, which is regularly used by universities, was built upon the already-rich literature on measuring and evaluating academic programs. These resources obviate any need to rely on the crude proxy of racial enrollment statistics—or the even more attenuated proxy of

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[2] This brief addresses the issues of narrow tailoring and the use of race-neutral alternatives. *Amici* do not address any other constitutional issues concerning the Ten Percent Plan or college admissions more generally, including whether the use of race in university admissions furthers a compelling governmental interest.

classroom-level racial statistics—to evaluate race-neutral alternatives.

In *Grutter*, this Court accepted the University of Michigan Law School's representations that it had seriously considered race-neutral alternatives before implementing a race-conscious admissions policy. Based on their collective experiences and research relating to the use of race-conscious and race-neutral admissions programs in higher education, *amici* believe that the Court should not accept similar representations from the University of Texas (the "University") in this case.

It is apparent that the University did not fulfill its obligation to consider seriously race-neutral alternatives. There is no evidence that it conducted a proper analysis of such alternatives prior to its decision to use a race-conscious supplement to the Ten Percent Plan. Because the constitutionally compelling goal at issue is the educational benefit of diversity, rather than simple headcounts to achieve racial balancing, the University was obligated to consider race-neutral alternatives that could advance the educational benefits of diversity as effectively as taking account of race in admissions in order to add a relatively small number of African-American and Hispanic students. There is no indication that the University considered such alternatives, much less that it would have found them inadequate.

The University is already a remarkably racially diverse institution and has just enrolled its first majority-minority class, thanks almost entirely to the impact of its race-neutral Ten Percent Plan. It is precisely this type of institution that has benefitted from, and should continue to benefit the most from, implementing race-neutral alternatives.

## ARGUMENT

### I. The Court's Jurisprudence Requires States To Give Serious Consideration to Race-Neutral Alternatives, and that Requirement Is Subject to Strict Scrutiny.

The Court has consistently held that all racial classifications, including those used in higher education admissions programs, must be strictly scrutinized to determine whether a less intrusive, race-neutral alternative can advance the compelling governmental interest that a racial classification purports to serve. Because of the pernicious effects of racial classifications, the Court has required the use of such alternatives if they advance the compelling governmental interest as well as—or almost as well as—a race-conscious policy. A race-conscious policy can be either procedurally impermissible, if race-neutral alternatives have not been seriously considered, or substantively impermissible, if a race-neutral alternative would work about as well as the proposed race-conscious policy.

Narrow tailoring of racial classifications has long required serious consideration of race-neutral alternatives. In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), Justice Powell, in his plurality opinion, noted that "the classification at issue must 'fit' with greater precision than any alternative means" and that courts "should give *particularly intense scrutiny* to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest . . . ." *Id.* at 280 n.6 (emphasis added). Such an alternative need only serve the legislative purpose "about as well" as a racial classification, and at "tolerable administrative expense." *Id.*

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court confirmed that race-preferential affirmative action programs are subject to strict scrutiny. The Court stated that "'[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies.'" *Id*. at 507 (quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987)). Unlike in *Paradise*, however, the Court imposed the requirement of considering race-neutral alternatives on the government agency, rather than merely placing that burden on the courts. *Croson*, 488 U.S. at 507. In other words, an agency had a duty to consider race-neutral alternatives, and the failure to do so could be an independent basis for invalidating race-conscious governmental action.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court again examined whether the defendant had considered race-neutral policies as a key factor in the narrow tailoring test. The Court directed the district court on remand to "address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting." *Id*. at 237-38.

*Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), applied these principles to university admissions programs. Relying on *Wygant* and *Croson*, the Court once again articulated the requirement for considering race-neutral alternatives:

> Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to

> provide educational opportunities to members of all racial groups. . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.

*Grutter*, 539 U.S. at 339. Based on the handful of race-neutral alternatives presented to the Court and a perceived good faith by the University, the Court held that the University of Michigan Law School had satisfied its obligation to consider race-neutral alternatives.[3]

The Court again strictly scrutinized a school's consideration of race-neutral alternatives in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). Citing *Grutter*, the Court held that the narrow tailoring test had not been satisfied because "several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration." *Id*. at 735. In particular, the Court noted that "Jefferson County has failed to present any evidence that it considered alternatives, *even though the district already claims that its goals are achieved primarily through means other than the racial classifications*." *Id*. (emphasis added).

