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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* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, TEXAS STATE CONFERENCE OF NAACP BRANCHES AND BARBARA BADER ALDAVE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The following *amici* submit this brief, with the consent of the parties, in support of Respondents' argument that the lower courts' decisions were correct in upholding the actions taken by Respondents.

Founded in 1909, the National Association for the Advancement of Colored People (hereinafter "NAACP" or the "Association") is the nation's oldest and largest civil rights organization. The principal objectives of NAACP are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof. The Texas State Conference of NAACP Branches implements the mission of the Association at the state level or at other levels if requested by the national office. The fundamental goal of NAACP's education advocacy agenda is to ensure that all students have access to a quality, integrated public education. NAACP has been at the forefront of every

1. No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund such preparation or submission. The parties have filed blanket consents with the Court consenting to the filing of all *amicus* briefs.

major advance in ensuring integration at every level of the nation's public schools.

Barbara Bader Aldave is currently the Loran L. Stewart Professor at the University of Oregon School of Law. She served as a Professor at the University of Texas School of Law from 1974-1989, and throughout most of that period directed the School's efforts to increase minority enrollment. She ultimately resigned from the School's Admissions Committee when it rejected her advice that it should continue to adhere to the guidelines of the *Regents of the University of California v. Bakke* decision. Subsequently, as Dean of St. Mary's University School of Law in San Antonio, she increased the enrollment of students of color from 11% to 38%, and spoke and wrote extensively in support of her opinion that the decision of the Fifth Circuit Court of Appeals in *Hopwood v. State of Texas* could not and did not overrule this Court's decision in *Bakke*.

SUMMARY OF ARGUMENT

The University of Texas (UT) at Austin's admission policy has no racial preference and caused no injury in fact to Petitioner. More than 90% of 10,200 admission slots available to Texas residents are awarded without any consideration of race. For the remaining admissions slots, UT considers academic index (AI) (a calculation including class rank and ACT/SAT scores) and personal achievement index (PAI). PAI considers: scores on two essays; leadership; extracurricular activities; awards/honors; work experience; service to school or community; and seven special circumstances, one of which is race. Race is merely a factor of a factor which can positively

impact applicants of all races, including white applicants. Moreover, Petitioner's AI was not within the required range. Regardless of her race, she would not have been admitted to UT. Therefore, Petitioner suffered no injury in fact. Accordingly, there is no basis for this Court to exercise jurisdiction.

Texas's long history of state-sponsored discrimination justifies its actions to remedy the lasting effects. Prior to 1955, the Texas Constitution expressly required segregated schools for white and African American children. For several years, in violation of Title VI of the Civil Rights Act of 1964, Texas failed to eliminate the vestiges of *de jure* segregation in public higher education and in all other levels of public education. Texas also failed to reach its goals of integrating the State's predominantly white colleges and universities. Because the duty to desegregate is affirmative in nature, the mere adoption of racially neutral policies for prospective application is not an adequate remedy to the consequences of past discriminatory conduct.

UT's admission program is constitutional because it is narrowly tailored to eradicate the vestiges of Texas's prior official policy of discrimination. UT's admissions program provides a modest remedy for the lingering injury which black Texans have suffered from a century or more of *de jure* educational segregation, and several decades more of a *de facto* segregated university system. It serves one of the most compelling of state interests: undoing the scarring damage of state-imposed and encouraged discrimination in higher education. The program considers race as only one factor among many, in the context of "truly individualized" evaluation of each applicant for admission to UT. UT's program withstands

strict constitutional scrutiny because it was adopted after careful consideration, and is narrowly tailored to accomplish the state's interest in remedying the effects of intentional discrimination.

Finally, forcing UT to ignore race would force UT to ignore the accomplishments of racial minorities. Petitioner's request is that applicants effectively be dissected by UT, and their races removed and discarded. Granting Petitioner's request would negatively affect individuals whose life experiences were most influenced by their race, while positively impacting those for whom their race presented no obstacle or played little to no perceived role in their development.

ARGUMENT

I. UT'S ADMISSION POLICY HAS NO RACIAL PREFERENCE, AND CAUSED NO INJURY IN FACT TO PETITIONER

Pursuant to the Texas Top Ten Percent Law, admission to UT is offered automatically to Texas residents graduating in the top 10% of their high school classes. Petitioner, a Texas resident, applied to the schools of Business Administration and Liberal Arts, but was unqualified for automatic admission. *Fisher*, 556 F. Supp.2d at 605; JA 405a. The admissions office also establishes "A" group and "C" group parameters for some UT schools based solely on an applicant's academic index (AI). JA 410a. The AI is derived from an applicant's predicated G.P.A. (which includes ACT/SAT scores and class rank) and any curriculum-based bonus points, *i.e.*, race plays no part whatsoever in the calculation of the AI. JA 406a. "A"

group applicants have high AIs, and are offered admission based solely thereon. JA 410a. Remaining admissions decisions are based upon a combination of each applicant's AI and personal achievement index (PAI).

