

No. 11-345

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**In the  
Supreme Court of the United States**

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ABIGAIL NOEL FISHER,  
*Petitioner,*

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,  
*Respondents.*

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

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**BRIEF AMICUS CURIAE OF  
KIMBERLY WEST-FAULCON  
IN SUPPORT OF RESPONDENTS**

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**QUESTION PRESENTED**

Whether the Equal Protection Clause permits the University of Texas to consider applicants' race as one of the many factors that go into the university's admissions decisions.

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

Modern research finding that tests based on improved theories of intelligence narrow “the black-white test score gap” undermines claims by rejected white college applicants that the admission of members of lower-scoring racial groups violates their equal protection rights under the Fourteenth Amendment. Rejected white litigants in “reverse discrimination” cases erroneously rely on differences in racial group mean (average) scores on traditional mental ability tests like the SAT,<sup>2</sup> Law School Admissions Test (LSAT), Graduate Records Examination (“GRE”), and Medical College Admissions Test (“MCAT”) as well as misconceptions of the predictive power of such tests to support their contention that the admission of nonwhites with relatively lower scores demonstrates that a selective university has used a racial classification in a manner that fails strict scrutiny.

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<sup>1</sup> The parties have filed blanket consents to the filing of *amicus* briefs in this case. No party to this case or counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and *amicus* counsel paid for or made a monetary contribution to fund the preparation or submission of this brief. *Amicus curiae* files this brief as an individual and not on behalf of the institution with which *amicus curiae* is affiliated.

<sup>2</sup> Originally called the Scholastic Aptitude Test, “SAT” no longer has an official meaning. TONY MONCHINSKI, *CRITICAL PEDAGOGY AND THE EVERYDAY CLASSROOM* 171 (2008) (observing that the acronym SAT once stood for “scholastic *aptitude* test” and later “scholastic *assessment* test” but that “[q]uestions of what the SAT supposedly assessed led to the jettisoning of that acronym and today the initials SAT stand for nothing”).

The “mean test score fallacy”—the claim that black-white differences in racial group test score averages constitute proof of race discrimination against whites—has been undermined by empirical research finding that (i) differences in distributions of test scores by race result in differences in racial group average scores *even if admissions test score cut-offs are completely color-blind* and (ii) the use of multiple valid non-test-driven admissions criteria identifies applicants from lower-scoring racial groups who qualify for admission despite relatively lower test scores. This research exposes the invalidity of “folk” beliefs about traditional standardized tests as predictors of merit—“folk” beliefs which have been rightly rejected by Justices of this Court.

The claim that differences in average test scores evidence racially “preferential” treatment that will continue perpetually is further undermined by social science research. First, research shows that the “black-white test score gap” is narrowing over time. Second, theoretically-improved standardized tests narrow the “black-white test score gap”—have smaller racial skews—yet do a better job than conventional tests of predicting test-takers’ future performance. Rejected white applicants alleging reverse discrimination lack awareness of the smaller black-white score differences of modern mental ability tests.

*Amicus Curiae* has written this brief to bring to the Court’s attention the portions of this research that seem most relevant to the issues under consideration in *Fisher v. University of Texas, et al.*

*Amicus curiae* is, Kimberly West-Faulcon,<sup>3</sup> a nationally recognized scholar pioneering interdisciplinary research of law and intelligence testing that exposes the legal implications of modern research from the fields of psychology, statistics and psychometrics. Professor West-Faulcon's research bears directly on the questions of (1) whether the current admissions policy of the University of Texas ("UT") operates as a racial "preference" that should trigger the Court's strict scrutiny analysis and (2) assuming UT's current admissions policy does employ racial classifications in a manner subject to strict scrutiny, whether social science research finding smaller racial differences in more theoretically sophisticated modern intelligence and college admissions tests demonstrates that the minimal<sup>4</sup> racial attentiveness of UT's admissions policy is narrowly tailored.

She files this brief in order to acquaint the Court with this research and to explain its relevance to the constitutionality of UT's current admissions policy. Since relatively higher scores on conventional tests do not align in rank order with greater admissions-related merit, white applicants must point to more than their test scores to prove race discrimination. Accordingly, correcting for the theoretical inadequa-

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<sup>3</sup> Kimberly West-Faulcon is the James P. Bradley Chair in Constitutional Law at Loyola Law School in Los Angeles.

<sup>4</sup> Petitioner in this case does not claim to be more qualified than the 81% of Texas white and nonwhite residents admitted to the UT under the high-school-grades-driven Top Ten Percent Law ("TTPL"). Moreover, petitioner concedes that the impact of race on admissions decisions for the less than 20% of the UT 2008 freshman class was "infinitesimal." Brief of Petitioner at 9.

cies of traditional college admissions tests like the SAT is constitutionally permissible.