Thus, the Court's jurisprudence is clear that strict scrutiny requires serious consideration of race-neutral

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[3] In *Gratz*, the Court did not reach the question whether consideration had been given to race-neutral alternatives, but quoting *Wygant* and *Adarand*, it reaffirmed that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," and that the Court's "review of whether such requirements have been met must entail 'a most searching examination.'" 539 U.S. at 270.

alternatives. In light of the Court's reliance on *Wygant* and *Adarand* in evaluating universities' and school districts' consideration of race-neutral alternatives, it is clear that the Fifth Circuit erred in holding that these precedents "have little purchase" in evaluating what the University has done.

It is equally clear that *Grutter* did not alter the requirement that the consideration of race-neutral alternatives be scrutinized, as the Fifth Circuit held. Rather, the Court's "satisfaction" with the University of Michigan Law School's consideration of race-neutral alternatives reflected an application of the principle under the circumstances of that case, where no party had articulated either a reasonable race-neutral alternative or even a method for testing such an alternative.

Since *Grutter*, the federal government has articulated standards for evaluating race-neutral alternatives. Universities have the administrative framework in place to utilize these standards, and courts are more than capable of scrutinizing their results. In addition, the Texas Legislature obviated the problem of identifying an effective race-neutral alternative for the Court. Had the University tested its admissions program under these standards, it surely would have concluded that the race-neutral Ten Percent Plan works, at a minimum, "about as well" as the race-conscious system that the University unnecessarily and unconstitutionally tacked on to the Legislature's Ten Percent Plan. Indeed, the race-neutral Ten Percent Plan alone made the University a leader among institutions of higher education in achieving diversity, not only in terms of race, but also socioeconomic status and geography, as well as diversity of skills, interests, and experiences, such as the demonstrated ability to overcome different types of

disadvantages. *See* Pet. Br. at 3-4, 10; *Cf. Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011) ("Even if the sale of violent video games to minors could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.").

## II. Courts Can and Should Assess Whether Universities Seriously Considered Race-Neutral Alternatives.

Both governmental agencies and non-governmental entities in the educational arena have issued reports and developed standards in response to the requirement that serious consideration be given to race-neutral alternatives. A review of some of this literature demonstrates that substantial guidance is already available to universities to assist in their consideration of race-neutral alternatives.

### A. Guidance from Governmental Agencies

After *Adarand*, the Department of Justice published an affirmative action guidance memorandum to assist other government agencies, including those responsible for higher education policies. *See* U.S. Dep't of Justice, *Legal Guidance on the Implications of the Supreme Court's Decision in* Adarand Constructors, Inc. v. Pena, 19 Op. Off. Legal Counsel 171 (1995) ("DOJ Guidance Memo"). The memorandum explained the intricacies of the Court's affirmative action jurisprudence and provided lists of questions to ask when evaluating a program's compliance with constitutional requirements. With respect to race-neutral alternatives, the questions included:

> Did Congress or the agency consider race-neutral means to achieve the ends of the program at the time it was adopted? Race-neutral alternatives might include preferences based on wealth, income, education, family, geography. . . . Were any of these alternatives actually tried and exhausted? What was the nature and extent of the deliberation over any race-neutral alternatives—for example, congressional debate? agency rulemaking? Was there a judgment that race-neutral alternatives would not be as efficacious as race-conscious measures? Did Congress or the agency rely on previous consideration and rejection of race-neutral alternatives in connection with a prior, related race-conscious measure (or series of measures)?

DOJ Guidance Memo at 26.

Following *Grutter*, the Office for Civil Rights in the Department of Education also issued guidance regarding race-neutral approaches to achieving diversity in higher education. Two of these reports focused on race-neutral alternatives in undergraduate admissions in States where racial preferences are prohibited by State law. *See* Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004), *available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html ("Achieving Diversity"); Office for Civil Rights, U.S. Dep't of Educ., *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity* (2003), *available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutral report.html ("Innovative Approaches"). A third report

focused on race-neutral programs for private colleges. *See* Office for Civil Rights, U.S. Dep't of Educ., *Inclusive Campuses: Diversity Strategies for Private Colleges,* Report No. 3, Race-Neutral Alternatives Series (2005) ("Inclusive Campuses").

This report is particularly significant because it established a clear framework for evaluating race-neutral alternatives. The report's findings were incorporated into and adopted by a report from the U.S. Civil Rights Commission. *See* U.S. Comm'n on Civil Rights, *Fed. Procurement After* Adarand (2005), *available at* http://www.usccr.gov/pubs/080505_fedprocadarand.pdf. Specifically, the Inclusive Campuses framework, as endorsed by the Commission, recommended:

> identifying and evaluating a wide range of policies; articulating underlying facts that will prove whether a race-neutral plan works; collecting empirical research to demonstrate success; ensuring such assessments are based on current, competent, and comprehensive data; reviewing race-conscious plans periodically to determine the need for continuing them; and analyzing data to establish causal relationships before concluding that a race-neutral plan is ineffective.