The PAI considers: scores on two essays; leadership; extracurricular activities; awards/honors; work experience; service to school or community; and seven special circumstances, one of which is race. SJA 152a. "None of the elements of the personal achievement score—including race—are considered individually or given separate numerical values to be added together." *Fisher*, 631 F.3d at 228. Moreover, race "can positively impact applicants of all races, including Caucasian[s]. . . ." *Id*. For example, "both a white student who is president of his or her majority African American high school and an African American student who is president of his or her majority white high school bring an additional aspect of diversity when one considers the relative rarity of being a student leader who can reach across racial lines." JA 435a. Put succinctly, UT's policy has no racial preferences and considers race as one of many factors to assess every applicant.[2]

For Fall 2008, the relevant term, 92% of 10,200 admissions slots available to Texas residents were awarded to top 10% and "A" group applicants, *i.e.*, with no consideration of PAIs. JA 414a. Due to the limited amount of remaining admission slots, a minimum AI of 3.5 was necessary for Petitioner to be offered admission,

2. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007).

regardless of her PAI.[3] JA 416a. Petitioner's AIs were only 3.1. In short, Petitioner would not have been offered admission for Fall 2008 had she been Caucasian, African American, Hispanic, or otherwise. *See id.* Accordingly, even if race had been a factor considered in calculating her PAI, Petitioner cannot show any injury in fact. Although this is not a putative class action, the same would hold true for all similarly-situated applicants whose AIs precluded their admission. A petitioner who cannot show injury from a policy – even theoretically – has no standing to challenge the policy. *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 261 (1977).

II. TEXAS'S LONG HISTORY OF STATE-SPONSORED DISCRIMINATION NECESSITATES ITS ACTIONS TO REMEDY THE LASTING EFFECTS

Texas has a long history of racial discrimination in its public higher education and public elementary and secondary school systems.[4] This dual elementary and secondary public school system has lowered the number of Texas high school graduates eligible to attend the public higher education system, including the State's flagship

3. Relevant admissions statistics were not finalized until October 2008, after the District Court's May 29, 2008 opinion regarding Petitioner's motion for preliminary injunction, and thus may contradict any preliminary data reflected therein. JA 405a.

4. Lupe S. Salinas & Robert H. Kimball, *The Equal Treatment of Unequals: Barriers Facing Latinos and the Poor in Texas Public Schools,* 14 Geo. J. on Poverty L. & Pol'y 215 (2007).

campus and programs.[5] Amici offer this as context to the environment in which the public higher education system operates.

In 1970, the United States brought suit in the Eastern District of Texas against various Texas school districts, the governing county boards of education of each such district and their respective officials, and the Texas Education Agency ("TEA") to achieve meaningful school desegregation. Each of the school districts named as a defendant in the original suit was either an all-white district or an all-black district that had taken no steps to comply with the Supreme Court's desegregation precedent. The district court, Judge William Wayne Justice presiding, found that the named school districts were responsible for creating and maintaining dual school systems and that systemically, "the vestiges of racially segregated public education" had not been eliminated. Accordingly, Judge Justice entered Order 5281, a far-reaching desegregation decree applicable to the named school districts and the TEA, which directs funding to the State's public schools. *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex.1970). The Order contains two parts, the first directed at desegregating the named school districts and the second directed at correcting systemic segregation. Specifically, with respect to transfers, the Order enjoined TEA and any person acting in concert with TEA from permitting, approving or supporting by any means the inter-district transfer of students within the state of Texas which will

5. Kevin T. Leicht & Teresa A. Sullivan, Minority student pipelines before and after the challenges to affirmative action (Ford Foundation, May 25, 2000).

reduce or impede desegregation or which will reinforce, renew or encourage the continuation of acts and practices resulting in discriminatory treatment of students on the ground of race, color, or national origin. *Id.* at 1060. The Order was later modified by the district court, *United States v. Texas*, 330 F. Supp. 235 (E.D. Tex. 1971), and subsequently by the Fifth Circuit, *United States v. Texas*, 447 F.2d 441 (5th Cir. 1971), but the text of the transfer provision remained largely the same.

Throughout the 1980s, many black and Hispanic students in Texas lived in school districts that courts and the U.S. Department of Justice (DOJ) had determined were unconstitutionally segregated.[6] In fact, more than 70% of blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans.[7]

Nevertheless, Texas adopted an official policy of resistance to integration of its public schools throughout the 1980s.[8] In 1983, the Fifth Circuit found that schools in numerous counties throughout Texas still suffered from

6. *Hopwood v. State of Tex.*, 861 F. Supp. 551, 554 (W.D. Tex. 1994); *see e.g. Hous. Indep. Sch. Dist. v. Ross*, 282 F.2d 95, 96 (5th Cir. 1960); *Borders v. Rippy*, 247 F.2d 268 (5th Cir. 1957); *U.S. v. Texas Ed. Agency* , 467 F.2d 848 (5th Cir. 1972); *Flax v. Potts*, 204 F. Supp. 458 (N.D. Tex. 1962), *aff'd*, 313 F.2d 284 (5th Cir. 1963) ; *U.S. v. State of Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex. 1971*), aff'd with modifications*, 447 F.2d 441 (5th Cir. 1971)

7. *Cheryl J. HOPWOOD, Plaintiff-Appellant-Cross-Appellee, v. STATE OF TEXAS, et al.*, Brief of the State of Texas 1999 WL 33619061, (5th Cir. April 20, 1999).

8. *Id.*

unconstitutional segregation.[9] In *Tasby v. Wright*, the Fifth Circuit found that Dallas public schools were still segregated and had "opposed any student desegregation, no matter how feasible or how minimal." Similarly, in *Ross v. Houston Indep. Sch. Dist.*, the court found that, although Houston had been declared unitary, "70% of the black students in HISD still attend[ed] schools that [we]re 90% minority, including as minorities black and Hispanic students."[10]

Texas's policy of resistance resulted in numerous lawsuits and court-imposed desegregation plans throughout the 1980s and 1990s.[11] Moreover, the Office of Civil Rights (OCR) found that many of the school districts operating dual systems of education were practicing "official" discrimination against black and Mexican American students.[12] Segregation continued between 1989 and 1994. In fact, in May 1994, desegregation lawsuits were pending against more than forty Texas school districts.[13]

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9. *U.S. v. Crucial*, 722 F.2d 1182, 1184-85, 1188 (5th Cir. 1983) (finding that Echor County suffered from unconstitutional segregation); *Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983); *Flax v. Potts*, 567 F. Supp. 859, 861 (N.D. Tex. 1983) (holding that Fort Worth still was not a unitary school system); *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 226-27 (5th Cir. 1983) (noting that racial segregation in schools continued until 1967).