### INTRODUCTION AND SUMMARY OF ARGUMENT

It has long been erroneously claimed that differences in the average test scores of racial groups, most specifically differences in the average test scores of whites as compared to blacks, constitute strong evidence of widespread “reverse discrimination”—discrimination against white applicants.<sup>5</sup> The propriety of evaluating the constitutionality of a university’s admissions policy by inferring racial discrimination from numerical differences in the average SAT scores of black and white admits turns on empirical questions that have been analyzed extensively by social science research. In the instant case, this social science research is particularly relevant because there is no evidence that the small degree of racial attentiveness exercised under UT’s current

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<sup>5</sup> See, e.g., Brief Amicus Curiae of Richard Sander and Stuart Taylor at 15-17; Robert Lerner & Althea K. Nagai, *Racial Preferences in Higher Education: The University of California at Berkeley* (1997) available at <http://ceousa.org/berkeley.html>; Robert Lerner & Althea K. Nagai, *Racial Preferences in Colorado Higher Education: Racial Preferences in Undergraduate Admissions at the Public Colleges and University of Colorado* (1997) available at <http://ceousa.org/warp.html>; Robert Lerner & Althea K. Nagai, *Racial Preferences in Michigan Higher Education* (1997) available at <http://ceousa.org/michigan.html>; STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 386-422 (1997); RICHARD J. HERNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 450 (1994).

policy had any substantive impact on petitioner's admissions decision.<sup>6</sup>

This brief explains how social science research undermines the common misconception that black applicants must be receiving “preferential” treatment and that the magnitude of the so-called “preference” is large on the basis of a casual numerical comparison of the average test scores of black admits as compared to white admits. It also explains that “the gap” in black-white group average scores on traditional mental tests, while still in existence, has been narrowing for several decades. The brief describes the relevance of contemporary research finding that theoretically-improved and updated versions of such tests have been shown to narrow the black-white average score gap presumably because they are based on more theoretically robust and more outcome predictive theories of intelligence.

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<sup>6</sup> As explained by Harvard law professor Tomiko Brown-Nagin:

[Petitioner] Fisher cannot and does not claim to have been a superior candidate relative to students of color admitted under the Top Ten Percent Law. The TTPL is a merit-based system. Fisher failed to gain admission because her grades were inferior to those of students admitted through this pathway. Fisher also does not categorically assert that she posted scores and a class rank superior to students admitted under the second (race-neutral) stream. Most importantly, Fisher does not claim that racial consideration under the holistic stream—the only avenue through which officials may explicitly consider race—necessarily doomed her prospects. No evidence supports that position.

Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 Vand. L. Rev. En Banc 113, 114-15 (2012).

Such research calls into question petitioner’s allegation that UT’s minimal consideration of race as a factor in admissions violates her Fourteenth Amendment constitutional rights because she is Caucasian.

## ARGUMENT

### **I. Social Science Research Has Undermined the “Mean Test Score Fallacy” Underlying Petitioner’s Claim: That Large Black-White Differences in Racial Group Average Scores Constitute Proof of Race Discrimination Against Whites**

For decades, differences in the average test scores of racial groups, particularly the differences in black and white average group scores, have been misconceived as strong evidence of widespread race discrimination against whites—“reverse discrimination” in selective higher education admissions.<sup>7</sup> Despite the intuitive appeal of inferring race discrimination from numerical differences in black-white test scores, empirically-based social science research on this question has long shown that such arguments are fundamentally misleading. Contrary to the suggestion by petitioner and numerous amici, the magnitude of numerical differences in black-white racial group average test scores is not a measure of “racial preference” and it is not empirical proof of race discrimination against whites. This social science research explains why the racial group average SAT

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<sup>7</sup> See, e.g., Hernstein & Murray, *supra* note 5; Thernstrom & Thernstrom, *supra* note 5; Brief Amicus Curiae of Richard Sander and Stuart Taylor.

scores of applicants admitted to UT in 2008 differ even though the consideration of race by the university was “infinitesimal.”<sup>8</sup>

As detailed in a 1999 study conducted by labor economists William T. Dickens and Thomas J. Kane, “one cannot simply compare the test scores of blacks and whites on the same job or at the same school to determine whether the process of choosing people for that job or school is race-blind.”<sup>9</sup> It is a fallacy that the existence of black-white difference in mean test scores of admitted students proves reverse discrimination against whites because social science research has shown definitively that *averages* of black-white racial group scores also differ when admissions are completely race-blind. Dickens and Kane identify two reasons why it is a common<sup>10</sup> but misleading error “to infer racial preference based solely on the observed characteristics of admitted students.”<sup>11</sup>

According to their study, the reason for differences in the *average* SAT scores of black and white admits is not race discrimination against whites in the form of racial preferences for nonwhites. Instead, social science research has found two central

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<sup>8</sup> See Brief of Petitioner at 9.

<sup>9</sup> William T. Dickens and Thomas J. Kane, 38 INDUSTRIAL RELATIONS 331, 357 (1999).

<sup>10</sup> Prominent examples of reliance on this fallacy to support claims of extensive “reverse discrimination” include its use by Richard Hernstein and Charles Murray in their book, *The Bell Curve*. For its use in this litigation, see *e.g.*, Brief Amicus Curiae of Richard Sander and Stuart Taylor at 15-17.