*Id*. at xi.

The Commission itself created a framework for evaluating race-neutral alternatives, which was similar to the Inclusive Campuses framework. Although it is targeted at governmental agencies, its standards are general enough to be useful in a higher education context:

> Element 1: Standards—Agencies must develop policy, procedures, and statistical standards for evaluating race-neutral alternatives. . . .
>
> Element 2: Implementation—Agencies must develop or identify a wide range of race-neutral approaches, rather than relying on only one or two generic governmentwide programs. . . .
>
> Element 3: Evaluation—Agencies must measure the effectiveness of their chosen procurement strategies based on established empirical standards and benchmarks. The end goal should be to eliminate reliance on race-conscious programs. . . .
>
> Element 4: Communication—Agencies should communicate and coordinate race-neutral practices to ensure maximum efficiency and consistency governmentwide.

*Id*. Each of these frameworks provides clear and practical guidance about what issues universities should consider when evaluating a race-conscious program.

There is little evidence, however, that governmental agencies have actually complied with these obligations. For example, the Commission on Civil Rights found that "[m]ost agencies could not demonstrate that they consider race-neutral alternatives before resorting to race-conscious programs" and that "agencies generally do not adhere to" the DOJ Guidance Memo. *Id*. at 71. These troubling findings confirm, on a practical level, the important role that courts play in applying strict scrutiny to both the substance and process of governmental entities' consideration of race-neutral alternatives.

### B. Guidance from Non-Governmental Entities

Public universities also may rely on guidance from non-governmental sources. For example, after *Grutter*, the College Board published a series of reports regarding affirmative action in higher education written by Arthur L. Coleman and Scott R. Palmer—two former Clinton-administration officials from the Office of Civil Rights in the Department of Education—which relied and built upon the Office of Civil Rights practices described above.

The College Board concluded that universities must consider several factors to determine if a race-conscious program is narrowly tailored, including:

- Whether the use of race is necessary in light of the university's goals;
- Whether the use of race is sufficiently flexible in light the university's goals;
- Whether race becomes the driving force for admissions decisions under a race-conscious program; and
- Whether there is a limit on the duration of the race-conscious program and a process of periodic review.

*See* Arthur L. Coleman & Scott R. Palmer, *Admissions and Diversity After Michigan: The Next Generation of Legal and Policy Issues* 19, 24 (College Bd. 2006), *available at* http://www.collegeboard.com/prod_downloads/diversitycollaborative/acc-div_next-generation.pdf. The report goes on to provide "practice pointers" for implementing these factors:

> 1. A body with the responsibility and authority for examining and making policy recommendations regarding race-neutral

> alternatives should be charged with periodically researching and evaluating possible race-neutral alternatives in light of institution-specific, diversity-related goals.
>
> 2. A record of practices considered, along with the accompanying evaluations regarding their viability, should be maintained. In addition, evidence-based foundations for making judgments about which practices to try and which to reject should be documented. (Research studies that include projections about likely results over time may also be useful, especially where comprehensive historical foundations for those conclusions do not exist.)
>
> 3. The entire array of race-neutral practices pursued by the institution should be well documented, along with an ongoing record of research regarding the effectiveness of those practices in achieving institutional diversity goals.

*Id*. at 53.

The American Association for the Advancement of Science and National Action Counsel for Minorities in Engineering reached a similar conclusion, urging educators to adopt a systematic approach to designing race-neutral alternatives: "Program activities should be designed to address specific diversity needs, be justified with research into past and present practices, and take into account the positive and possible negative impacts on other students (minority and non-minority alike)." Shirley M. Malcom et al., Am. Ass'n for the Advancement of Sci. & Nat'l Action Counsel for Minorities in Eng'g,

*Standing Our Ground: A Guide for STEM Educators in the Post-Michigan Era* 36 (2004), *available at* http://www.aaas.org/standingourground/PDFs/Standing_Our_Ground.pdf. In short, there is ample guidance within the educational community describing a wide array of practical steps universities can take to ensure that they give serious consideration to race-neutral alternatives to achieving diversity.

### C. Both Universities and Courts Can Easily Implement a Systematic Approach to Consider Race-Neutral Alternatives

There is extensive literature on methods for evaluating the efficacy of academic programs, and this literature can easily be adapted to conduct the evaluations required by the courts. *See, e.g.*, George La Noue & Kenneth L. Marcus, *"Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 Cath. U. L. Rev. 991 (2008). For example, universities have become adept at self-evaluation for purposes of gaining accreditation from, or membership in, organizations ranging from the American Bar Association to the Association of American Universities to the National Collegiate Athletic Association.