10. *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218,226-27 (5th Cir. 1983).

11. *Hopwood v. State of Tex.* 861 F. Supp. 551, 556 (1994).

12. *Id.* at 554.

13. *Id.*

On December 19, 2010, the Texas State Conference of NAACP and Texas League of United Latin American Citizens (LULAC) requested that OCR conduct a compliance review of the State with respect to African American and Latino K-12th grade public school students in the state of Texas (State of Texas, the Texas Education Agency (TEA), and the State Board of Education (SBOE)) pursuant to Title VI and its implementing regulations, and the Thirteenth and Fourteenth Amendments to the United States Constitution. This request concerned:

- the miseducation of minority students
- recent SBOE curriculum changes which negatively impact all students, but disparately greater harm of minority students
- disparate discipline for minority students[14]
- the use of accountability standards to impose sanctions on schools with high populations of minority students
- the underrepresentation of Latinos and African Americans in Gifted and Talented Programs and the rules relating to the operation of such programs that lead to and/or contribute to the discriminatory result

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14. Fabelo et al., Breaking Schools' Rules: A Statewide Study of How School Discipline Related to Students' Success and Juvenile Justice Involvement ix (Council of State Governments Justice Center 2011).

The Texas State Conference of NAACP Branches and LULAC contended that the Texas State Board of Education (SBOE) curriculum changes were made with the intention to discriminate, and that the SBOE curriculum and other areas raised in the request to OCR were either the result of unnecessary policies that have a disparate or stigmatizing impact on African Americans and Latinos, or reflect disparate treatment or neglect. NAACP and LULAC remain concerned that historically, the State has not only failed to provide the basic education that its laws require to all its citizens' children, but it has adopted standards to ensure that the status quo of disproportionately poor performing and negatively impacted minority students does not change. Racially segregated elementary and secondary public schools throughout the State have denied many black students and other students of color meaningful opportunities to attend institutions of higher education.

Under Title VI of the Civil Rights Act of 1964, the constitutionally-mandated affirmative duty to eliminate all vestiges of a previously dual higher education system is a condition of receipt of federal financial assistance.[15] Because the duty to desegregate is affirmative in nature, this Court has held that the mere adoption of racially neutral policies for prospective application is not adequate to remedy the consequences of past discriminatory conduct.[16]

15. *Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968).

16. *Davis v. Sch. Comm'rs of Mobile Cnty.*, 402 U.S. 33, 35 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

The dual system of public higher education in Texas, like that in several other Southern and border states, reflects a long history of state-sponsored discrimination. Indeed, prior to 1955, the Texas Constitution specifically required separate schools for white and colored children.[17] Heman Marion Sweatt, an African American, applied to the University of Texas Law School for admission in its February 1946 class.[18] On February 26, 1946, President T.S. Painter of the University of Texas requested an opinion from the Texas Attorney General on the question of "whether a person of negro ancestry, otherwise qualified for admission into the University of Texas, may be legally admitted to that institution." The Texas Attorney General's response lauded the segregation of races as a wise policy. The opinion concluded that Texas is not required to admit any African American applicant until the applicant in good faith makes a demand for legal training at the segregated institution, gives the authorities reasonable notice, and is unlawfully refused. The Attorney General, Grover Sellers, then advised President Painter to refuse Mr. Sweatt's admission to the University of Texas.[19] NAACP and the Texas State Conference of NAACP assisted Mr. Sweatt in his challenge to the State's policies of segregated educational institutions. This work ultimately led to *Sweatt v. Painter*, in which this Court held "that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School."[20]

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17. Tex. Const. art. VII, §7 (1925, repealed 1969).

18. *Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

19. Op. Att'y Gen. No. 0-7126 (Mar. 16, 1946); *see also Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

20. *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

Despite the elusiveness of Fourteenth Amendment guarantees for African Americans and other persons of color, two effective litigation strategies finally bore fruit in the 1950s. First, *Brown v. Board of Education* held that the Constitution demands the dismantling of dual school systems intentionally segregated by race.[21] Second, *Cooper v. Aaron* and related cases barred governmental support of unconstitutionally discriminatory institutions.[22]

Both concepts were incorporated in one of the first sweeping federal commitments to civil rights enforcement, the Civil Rights Act of 1964 (the Act). Title VI of the Act prohibits discrimination on the ground of race, color, or national origin under any program receiving federal financial assistance.[23] Each federal department may ensure compliance by (1) refusing financial assistance to any recipient found violating the prohibition after a finding on the record, with an opportunity for a hearing; or (2) "by any other means authorized by law."[24] The Act specifically provides that enforcement efforts should not begin until the non-complying party has been notified and given an opportunity to comply voluntarily.[25] Thus, the Act permits the Executive to deny financial support to non-complying public educational bodies, and to use the threat of fund-

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21. 347 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II).

22. 358 U.S. 1 (1958).

23. Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (hereinafter cited as Title VI).

24. Title VI, § 602, 42 U.S.C. § 2000d-1. HEW regulations specified referral to the Department of Justice as the primary other means authorized under law. 45 C.F.R. § 80.8(a) (1979).