<sup>11</sup> Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 19 (Gary Orfield and Edward Miller, eds., 1998).

reasons that black-white admits' average scores will differ even if blacks and whites are required to exceed the same race-blind cutoff on test scores. First, differences in average black-white racial group scores exist due to the *distribution* of test scores between blacks and whites—among blacks who score high enough on the SAT to be admitted to highly selective universities, their scores are not the “highest of the high” scores. Second, because “[b]lack test scores are much worse, relative to whites, than their other qualifications,”<sup>12</sup> “it is easier to find blacks with low[er] test scores who make up for that deficiency with other redeeming traits.”<sup>13</sup>

Despite its repeated and definitive debunking by well-regarded social science,<sup>14</sup> the mean test score fallacy lives on because it perpetuates two myths. The fallacy relies substantially on the myth that standardized admissions tests like the SAT are such precise tools for measuring future success in college that non-test-driven admissions criteria are anti-meritocratic. It also perpetuates the myth that college grades are necessarily a more important measure of college success than successful graduation from a selective institution.

The idea that an applicant with a higher SAT score is *per se* more deserving of admission than a differentially credentialed applicant with a lower SAT score is based on a non-scientific “folk” under-

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<sup>12</sup> Dickens & Kane, *supra* note 9 at 332.

<sup>13</sup> *Id.* at 332.

<sup>14</sup> *Id.*; Kane, *supra* note 11 at 19-20; Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP* 431, 435 (Christopher Jencks & Meredith Phillips, eds., 1998).

standing of the nature of mental ability and mental testing.<sup>15</sup> Justices of this Court have previously rejected such “folk” understandings of intelligence and the predictive capacity test scores.

**A. Justices of this Court Have Previously Rejected “Folk” Understandings of Intelligence and the Predictive Capacity of Test Scores**

Some members of the Court have recognized the folly of viewing test scores as perfectly precise measures of test-takers’ admissions-related “merit.” Justice Douglas, Justice Powell, and Justice Thomas are among the Justices who have most explicitly questioned the typical “folk” assumption that reliance on non-test-score-driven criteria is, by its very nature, a deviation from a “true” academic merit-based standard. In reference to tests designed to predict performance in law school, Justice Douglas observed:

Certainly the tests do seem to do better than chance. But they do not have the value that their deceptively precise scoring system suggests. The proponents’ own data show that, for example, most of those scoring in the bottom 20% on the test do better than that in law school—indeed six of every 100 of them will be in the *top* 20% of their law school class. And no one knows how many of those who were not admitted

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<sup>15</sup> See Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1245 (2011).

because of their test scores would in fact have done well were they given the chance.<sup>16</sup>

Although he did not state so explicitly, Justice Douglas exhibited an understanding of the reality that conventional standardized tests are sufficiently imperfect that some lower-scoring applicants might nevertheless have greater admission-related merit than applicants with higher test scores. He noted, “Of course, the law school that admits only those with the highest test scores finds that on the average they do much better, and thus, the test is a convenient tool for the admissions committee. The price is paid by the able student who for unknown reasons did not achieve that high score....” In short, instead of presuming that admissions-related merit and rank-order test scores align perfectly, Justice Douglas’ view of tests leaves open the possibility that a student who fails to achieve a high score is “able.”

In a case involving test scores designed to predict success in medical school, Justice Powell also rejected the general presumption that rank-ordering by test score always aligns with rank-order admissions-related merit. Specifically, in his controlling opinion in *Regents of the University of California v. Bakke*, Justice Powell articulated a doctrinal framework for evaluating the constitutionality of the consideration of race as a factor in admissions if the rationale for its adoption was to cure “established inaccuracies” in

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<sup>16</sup> *DeFunis v. Odegaard*, 416 U.S. 312, 329 (1974) (Douglas, J., dissenting) (internal citation omitted).

the capacity of the admissions test to predict academic performance.<sup>17</sup>

Additionally, Justice Thomas has also questioned the presumption that standardized admissions tests have the capacity to predict who will succeed in law school.<sup>18</sup> In fact, in *Grutter v. Bollinger*, Justice Thomas admonishes law schools for relying on LSAT admissions test scores “with full knowledge of their disparate impact” against groups like African Americans.<sup>19</sup> He also expresses the view that rank-order test scores and admissions-related merit are not perfectly aligned when he makes reference to “those students who, despite a lower [test] score or undergraduate GPA, will succeed in the study of law.”<sup>20</sup> Like Douglas and Powell, Justice Thomas is among the members of the Court who have explicitly acknowledged the predictive limitations of the capacity of admissions tests to predict future academic success.

### **B. Differences in Distributions of Test Scores By Race Result in Differences in**

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<sup>17</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978). In his analysis, Justice Powell also made a point relevant to the case at hand—that the consideration of race as a factor to redress limitations in the predictive power of a particular test is not a racial preference. *Id.*

<sup>18</sup> *Grutter v. Bollinger*, 539 U.S. 306, 367 (2003) (Thomas, J., concurring in part and dissenting in part) (stating that “there is much to be said for the view that the use of tests and other measures to ‘predict’ academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law.”)