The rich literature regarding program evaluation emphasizes clear, simple principles defining the question to be asked or problem to be solved; measuring the outcomes of, and attributing those outcomes to, a given program; determining the link between the program and the outcomes, and explaining that relationship. *See* Carol H. Weiss, *Evaluation: Methods for Studying Programs and Policies* 75-76 (2d ed. 1998). For example, the Joint Committee on Standards for Educational Evaluation (which is housed at the University of Iowa and includes a variety of professional associations as members)

emphasizes standards relating to, among other things, the collection of reliable information, and the use of explicit reasoning, transparency, and disclosure. *See, e.g.*, Joint Comm. on Standards for Educ. Evaluation, *Program Evaluation Standards Statements*, *available at* http://www.jcsee.org/program-evaluation-standards/program-evaluation-standards-statements.

Courts could assess studies following these guidelines in the same way they evaluate the testimony or reports of expert witnesses, who are required to follow similar standards. *Cf.* Fed. R. Civ. P. 26(a)(2)(B) (requiring expert reports to include "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them"); *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-95 (1993) (requiring courts to assess the "scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission").

Because there are already tools available for universities (and thus courts) to test the efficacy of race-conscious programs as compared to race-neutral alternatives, it is essential that courts require universities to do so by applying strict scrutiny to universities' consideration of race-neutral alternatives. Some commentators have noted that "many of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds." Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 34 (2002). Similarly, University of Texas law professor Sanford Levinson colorfully observed the degree to which some schools give

effect to the form, but not the substance, of the Court's jurisprudence:

> [B]ecause of Justice Powell's emphasis on the almost unique legitimacy of "diversity" as a constitutional value, it has become the favorite catchword . . . of those defending the use of racial or ethnic preferences. . . . Whatever the actual efficacy of the Supreme Court in changing the behavior of American institutions, it seems indisputable that the Court sometimes fulfills the function of the French Academy in establishing the conventions of "law talk," so that all properly socialized lawyers, and many non-lawyers as well, adopt certain conventions of argument because the Court leads the way. It is a version of the old children's game of "Simon Says."

Sanford Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 577-78 (2000). Although there undoubtedly are many universities that make genuine, good-faith efforts to comply with their constitutional obligations, these commentators' observations reveal the importance of applying strict scrutiny to universities' evaluation of race-neutral alternatives to determine whether they actually have given such alternatives serious consideration.

## III. The Legislature's Ten Percent Plan Was an Effective Race-Neutral Alternative.

There is no evidence in the record, much less a strong showing of evidence, that the University applied the standards set forth above to evaluate its race-conscious admissions program. Even using the University's flawed metric of evaluating the Ten Percent

Plan's efficacy in increasing certain racial statistics, it is clear that the race-neutral Ten Percent Plan successfully enhanced student diversity and its associated educational benefits.

The compelling interest behind a race-conscious admissions program is "the educational benefits that flow from a diverse student body," *Grutter*, 539 U.S. at 343, not mere racial balance by headcount. In *Bakke*, Justice Powell framed the proper governmental interest as selecting a student body that would encourage "the robust exchange of ideas." *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 313 (1978). Similarly, in *Grutter*, the Court described the educational benefits of diversity that come from "exposure to widely diverse people, cultures, ideas, and viewpoints" and promote "cross-racial understanding." 539 U.S. at 330-31.

The University's goal of achieving a certain level of racial representation in even its smallest classes (and by extension in other micro-groups in the university community) is not a constitutionally compelling government interest. The racial composition of a group of students is a pedagogically unsound and constitutionally infirm proxy for measuring the achievement of these goals, particularly when applied on a class-by-class basis. For example, it is facially implausible, much less supported by any showing of evidence, that having a "critical mass" of black or Hispanic students in a calculus or chemistry class will expose students to diverse cultures and viewpoints, or promote cross-racial understanding. And even in classrooms where diverse viewpoints contribute to the educational experience, such as in certain social science classes, it would be entirely inappropriate for a professor to assume that a student of a given race would express a viewpoint any different from

those of other students—even if he or she were among those students who elect to participate actively in classroom discussions. Asking a student of a particular race to represent that race in class discussions would be an objectionable invitation to stereotyping and very poor pedagogy. Moreover, through the Internet, professors and students can instantly access any diverse viewpoint relevant to any class, regardless of the racial or ethnic identifications of course classmates.