25. *Id.*

termination to persuade recipients of federal funds to dismantle vestiges of segregation. Enforcement of the Act, however, had to overcome a ninety-year pattern of conduct by Texas and its institutions that had blocked or frustrated black entry into Texas's historically white institutions of public higher education and inadequately funded historically black institutions of public higher education.[26]

Through agreement with other executive departments, the Department of Health, Education and Welfare (HEW) assumed responsibility for Title VI enforcement with respect to most federal financial assistance to elementary, secondary and higher education and other specified health and social welfare activities.[27] In 1969, black students were still facing a wall of state-sponsored discrimination despite the mandate of Title VI, and HEW, through its OCR, determined that ten Southern states were operating dual systems of higher education in violation of Title VI.[28] Nevertheless, HEW took no administrative enforcement actions and referred no states to the DOJ for litigation, preferring to follow an approach of voluntary negotiation and consensus in achieving desegregation.[29]

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26. David E. Kendall, *The Affirmative Duty to Integrate in Higher Education*, 79 Yale L.J. 666, note 7 (1970).

27. Exec. Order No. 11,247, 30 C.F.R. 12327 (1965), *reprinted in* 42 U.S.C. § 2000d-1 (1976). President Lyndon Johnson directed the Attorney General to coordinate enforcement of Title VI and directed each department to cooperate in the enforcement.

28. *Adams v. Richardson*, 351 F. Supp. 636, 637-38 (D.D.C. 1972), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973)

29. *Id*. at 638.

In 1970, parents of school-age children filed *Adams v. Richardson*, 351 F. Supp. 636 (D.D.C. 1972), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973), against the Secretary of HEW. This action charged that HEW had failed to enforce Title VI in state colleges and universities. The District Court found that between January 1969 and February 1970, HEW concluded that ten states were operating segregated systems of higher education in violation of Title VI. Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia were the states in question and are known as the original *Adams* states.

The District Court ruled that HEW had abused its discretionary authority under Title VI, and ordered the ten states to file plans for desegregating their public colleges and universities. For several years, HEW and the states bickered about the adequacy and appropriateness of the various plans.[30] In April 1977, the District of Columbia Circuit, in *Adams v. Califano*, 430 F. Supp. 118 (D.C. Cir. 1977), ordered HEW to publish criteria specifying the ingredients of acceptable plans to desegregate systems of public higher education. "These criteria require states to create a unitary system out of the present racially unbalanced, dual system, and to desegregate student enrollment, academic and non-academic personnel, and administrative and governing boards in each institution."[31]

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30. Derrick A. Bell, Race, Racism And American Law, 459 n.10 (6th ed. 2008).

31. *Id.* The responsibility for conducting this Title VI review was transferred to the U.S. Department of Education by authority of the Department of Education Organization Act, 20 U.S.C. Section 3441 (1980).

Although Texas was not an original *Adams* state, and thus was not subject to the *Adams* court's original order, as a result of Texas's status as a state that had historically maintained a segregated public education system, the Court entered an unpublished supplemental order that directed HEW to include Texas in its enforcement proceedings.[32] During the spring of 1978 and the summer of 1979, OCR staff in HEW conducted a statewide review of higher education in Texas.[33] OCR concluded in 1981 that Texas had failed to eliminate the vestiges of its former *de jure* segregation in public higher education.[34] Because vestiges of that dual system still existed, OCR found that the State's public higher education system was not in compliance with Title VI.[35] OCR specifically noted that the racial composition of student enrollments, faculties, staffs, and governing boards continued to reflect the racial identity assigned by law to Texas public institutions prior to 1954.[36] In response, Texas made commitments to OCR

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32. *Hopwood v. Texas*, 861 F. Supp. 551, 555-56 (W.D. Tex. 1994).

33. Victor Goode, *Texas Plan: Public Law School Education, Title VI, and the Settlement Monitoring Process*, 12 S.U. L. Rev. 157, 171 (1985-1986), citing a letter from Cynthia Brown, Assistant Secretary for Civil Rights, Department of Education, to Mark White, Texas Attorney General (Jan. 15, 1981) (discussing compliance by Texas with Title VI) (hereinafter cited as "Brown Letter").

34. *Id.*

35. *Id.*

36. *Id.* OCR also noted that additional vestiges of the formerly dual system were evident in inequities in resource allocations to traditionally black and traditionally white schools (such as resources for physical facilities and for faculty salaries)

which, in turn, granted provisional approval to a Texas state-wide desegregation plan.[37]

In the early 1980s, OCR and Texas officials negotiated for appropriate measures that would improve the status of minorities in state institutions of higher education and bring Texas into compliance with Title VI.[38] In 1982, Texas submitted the Texas Equal Education Opportunity Plan for Higher Education ("Texas Plan") which included a state commitment to the goal of equal educational opportunity and student body desegregation for both black and Hispanic students.[39] Assistant Secretary of Education Clarence Thomas reviewed the Texas Plan and informed the State that the Texas Plan was deficient. He found that the numeric goals of black and Hispanic enrollment in graduate and professional programs were insufficient to meet Texas's commitment to enroll those minority students in proportion to the number of minorities graduating from undergraduate institutions statewide.[40] Texas then submitted a revised Texas Plan, which OCR found deficient because it did not set targets

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and the duplication of programs between traditionally black institutions and traditionally white institutions sharing service areas. *Id.* at 2.