<sup>19</sup> *Id.* at 369.

<sup>20</sup> *Id.* at 372.

**Racial Group Average Scores Even if  
Admissions Test Score Cut-offs are  
Completely “Color-Blind”**

The 1999 Dickens and Kane study empirically tested assertions that differences in black-white average test scores of selected applicants is evidence of widespread “reverse discrimination” against white applicants, specifically focusing on claims made by Richard Herrnstein and Charles Murray—authors of *The Bell Curve*, Robert Lerner and Althea Nagai — authors of the Center for Equal Opportunity reports issued in 1997 examining differences in black-white test scores at state schools in California, Colorado, and Michigan, and Stephan Thernstrom and Abigail Thernstrom—authors of *America in Black and White*.<sup>21</sup> The study finds that all of these authors are “misinterpreting the significance of test score differences” and using “mistaken logic.”<sup>22</sup> To demonstrate this error, Dickens and Kane construct mathematical models to explain why it is incorrect to point to differences between black-white mean test scores as proof of “massive” racial preferences.<sup>23</sup>

For reasons that modern social science research increasingly attributes to theoretical inadequacies in the theories of intelligence that underlie conventional mental tests like the SAT,<sup>24</sup> African American

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<sup>21</sup> Dickens & Kane, *supra* note 9 at 333.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (observing that “[n]owhere in these [mean test score fallacy state] reports is there any discussion of the magnitude of the differences that might be expected in the absence of preferences”).

<sup>24</sup> West-Faulcon, *More Intelligent Design*, *supra* note 15 at 1240, 1241 (describing new intelligence research finding “that

test-takers score, on average, about one full standard deviation lower than white test-takers on average.<sup>25</sup> This characteristic of traditional mental tests—that, when averaged, the scores *above* the qualifying test score level for selective universities of admitted blacks (and Latinos) are typically lower than the white admitted students’ racial group test score average—is the first reason that differences in black-white average scores of selected applicants are not evidence of either the existence of race-consciousness nor evidence of the magnitude of the consideration of race in a university’s admissions process.

The study of the mean test score fallacy by Dickens and Kane explicates the mathematical reality that the *average* test score of high-scoring black test-takers will be lower than the *average* test score of high-scoring white test-takers *even when admissions decisions are completely race-blind*.<sup>26</sup> When “the distribution of standardized test scores” differs between any two groups, “the mean test scores will be lower for people drawn from the second distribution even though both must pass the same relatively high

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newly designed tests” are more valid and predictive than traditional factorist tests *and* “that differences in racial group average scores are smaller on tests based on more complete theories of intelligence (multi-dimensional conceptions of intelligence) than factorist tests”). “Such findings—essentially that at least some portion of the racial differences in factorist test scores are attributable to inadequacies in factorist tests as predictors of future academic success—have significant legal and policy implications related to race and selective higher education admissions.” *Id.* at 1241.

<sup>25</sup> Robert J. Sternberg, *The Rainbow Project: Enhancing the SAT Through Assessments of Analytical, Practical, and Creative Skills*, 34 INTELLIGENCE 321, 322 (2006).

<sup>26</sup> Dickens & Kane, *supra* note 9 at 332.

standard.”<sup>27</sup> Mathematical models of a hypothetical “color-blind” admissions process requiring all applicants “be above the white average” SAT score reveal that “no matter where the [test score cut-off] range is positioned,” the average of the black distribution of test scores will be to the left (lower than) the average of the white distribution.<sup>28</sup>

In short, a numerical difference in racial group average scores of admitted freshmen is not proof that race factored in the admissions process. Even if UT’s admissions process were totally “race-blind,” “blacks and whites meeting the same standard will have different average scores” unless every applicant is required to have “the same test score.” Since UT does not require all applicants have the same SAT score, irrespective of UT’s policy on considering race in admissions, mathematics will dictate that the black racial group SAT score average at a selective university will differ from the white racial group average until the differences in black-white racial group averages in the general population are narrowed by use of more theoretically-sound mental tests.<sup>29</sup>

**C. Use of Multiple Valid Non-Test-Driven Admissions Criteria Identifies Applicants From Lower-Scoring Racial Groups Who Qualify for Admission Despite Relatively Lower Test Scores**

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<sup>27</sup> *Id.* at 335.

<sup>28</sup> *Id.* at 337-38.

<sup>29</sup> Correspondingly, black applicants are more likely to qualify based on non-SAT score admissions factors (in some cases, this may even be despite a relatively lower SAT score).