Even if it were theoretically sound for a university to measure the effects of admissions programs on individual small classrooms, universities still must consider whether race-neutral admissions programs would be about as effective at the classroom level as race-conscious programs, viewed in light of the constitutionally permissible interest in the educational benefits of diversity. For example, if a race-neutral admissions program creates socioeconomic or geographic diversity in a broad range of classrooms, it may advance the educational benefits of diversity as well as or better than a race-conscious program—particularly a race-conscious program that adds only a handful of racially diverse students per year.

Moreover, approximately 40 percent of Americans live in States that have banned the use of race-conscious admissions policies in higher education, and universities in these States have developed an array of innovative race-neutral alternatives to ensure diversity on their campuses. *See, e.g.*, Roger Clegg, *Take the Fisher Case*, Nat'l Rev. Online (Jan. 9, 2012), *available at* http://www.nationalreview.com/phi-beta-cons/287298/take-ifisheri-case-roger-clegg#. These alternatives range from pre-admission efforts by States, such as aligning K-12 education requirements with university admission

standards and expanding utilization of the College Board's Advanced Placement testing program, to outreach efforts by universities to underserved communities, to enhanced programs for transfer students. *See* Achieving Diversity at 5; Innovative Approaches at 10-32.

Given the proper goals of a diversity program and the superficiality of relying solely on racial statistics for admitted or enrolled students as a proxy for achieving those goals, serious consideration of race-neutral alternatives should also include an analysis of post-enrollment race-neutral alternatives. Here too, a wide array of tools are available to universities to ensure that students gain the educational benefits of diversity. For example, universities can encourage the formation of campus organizations that promote the educational goals of diversity, such as cross-racial understandings. They can invite speakers or performers, organize symposia, or promote study abroad programs. Race-neutral alternatives like these can encourage students from across a wide range of areas of study to interact with and learn from each other, and such programs would be directly targeted at maximizing the educational benefits that flow from a diverse student body. As a practical matter, any program that encourages a broad range of students to interact with each other will indirectly promote the educational benefits of diversity. One could easily imagine students understanding and learning more about their peers from a season of flag football than from a semester of physics.

Even if race-conscious headcounts were a proper metric for seriously considering the availability of race-neutral alternatives, it is clear that the race-neutral Ten Percent Plan has been tremendously successful. As Petitioners set forth more fully in their brief, the

University of Texas is more racially diverse than it was before the Ten Percent Plan was instituted. *See* Pet. Br. at 10, 36. The University just enrolled its first majority-minority freshman class (mostly attributable to the impact of the Ten Percent Plan), and demographic trends in Texas are likely to increase racial diversity further in the future. *Id*. at 10. These trends were apparent at least five years before the University added a race-conscious component to the Ten Percent Plan. Dr. Larry Faulkner, who was President of the University of Texas when the racial component was subsequently added, succinctly summarized the success of the Ten Percent Plan in October 2000:

> [T]he Top 10 Percent Law has enabled us to diversify enrollment at UT Austin with talented students who succeed. Our 1999 enrollment levels for African American and Hispanic freshmen have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies. And minority students earned higher grade point averages last year than in 1996 and have higher retention rates. An impressive 94.9 percent of 1998 African American freshmen returned to enroll for their sophomore year in 1999. For Hispanics, 85.8 percent returned for their second year. So, the law is helping us to create a more representative student body and enroll students who perform well academically.

Larry Faulkner, *The "Top 10 Percent Law" Is Working for Texas* (Oct. 19, 2000), *available at* http://www.utexas.edu/student/admissions/research/faulknerstatement.html.

* * *

The University of Texas had a constitutional obligation to conduct an adequate evaluation of its new race-conscious admissions system, focusing directly on the educational benefits of diversity, rather than on the constitutionally suspect proxy of racially categorized enrollment statistics. The University's review should have considered race-neutral alternatives that could be used in combination with the Ten Percent Plan, such as post-enrollment programs that encourage the interaction of students from across a broad range of academic programs, and race-neutral admissions programs currently in use by other universities. The University has failed to produce any evidence demonstrating that it conducted such an analysis, which it was required to do before implementing its race-conscious admissions policy.

Even if the University had produced such evidence, its race-conscious policy would still be impermissible because the University also failed to produce a robust evidentiary record that justified the use of racial classifications—with all their pernicious effects and attendant dangers, *see Gratz*, 539 U.S. at 270—to achieve its educational goals. Thus, the Court should require the University to stop discriminating on the basis of race and allow it to continue doing what it already does so well: enrolling unprecedented numbers of racially diverse students through its race-neutral Ten Percent Plan.

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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[1] *Amici* submit this brief in their individual capacities only, and not on behalf of any agency or organization. Affiliations are listed only to identify *amici*'s relevant experience.

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