37. Letter from Mark White to Cynthia Brown (Jan. 14, 1981) (discussing compliance by Texas with Title VI).

38. *Hopwood v. Tex.*, 861 F. Supp. 551, 569 (W.D. Tex. 1994) *rev'd*, 78 F.3d 932 (5th Cir. 1996) *abrogated* by *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003); Scanlan, Laura C., *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. Rev. 1580, 1596-97 (1996).

39. *Id.*

40. *Id.*

for increasing minority enrollment for each institution, and did not project achievement dates for the targeted goals.[41]

In March 1983, the District Court for the District of Columbia entered an order in the ongoing Title VI enforcement suit, finding that "Texas has still not committed itself to the elements of a desegregation plan which in defendants' judgment complies with Title VI."[42] The court ordered DOE to begin enforcement proceedings against Texas unless Texas submitted a plan that fully complied with Title VI within forty-five days.[43] OCR provided Texas with a list of thirty-seven steps that would improve the Texas Plan, including the consideration of an applicant's complete record in admission decisions and the selection of "[minority] students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements."[44] Texas amended its plan to address the deficiencies identified by OCR.[45] In June 1983, OCR accepted the Texas Plan as being in compliance with Title VI.[46] The revised Texas Plan

41. *Hopwood v. Tex.*, 861 F. Supp. 551, 556 (W.D. Tex. 1994) *rev'd*, 78 F.3d 932 (5th Cir. 1996) *abrogated* by *Grutter v. Bollinger*, 539 U.S. 306 (2003).

42. *Id.*

43. *Id.*

44. *Id.*; Scanlan, Laura C., *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. Rev. 1580, 1596-97 (1996).

45. *Id.*

46. *Hopwood v. Tex.*, 861 F. Supp. 551, 556 (W.D. Tex. 1994)

included a commitment to "seek to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs."[47] The Texas Plan was subject to monitoring for compliance until 1988.[48] In 1988, the Texas Higher Education Coordinating Board (the "Board") officials evaluated the results of the Texas Plan and determined that Texas had not met the goals and objectives of the plan.[49] As a result, the Board developed and adopted a successor plan (Plan II) to avoid a mandate from the federal government to negotiate a second plan.[50] Plan II did not contain any specific numeric enrollment goals but stated a commitment to increase black and Hispanic student enrollment.[51] Plan II was effective from September 1989 to August 1994.[52] OCR continued to monitor the Texas system to determine whether the vestiges of *de jure* segregation had been eliminated, in light of *United States v. Fordice*, 505 U.S. 717 (1992). *Hopwood*, 861 F. Supp. at 557.

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rev'd, 78 F.3d 932 (5th Cir. 1996) *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

47. *Id*.

48. *Id*.

49. *Id*. at 557.

50. *Id*.

51. *Id*.

52. *Id*.

In 1996, the Fifth Circuit halted the state's ongoing efforts to address the continuing *de facto* segregation in its institutions of higher education. In *Hopwood v. Texas*, four white plaintiffs who had been rejected from The University of Texas School of Law challenged the institution's admissions policy on equal protection grounds and prevailed.[53] The Fifth Circuit panel in *Hopwood* rejected the history of segregation contained in the district court opinion and declared the use of race-based criteria in admissions decisions at the law school to be unconstitutional.[54] Following the *Hopwood* decision, the Texas Attorney General issued an opinion prohibiting the use of race as a factor in admissions by any undergraduate or graduate program in Texas state higher education. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 222 (5th Cir. 2011). Thereafter, Texas institutions of higher education ceased all race-conscious admissions policies. The Texas Legislature responded to the *Hopwood* decision by enacting the Top Ten Percent Law.[55] The law altered UT's preexisting policy and mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university.[56] The Top Ten Percent Law was not only ineffective in addressing the vestiges of segregation; it allowed the gains made in previous years to evaporate. In 1997, the number of minority applicants to the UT dropped by nearly 25%, while the total number of applicants to the university

53. 78 F.3d 932 (5th Cir. 1996).

54. *Id.*

55. *Fisher v. U. Tex. at Austin*, 631 F.3d 213, 224 (5th Cir. 2011).

56. *Id.*

decreased by only 13% as compared to 1995.[57] African American enrollment for 1997 dropped almost 40% from the 1995 level (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen).[58] In 1999, the Houston Chronicle reported that black students made up only 3 percent of overall enrollment at Texas colleges, with 32 percent of those students attending historically black colleges.[59] Moreover, black students made up less than 5 percent of enrollment at more than half of the majority-white colleges.[60]

OCR continued its efforts to address Texas's long history of segregation in schools. In February 1997, DOE wrote to Governor George W. Bush to renew OCR's dialogue with Texas, asking "to augment our information in the areas of the [desegregation] plan where OCR has concerns, and to address information indicating possible problems with higher education opportunities for blacks and Hispanics in Texas."[61] Also in 1999, just nine years before Petitioner applied to UT, OCR officials met with representatives from the Board, the Governor's Office and the Attorney General's Office and informed those representatives that OCR had found that disparities traceable to *de jure* segregation continued to exist in

57. *Id.*

58. *Id.*

59. Lydia Lum, *Duplication at UH, TSU Seen Impeding Diversity*, Houston Chron., Nov. 10, 1999.

60. *Id.*

61. *Cheryl J. HOPWOOD, Plaintiff-Appellant-Cross-Appellee, v. STATE OF TEXAS, et al.*, Brief of the State of Texas 1999 WL 33619061.

Texas higher education.[62] The Board agreed to prepare a revised Texas Plan for consideration by OCR in July 2000.