There is an additional mathematical reason that differences in the average SAT score of admitted black and the white admits are not evidence of the existence of racial preferences in favor of nonwhites or the magnitude of weight placed on race in a selective admissions process. Simply put, even when a university maintains extremely high academic selection standards, those African Americans who meet or exceed those standards are more likely to do so based upon their non-test-score qualifications. In that black applicants are less likely to be selected for admission *because of* their SAT score, the SAT scores of African American applicants who score high enough to be qualified for admission to selective universities will, on average, be lower as compared to qualified white applicants.<sup>30</sup>

The Dickens and Kane study explains the significance of the fact that universities rely on multiple types of qualifications in addition to SAT scores as follows:

There are two reasons why introducing qualifications besides test scores into consideration will

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<sup>30</sup> A relatively higher-scorer on a standardized mental tests is not “entitled” to admission to a particular selective college or university. See West-Faulcon, *More Intelligent Design*, *supra* note 15 at 1292 (“evidence that tests like the SAT have less predictive power than systems tests, such as triarchic admissions tests designed according to the “theory of successful intelligence,” also makes it less likely that rejected white applicants can demonstrate that inconsistent reliance on factorist test scores constitutes “reverse discrimination” in violation of the Fourteenth Amendment and federal statutes prohibiting race discrimination such as Title VI”).

result in blacks' test scores being lower than whites'. First, blacks' test scores tend to be their weakest credential relative to whites. Second, test scores (or what they represent) are only a small part of what is considered in most selection processes. . . . To see why this matters, it again helps to start with an extreme case. Suppose that test scores and any characteristic with test scores are completely irrelevant as qualifications for a particular task. Then, no matter what the level of qualification considered the distribution of test scores would just reflect that of the population. If it is confusing to do this thought experiment with test scores, think of doing it with eye color. Suppose that eye color is completely uncorrelated with any qualification an admissions committee considered important. If one group of people had a disproportionate number of blue-eyed members, we would not be surprised if those of that group who qualified for an elite school were more likely to have blue eyes than other students—even if the admissions committee had no idea what the eye colors of applicants were.<sup>31</sup>

The fact that some nonwhites, particularly African Americans, are among the students admitted to selective universities based on admissions factors other than the comparative rank of their SAT scores is not a racial preference in any sense. Instead, it is the result of the fact that selective universities do not base admissions decisions solely on SAT scores

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<sup>31</sup> Dickens & Kane, *supra* note 9 at 338-41.

and the fact that the traditional SAT college admissions test has a significant racial “gap.” The reason for the former and the latter are explained, at least in part, by the psychometric characteristics of the conventional SAT test. As to the former, universities do not rely solely on SAT scores to make admissions decisions because the test is not a perfect predictor of future academic or real-world success.<sup>32</sup> With respect to the latter, social science research that has emerged over the last several decades supports the theory that part of the racial gap in scores on currently-used mental tests is attributable to theoretical inadequacies in the theories of intelligence underlying such tests.

If the SAT had 100% percent predictive power with respect to test-takers’ freshman-year GPA, test-takers’ GPA at graduation, or whether test-takers graduate, universities would be able to predict future academic success in college based solely on an applicant’s SAT score. This is not the case. Undisputed psychometric and statistical analysis of the SAT demonstrates its scientific value. Even when used in conjunction with high school grades, statistical models based on SAT score are far from perfectly correlated with the test-taker’s GPA at the end of the freshman year of college. SAT correlates to an even lesser degree when the outcome criterion of interest is grades beyond the first year of college or whether the test-taker graduates from the college to which they are admitted.<sup>33</sup>

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<sup>32</sup> See generally Richard C. Atkinson & Saul Geiser, *Reflections on a Century of College Admissions Tests*, 38 EDUC. RESEARCHER 665 (2009).

<sup>33</sup> See, e.g., *id.* at 672.

Unfortunately, “at the end of the roughly hundred-year period that mass-marketed standardized tests have been in existence, their predictive power still leaves substantial room for improvement.”<sup>34</sup> Far from perfect prediction, the 13% power of predicting first-year college GPA based on SAT score and the 23% predictive power of using SAT score combined with high school GPA to predict the same early college outcome is helpful but not complete information for universities to use in assessing the academic merit of applicants.<sup>35</sup>

The science and statistics behind the meaning of SAT scores are clear in delineating the limits of the traditional SAT college admissions test’s predictive power. Although advances in intelligence theory and mental testing show promise for the future, conventional currently-used admissions tests like the SAT require substantial augmentation with non-test score admissions criteria to explain the variation in

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<sup>34</sup> West-Faulcon, *More Intelligent Design*, *supra* note 15 at 1269 (examining modern innovation in mental testing in light of the fact that conventional standardized tests like the SAT “leave more of the variation in intelligence and future academic success unexplained than they actually explain”). Richard Atkinson is former President of the University of California and an expert in cognitive science and psychology. During his presidency, Atkinson gave a speech critical of the amount of weight placed on SAT scores in college admissions and announced plans to no longer require students applying to take the SAT I. See Richard C. Atkinson, President, University of California, The 2001 Robert J. Atwell Distinguished Lecture at the 83<sup>rd</sup> Annual Meeting of the American Council on Education (Feb. 18, 2001), *available at* <http://www.ucop.edu/news/sat/speech.html>.

<sup>35</sup> See West-Faulcon, *More Intelligent Design*, *supra* note 15 at 1264-68.

later-college and real-life success left unexplained by SAT scores. In fact, quite contrary to the oft-repeated “mismatch” contention that African Americans are harmed by their admission to universities with white average SAT scores higher than their own because they earn lower college grades, a substantial body of social science research shows that African Americans admitted with lower SAT scores than the university’s white average score succeed in graduating from selective universities and benefit greatly from their admission.