In 2000, OCR again found that "the racial identifiability of the State's higher education institutions continued to reflect their former *de jure* segregated status."[63] On May 11, 2000, Governor Bush and OCR officials signed the "Texas Commitment" that would form the basis for the state's implementation plan "to address issues of concern identified to the State regarding its higher education system, consistent with Title VI of the Civil Rights Act of 1964 and *United States v. Fordice*, 505 U.S. 717 (1992)."[64] The "Texas Commitment" consisted of five areas of focused action, and one of the five areas was to "improve the recruitment, retention, and participation rates of African American and Hispanic students at the State's historically white institutions."[65] Following the "Texas Commitment," the State developed the Closing the Gaps by 2015 Plan. Texas has submitted progress reports every year since reporting began in 2003 regarding its progress in meeting the goals outlined in the Closing the Gaps by 2015 Plan.

In 2003, the U.S. Supreme Court rejected the *Hopwood* holding in *Grutter v. Bollinger*, 539 U.S. 306

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62. Texas Higher Education Coordinating Board, The Texas Plan for Equal Opportunity: History and Synopsis, November 24, 1999 (on file with the amici).

63. Letter from OCR to Mr. Clay Johnson, Office of the Governor (October 11, 2000) (on file with the amici).

64. Letter from OCR, Taylor D. August, to the Office of the Governor, (May 23, 2000) (on file with the amici).

65. *Texas Commitment,* George W. Bush and Office of Civil Rights 3 (May 11, 2000).

(2003). This re-opened the door for the State to reconsider race-conscious measures as a part of its remedial strategies. In 2010, Texas initiated its Accelerated Plan for Closing the Gaps by 2015. Although Texas has made some gains in achieving its Closing the Gaps by 2015 goals, the State recognized that "historically low participation and success rates [for African American and Hispanic students] warrant sustained focus and efforts from the Coordinating Board and stakeholders to consolidate these gains and move further towards 2015 Closing the Gap goals."[66] The affirmative duty to desegregate, recognized in the elementary and secondary school desegregation cases is equally applicable to state systems of higher education.[67]

III. EVEN IF THIS COURT HELD THAT DIVERSITY IS NOT A COMPELLING STATE INTEREST, UT'S ADMISSION POLICY WOULD BE CONSTITUTIONAL BECAUSE IT IS NARROWLY TAILORED TO ERADICATE THE VESTIGES OF TEXAS'S PRIOR OFFICIAL POLICY OF DISCRIMINATION

Respondent argues that the UT admissions program passes constitutional scrutiny because it is narrowly

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66. Texas Higher Education Coordinating Board, Accelerated Plan for Closing the Gaps by 2015 5 (April 29, 2010).

67. *United States v. Fordice*, 505 U.S. 717 (1992); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd by Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979). As described in *Norris v. State Council of Higher Education*, 327 F. Supp. 1368, 1373 (E.D. Va. 1971), *aff'd*, 404 U.S. 907 (1971), a state duty is to "convert its white colleges and black colleges into just colleges."

tailored, evaluates each applicant individually and holistically, and because race is only one of many factors that UT weighs in carrying out the compelling state interest of building a diverse student body. NAACP agrees that even under a narrow reading of *Grutter v. Bollinger*, 539 U.S. 306 (2003), UT's program does not violate the Fourteenth Amendment's guarantee of equal protection.

Moreover, UT's admissions policy is also constitutional for a second reason, one that was not considered in the lower court opinions or in Respondent's brief. UT's policy, adopted by a state agency (the Board of Regents of the University of Texas System), is a remedial measure which is aimed at, and has the effect, of lessening or eliminating remaining vestiges of *de jure* segregation in the Texas higher educational system. This Court has consistently held that government entities that consider the race of applicants for purposes of remedying past racial discrimination do not violate equal protection.

The Court has identified the following four factors that, when present, permit race to be considered as a factor in government-sponsored remedial programs: (1) a past history of *de jure* segregation; (2) whether the race-conscious plan ameliorates the disabling effects of the discrimination; (3) whether the injury from discrimination remains when the policy is in effect; and (4) whether the program imposes quotas or a fixed percentage of admission of minority students. All four are fully satisfied on the record of this case, and support the constitutionality of the UT admissions program.

First, there must be a "judicial, administrative, or legislative finding," *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J., concurring), that the state or

governmental unit at issue previously had a system of *de jure* segregation or other type of racial discrimination, in violation of the Constitution or statute. Even in decisions that have restricted the use of racial considerations, this Court has always taken pains to distinguish the facts of the immediate appeal from those situations where race has been used to implement a remedy for proven state-sponsored discrimination. For example, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), involved admission to medical school in California, a state which had never adopted discriminatory measures against African Americans. *Bakke* distinguished the facts of that case from school desegregation cases which "involved remedies for clearly determined constitutional violations," and in which "[r]acial classifications. . . were designed as remedies for the vindication of constitutional entitlement." *Bakke*, 438 U.S. at 265. The majority in *Bakke* recognized that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Id.* at 307.

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court affirmed the position that remedying past discrimination is a permissible justification for race-based governmental action. *Id.* at 328. While *Grutter* divided the Court over whether "attaining a diverse student body" alone was a compelling governmental interest that justified a race-conscious admissions policy, not one Justice found that a race-conscious admissions policy would be impermissible as a remedy for proven past discrimination in college admissions. *See also Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007) (referring to the "compelling interest of remedying the effects of past intentional discrimination.").

The Court's rulings dealing with affirmative action in the fields of employment and government contracting also accept the use of race in government action to remedy past discrimination. Even where the Court has invalidated affirmative action laws or ordinances, it has noted that racial discrimination in employment or contracting may continue after the end of a *de jure* segregation regime, and that government retains the power to combat these effects through race-aware remedial measures. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) ("Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.").[68]

This first factor – a past history of *de jure* segregation – is satisfied on the undisputed historical record. Until 1969, Texas's own constitution and statutes required segregated schools at every level of education. Moreover, as shown above, for years after the formal end of segregation, Texas failed to implement any significant measures to eradicate the devastating effects of a century of legal segregation.

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68. This Court has not endorsed the dictum, stated in *Hopwood v. State of Texas*, 78 F.3d 932, 954 (5th Cir. 1996) that only the specific state unit that originally adopted discriminatory measures in education is permitted to adopt remedial measures that take race into account. Indeed, *Grutter* rejected the Fifth Circuit's conclusion in *Hopwood* outright. *See* 539 U.S. at 322, 325 (noting that *Hopwood* rejected diversity as a compelling state interest).

Until 1947, the Prairie View State Normal & Industrial College for Colored Teachers (now Prairie View A&M University) was the only state-supported institution of higher education which black students in Texas could attend. In 1947, to avoid the integration of the University of Texas, the State created a second all-black college, the Texas State University for Negroes (now Texas Southern University). *Hopwood v. Texas*, 861 F. Supp. 551, 555 n. 4 (W.D. Tex. 1994). Even after the end of legal education, Texas continued a discriminatory policy through all levels of education, *i.e.*, from kindergarten until effectively allowing black high school students only to attend its historically black colleges, then allocating money and other resources in a manner that strongly disfavored those colleges.

Second, this Court has upheld as constitutional race-conscious plans adopted by government bodies or educational systems in order to remedy the effects of past intentional discrimination. There is a legitimate government interest in "ameliorating the disabling effects of identified discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980). The body or system may voluntarily adopt a remedial plan; there is no requirement that only court-imposed plans are constitutional. *Parents Involved*, 551 U.S. at 737. The current process used by UT to admit students is the direct product of a plan adopted to remedy past *de jure* segregation.

Following the end of the Texas Plan, UT saw an immediate and precipitate drop in minority enrollment. *Fisher v. Univ. of Texas at Austin,* 631 F. 3d 213, 222 (5th Cir. 2011). Texas responded to this situation in two ways. First, in 1997, the Texas Legislature enacted the Top Ten

Percent Law, which stabilized the entering percentages of African American undergraduates, but at a significantly lower level than when the Texas Plan was in effect. Second, following this Court's decision in *Grutter,* UT undertook a study to determine whether it could remedy the disparity in enrollment (which, it will be recalled, came from abandoning the remedial plan adopted to address the effects of *de jure* segregation) through race-conscious policies. It ultimately adopted the policy at issue in this appeal, which permits UT to consider race as one of the many factors that may be evaluated in admissions. *Id.* at 226.

The Texas Plan, as it was in effect before 1997, attempted to remediate the effects of a long-segregated state educational system. It had a clear positive effect on enrollment of minorities who had been the traditional targets of discrimination: 4.5% of the 1993 entering class at UT were African American and 15.6% were Hispanic. However, once that remedial program was ended in 1997, the remaining effects of *de jure* segregation reasserted themselves at once. "Minority presence at UT decreased immediately." *Id.* at 223. African American enrollment in 1997 was almost 40% lower than in 1995 falling from 309 to 190. *Id.*

The current UT plan has returned African American enrollment at UT to the situation prevailing before the abolition of the Texas Plan (or better). In 1995, there were 309 entering African American freshmen; in 1998, during the purportedly "race-neutral" era, only 165 entered; but in 2008, 335 African Americans enrolled at UT. Even if the publicity surrounding *Hopwood* in 1996-97 negatively affected the number of African American

applications to UT in that period, the effect was minor and transitory. What cannot be disputed is that African American admissions to UT stayed depressed throughout the so-called "race-neutral" era, long after the publicity from *Hopwood* dissipated. The Fifth Circuit found that "significantly fewer" African Americans were enrolled at UT in 2004 (309) than in 1989 (380). 631 F. 3d at 244.

This data suggests the major contributor to depressed African American enrollment throughout the "race-neutral" period was the disappearance of the remedial measures adopted in the Texas Plan. UT's current "race-conscious" admissions policy is serving the same remedial end – undoing the pernicious effects of long years of state-sponsored segregation – that the Texas Plan served before 1997.

UT has justified its race-conscious policy on the basis of the compelling state interest in diversity recognized in *Grutter*. Even if this Court chooses to modify or limit *Grutter*'s holding in some respect, it should uphold the constitutionality of UT's policy. Under this Court's precedents, UT's policy is fully justified as a reinstatement of Texas's original, proper remedy for the effects of past intentional discrimination by the state and its higher education system.

The third factor for a constitutional race-conscious remedial policy is that the policy can last only as long as the injury from discrimination remains. Thus, the policy must end when there has been a judicial determination, supported by evidence, that the effects of past state discrimination on educational opportunity have been fully remedied. This Court has distinguished between systems

which have been judicially determined to have fully eliminated the effects of *de jure* segregation, and those which have not. In *Parents Involved*, one of the two school systems that employed a race-conscious school assignment system was Jefferson County, Kentucky, which had been previously segregated by law and, in 1975, was made subject to a desegregation decree. However, the district court dissolved that decree in 2000, after hearing "eight full days of evidence" and concluding that the county had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects." *Hampton v. Jefferson County Board of Ed.*, 102 F. Supp. 2d 358, 360, 377 (W.D. Ky. 2000). *Parents Involved* noted that Jefferson County was not trying to justify its student assignment plan as a remedy for past intentional discrimination. 551 U.S. at 721.