The now decades-old “mismatch” theory that nonwhites from racial groups with lower, on average, SAT scores are harmed by their admission is based on the unproven and unprovable assertion that blacks who graduate from selective colleges and universities but do so with relatively lower grades or class rank at the more selective university are harmed from graduating from that institution. The research contending to support the mismatch theory rarely acknowledges the fact that such contentions focus almost exclusively on college *grades*.<sup>36</sup>

While the *reasons* that some nonwhite high school students fail to attain the grades predicted by their SAT scores when they attend selective univer-

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<sup>36</sup> *Compare* Brief Amicus Curiae of Richard Sander and Stuart Taylor at 9-10, n. 25 (acknowledging that “some” studies find “high graduation rates for racial-preference recipients at more selective institutions” but suggesting, without empirical support, that graduation from selective universities is insignificant to African Americans in contrast to vaguely-referenced psychological harms or because “elite private colleges” commonly “adjust policies or inflate grades”).

sities warrants further empirical analysis,<sup>37</sup> the inference that such high school students are harmed by attending elite educational institutions or would enjoy better life outcomes if they chose less selective institutions is unsupported by empirical research. Instead, social science research has consistently shown that the nonwhite, particular African American, students supposedly harmed by being “mismatched” at more elite universities are more likely to successfully *graduate* from the selective universities to which they are admitted *and to benefit substantially from living life as graduates of more prominent and elite educational institutions (even if their GPA’s are lower than either the average white GPA, the GPA predicted by their SAT scores, or their GPA had they attended a less elite institution).*<sup>38</sup>

Because attending a more selective university does confer a benefit on students of any race, it is misleading for mismatch theorists to point to overall African American and Latino enrollment at *the various and differentially selective* University of California campuses to support the claim that the elimina-

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<sup>37</sup> Some researchers inappropriately suggest their empirical findings prove that the consideration of race as a factor in admissions *causes* blacks attending more elite institutions to attain lower grades. *See, e.g.*, Brief Amicus Curiae of Richard Sander and Stuart Taylor at 3 (citing Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004)). Such suggestions improperly conflate “correlation” and “causation.” For discussion of why such conflation is problematic, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 19-110 (2002).

<sup>38</sup> *See, e.g.*, WILLIAM G. BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 59-70 (1998).

tion of race as an admissions factor helps African Americans and Latinos. Since the implementation of California’s state anti-affirmative action law, Proposition 209, African American and Latino applicants (including those with very high GPA’s) to the University of California’s two *most selective* campuses—UC Berkeley and UCLA—have been consistently denied admission at higher rates than whites.<sup>39</sup>

The mismatch theorists cannot point to any empirical study that finds that students who graduate with lower grades from the nation’s most elite colleges and universities have worse professional and personal life outcomes than they would have if they had graduated with higher grades from a less elite educational institution.<sup>40</sup> Attending a more selective

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<sup>39</sup> See Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1131-1144 (2009).

<sup>40</sup> Richard Sander purports to have conducted empirical research that found such “harms” in the context of legal graduate school education. See Brief Amicus Curiae of Richard Sander and Stuart Taylor at 5-10. The methodology of Sander’s empirical research has been severely criticized. See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?* 57 STAN L. REV. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855 (2005); Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); Daniel E. Ho, *Affirmative Action’s Affirmative Actions: A Reply to Sander*, 114 YALE L.J. 2011 (2005); Daniel E. Ho, *Why Affirmative Action Does not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1991 (2005); Beverly Moran, *The Case for Black Inferiority? What Must Be True If Professor Sander is Right: A Response to a Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41 (2005); Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Le-*

university may put a black student with a relatively lower SAT score at risk of graduating with a lower college GPA relative to his or her classmates, but “it is nevertheless associated with improved chances of graduating.”<sup>41</sup> “To the extent that more selective institutions offer benefits to their students, these pay-offs seem no smaller for black and Hispanic youth who gain admission to them than for other students.”<sup>42</sup>

In a highly-regarded longitudinal study published in 1998, former Princeton and Harvard university presidents, William Bowen and Derek Bok, found that the graduation rates of African Americans in the lower SAT score bands *increased* with the selectivity of the undergraduate institution they attended.<sup>43</sup> Institution-specific studies of the capacity of the SAT to predict later college academic success of African American students also highlight limitations in the usefulness of the SAT for black students who qualify for admission but do so with scores lower than the university average.

A study comparing the graduation rates of relatively higher-scoring and lower-scoring African

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*gal Education: The Systemic Flaws in Richard Sander’s Affirmative Action Study*, 46 J. BLACKS IN HIGHER EDUC. 102, 102–03 (2004). Even if Sander’s purported findings were accurate for one particular type of graduate school education—if it were true that *law* graduates are better off attending less elite law schools if they rank higher in their graduating class—those findings do not demonstrate that the same holds true for undergraduate education and for real-world life benefits after *college* graduation and later in life.

<sup>41</sup> Thomas J. Kane, *Misconceptions*, *supra* note 11 at 23.