However, in the absence of proof that the evil has indeed been cured, the presumption is that the effects of state-imposed *de jure* discrimination in higher education continue. If a state wishes to be relieved of the measures that have been imposed to remedy that discrimination, it "has the burden to prove that it has undone its prior segregation." *Fordice*, 505 U.S. 717, 744 (O'Connor, J., concurring). This is because "discriminatory intent does tend to persist through time." *Id.*, 505 U.S. at 747 (Thomas, J. concurring). It follows necessarily that if private parties sue to invalidate a race-conscious state program, which remedies the effects of past discrimination in higher education, those parties bear the same burden as the state would: they must prove that the discriminatory system and its aftereffects have been fully eliminated. *See Green, et al. v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968).

Here, unlike *Parents Involved*, there has never been a judicial finding, based on evidentiary proof, that the vestiges of the segregated system of Texas higher education have been eliminated. Moreover, Petitioners never even attempted to make such a showing. Thus, the third factor is satisfied on this record.

The fourth and final factor for a constitutional "race-conscious" remedial program is that the program may not impose quotas or a fixed percentage of admission of minority students. While there is a compelling state interest in remedying past discrimination, the means chosen by government "'must be specifically and narrowly framed to accomplish that purpose.'" *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)). The narrow-tailoring requirement means that "a race-conscious admissions program cannot use a quota system," *Grutter*, 539 U.S. at 334, undertake racial balancing, or use a system that adds a fixed amount of bonus points to an applicant based on race. *Id.* at 337. A university may, however, consider race or ethnicity as a "plus factor," if it provides "truly individualized consideration" to applicants and is flexible enough to consider the whole person. *Id.* at 336-37. "There is no constitutional objection to the goal of considering race as one modest factor among many others," provided that race "does not become a predominant factor in the admissions decisionmaking." *Id.* at 392-93 (Kennedy, J., dissenting).

In summary, UT's admissions program provides a modest remedy for the lingering injury which black Texans have suffered from slavery, a century or more of *de jure* educational segregation, and several decades more of malign state neglect in a *de facto* segregated

university system. Accordingly, UT's admissions program serves one of the most compelling of state interests: undoing the scarring damage of state-imposed and encouraged discrimination in higher education. The program considers race as only one factor among many, in the context of "truly individualized" evaluation of each applicant for admission to UT. UT's program withstands strict constitutional scrutiny because it was adopted after careful consideration, and is narrowly tailored to accomplish the state's interest in remedying the effects of intentional discrimination.

IV. FORCING UT TO IGNORE RACE IN ADMISSIONS WOULD FORCE IT TO IGNORE THE ACCOMPLISHMENTS OF INDIVIDUAL STUDENT APPLICANTS IN OVERCOMING RACIAL BARRIERS

UT, like many other universities, requires applicants to submit personal essays. For example, in 2008, UT asked applicants to respond to the following in essay form: "Choose an issue of importance to you—the issue could be personal, school related, local, political, or international in scope—and write an essay in which you explain the significance of that issue to yourself, your family, your community, or your generation." JA 417a. If the Petitioner prevailed here, UT would be required to ignore the personal essays of African Americans that revealed how they overcame racial barriers and achieved success in grade and high school, or at work. Such accomplishments may be the best indicator of how a student will deal with the challenges of an elite educational institution, and what individual contributions that student can make to the UT experience. They are thus directly relevant to UT's

core mission of recruiting a distinguished and motivated student body.

Petitioner's argument runs contrary to what this Court has long recognized: African Americans enhance a group effort by contributing their personal experience with racial issues. For example, this Court ruled that African Americans may not be barred from jury service, because they possess "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable" and that such jurors contribute to the deliberations of juries a "perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972). In 2003, this Court approvingly cited Harvard's admission policy which recognized that "critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it." *Gratz v. Bollinger*, 539 U.S. 244, 272-73 (2003).

What Petitioner seeks is to deny African Americans and other racial minorities an admissions system that is "designed to consider each applicant as an individual." *Grutter v. Bollinger*, 539 U.S. 306, (Kennedy, J., dissenting). Under her position, every applicant would be "holistically" considered except African Americans and other racial minorities, whose personal essays would have to be censored (or self-censored) to remove any mention of experience with race. Important achievements by these students would thereby be deemed meaningless and worthless. UT would have to treat extraordinary applicants as though they were commonplace. For example, UT would have to pretend that the first African American member of a traditionally all-white organization, who tore down

barriers and rose to become president of the organization, had not done anything of historical significance. Even if an applicant had triumphed over direct, personalized, *de facto* racism, UT would be barred from considering that triumph. Thus, granting Petitioner's request would deny individuals who had overcome racial adversity the opportunity to demonstrate important accomplishments. Other students, for whom race presented no obstacle, would effectively have an unfair advantage. Many racial minority applicants have pulled themselves up by their bootstraps, and the Court should reject Petitioner's attempt to take away their boots.

CONCLUSION

The University of Texas at Austin's admission policy has no racial preference and caused no injury in fact to Petitioner. Indeed, the long history of state-sponsored discrimination necessitates Texas's actions to remedy the lasting effects. UT's admission program is constitutional because it is narrowly tailored to eradicate the vestiges of Texas's prior official policy of discrimination. Forcing UT to ignore race would force UT to ignore the accomplishments of racial minorities. For these reasons, *amici* urge the Court to uphold the lower court rulings.

Respectfully submitted,

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