<sup>42</sup> *Id.*

<sup>43</sup> Bok & Bowen, *supra* note 38 at 61.

American students admitted to the University of California’s most selective undergraduate institution—UC Berkeley—was undertaken to test assertions by Stephan Thernstrom and Abigail Thernstrom that black students with relatively lower SAT scores were less likely to graduate from UC Berkeley because they were “mismatched.”<sup>44</sup> The institution-specific study of African American admitted students in a specific freshman class at UC Berkeley found “zero correlation between SAT score and eventual graduation for this cohort.”<sup>45</sup> Actual graduation rates for African Americans were higher for blacks admitted with relatively lower SAT scores than for those African Americans admitted with ultra-high SAT scores.<sup>46</sup>

Similarly, an institution-specific study of the University of Texas School of Law strikingly revealed the limitations of conventional admissions test to predict the academic success of African American students. The study was conducted by the Law School Admission Services, Inc. (the “LSAC”), the

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<sup>44</sup> Gregg Thomson, Is the SAT a “Good Predictor” of Graduation Rates? The Failure of “Common Sense” and Conventional Expertise and New Approach to the Question, Office of Research, University of California, Berkeley, (Dec. 1998) at 4 (unpublished manuscript) (an empirical analysis undermining claims made by the Thernstroms) (citing Abigail Thernstrom and Stephan Thernstrom, *The Consequences of Colorblindness*, Wall Street Journal, April 7, 1998 at A18.).

<sup>45</sup> *Id.* at 6.

<sup>46</sup> African Americans with the highest SAT scores graduated at a lower than expected rate—61% rate as opposed to the expected 84% rate—while African Americans with SAT scores in the two lowest tiers of the study graduated approximately double the expected rate—67% and 84% as opposed to the expected 32% and 45% rates. *Id.*

publisher of the LSAT law school admissions test and the entity that provides its participating law schools in the United States and Canada with the values of the weights the school should give to LSAT scores and undergraduate GPA to predict applicants' first-year law school GPA.<sup>47</sup> The relationship between the LSAT scores of African American applicants to the UT School of Law and their predicted first-year law school GPA's resulted in a prediction equation from the LSAC that attributed a negative weight to black law school applicants' undergraduate GPA's.<sup>48</sup> This means the prediction equation was so invalid for African Americans that it only found correlations with LSAT scores based on a negative correlation between the undergraduate GPA of black applicants. The LSAC-generated equation for white applicants did not reach this bizarre result. In addition, it resulted in equations with less predictive power for black applicants than for white applicants (0.28 correlation for blacks—8% predictive power—compared to a 0.35 correlation for whites—12% predictive power). The UT law school-specific equation

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<sup>47</sup> See Linda F. Wightman, *Predictive Validity of the LSAT: A National Summary of the 1990-1992 Correlation Studies*, Law School Admission Council Research Report 93-05, Dec. 1993, Plaintiff's Exhibit 136, 861 F. Supp. 551 (W.D. Tex. 1994), (No. A-92-CAA-563-SS), rev'd on other grounds, 78 F. 3d 932 (5th Cir.), *cert denied*, 518 U.S. 1033 (1996).

<sup>48</sup> See Declaration of Martin M. Shapiro at 15, *Hopwood v. Univ. of Tex.*, 861 F. Supp. 551 (W.D. Tex. 1994), (No. A-92-CAA-563-SS), rev'd on other grounds, 78 F. 3d 932 (5th Cir.), *cert denied*, 518 U.S. 1033 (1996) (explaining the significance of LSAC report). See also Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL L. REV. 953, 972 (1996).

for black applicants not only called for admitting African American applicants with lower undergraduate GPA's, but it did not call for the same inappropriate treatment of white applicant college GPA's.<sup>49</sup>

Contrary to the implicit suggestion by those asserting the correctness of the mean test score fallacy, sole reliance on the SAT to select high school students for admission to selective universities would certainly be anti-meritocratic because of the undisputed limitations in the predictive capacity of the SAT and other similar conventional mental tests. Moreover, it is important to recognize that neither the predictive limits of traditional mental tests nor the racial differences in scores on such tests will necessarily exist 25 years from now. Modern research of intelligence and mental testing shows promise in decreasing racial differences in mental test scores without sacrificing their accuracy and predictive power.

## **II. Narrowing of the Racial Test Score Gap Means Black-White Differences in SAT Scores Will Be Smaller in Future Years**

In recent analyses of long-term data, “researchers are finding that the achievement gap between white and black students has narrowed significantly

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<sup>49</sup> *Id.* Specifically, the prediction equation called for multiplying African American undergraduate GPA by a negative number in the equation (-3.35) while the regression weight for undergraduate GPA for white applications was a positive number (+7.94). *Id.*

over the past few decades.”<sup>50</sup> Social science study of innovations in mental testing has used knowledge of the limitations of conventional theories of intelligence to develop valid intelligence tests with *smaller* racial differences in scores.<sup>51</sup> Intelligence theories such as the Cattell-Horn-Carroll (CHC) theory of cognitive abilities, Robert Sternberg’s triarchic theory of intelligence, and the PASS cognitive model of intelligence created by Jack Naglieri and J.P. Das purport to define intelligence more completely than the conventional theories of intelligence relied upon by traditional mental tests.<sup>52</sup> By designing “more theoretically based tests such as those that focus on measuring key factors of intelligence (e.g. fluid reasoning, general memory and learning),”<sup>53</sup> this research has shown it is possible to reduce racial differences in mental test scores.

For instance, when revised to “better fit” the dimensions of the intelligence theory of John Carroll, traditional intelligence tests such as the Woodcock-

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<sup>50</sup> Sabrina Tavernise, *Education Gap Grows Between Rich and Poor*, *Studies Say*, N.Y. TIMES, Feb. 9, 2012 at A1 (referencing Sean F. Reardon, *The Widening Academic Achievement Gap Between The Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND LIFE CHANCES’ OF CHILDREN* 93-94 (Greg J. Duncan & Richard Murnane, eds., 2011)). See also CHRISTOPHER JENCKS & MEREDITH PHILLIPS, *THE BLACK-WHITE TEST SCORE GAP* 182-223 (1998) (noting that the black-white test score gap “has narrowed since 1970).

<sup>51</sup> West-Faulcon, *More Intelligent Design supra* note 15 at 1241.

<sup>52</sup> Harold W. Goldstein, et. al., *Revisiting g: Intelligence, Adverse Impact, and Personnel Selection*, in *ADVERSE IMPACT: IMPLICATIONS FOR ORGANIZATIONAL STAFFING AND HIGH STAKES SELECTION* 102-108 (James Outtz, ed., 2010).

<sup>53</sup> *Id.* at 124.

Johnson III, Stanford-Binet 5, and WISC-IV tests have shown significantly decreased racial difference in scores without decreasing these tests' capacity to measure intelligence.<sup>54</sup> Instead of the one standard deviation typically reported as the difference between scores of African American and white test-takers, the revisions to the tests that aligned with Carroll's well-regarded intelligence theory substantially reduced the gap between African-American and white test scores. Instead of one standard deviation between the scores of the two racial groups, the difference was cut in almost half in some instances to 0.54.<sup>55</sup>

Another example of innovation in mental testing is the Cognitive Assessment System ("CAS") designed based on the PASS theory of intelligence. The CAS test, an intelligence test used to predict achievement of children and adolescents in school settings, shows "much lower racial differences than found with other traditional tests of intelligence."<sup>56</sup> In contrast to the often reported one standard deviation between black and white test-takers, the CAS test has been reported to have a black-white score difference of 0.26 standard deviation—only a little more than one-fourth the size of the racial gap typically reported for conventional intelligence tests.<sup>57</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 125. See also Jack A. Naglieri & J.P. Das, *Planning, Attention, Simultaneous, Successive (PASS) Theory: A Revision of the Concept of Intelligence*, in CONTEMPORARY INTELLECTUAL ASSESSMENT: THEORIES, TESTS, AND ISSUES 120-35 (Dawn P. Flanagan & Patti L. Harrison eds., 2005).

<sup>57</sup> Goldstein, *supra* note 52 at 125. Similar innovations in the development of employment tests have yielded tests with pre-

Lastly, and particularly relevant to the claims of petitioner, similar research undertaken in the context of college admissions testing has revealed that the conventional SAT test—the test currently operational and available to colleges and universities—has larger racial differences than a more predictive prototype college admissions tests developed according to a modern theory of intelligence. Robert Sternberg’s study with the College Board of the “Rainbow Measures”—tests of the three intelligences conceived as constituting intelligence under his “triarchic theory”—was based on data collected at fifteen schools across the United States.<sup>58</sup>

The Sternberg Triarchic Abilities Test (“STAT”) alone was shown to have smaller racial differences and twice the predictive power of the traditional SAT in predicting college GPA—“approximately double the predicted amount of variance in college GPA when compared with the SAT alone (comparative  $r^2$  values of .199 to .098 respectively).”<sup>59</sup> While Sternberg’s research did not find that the new college admissions test eliminated racial group score differences completely, the STAT had smaller racial differences than the traditional SAT. The study’s conclusion was that valid and reliable tests “can be designed that reduce ethnic and socially defined racial group differences on standardized tests, particular

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dictive power equal or better than traditional mental tests, and with no black-white mean differences. *Id.* at 127. *See also* Kimberly West-Faulcon, *Fairness Feuds: Competing Conceptions of Title VII Discriminatory Testing*, 46 WAKE FOREST L. REV. 1035, 1065-1071 (2011).

<sup>58</sup> Sternberg, *Rainbow Project*, *supra* note 25 at 326-28.

<sup>59</sup> *Id.* at 343-44.

for historically disadvantaged groups such as blacks and Latinos.”<sup>60</sup>

## CONCLUSION

Modern social science research has found that differences in racial group average SAT scores of UT admits are not evidence that petitioner was negatively impacted by the consideration of race under UT’s admissions policy. Moreover, modern research of intelligence and mental testing shows that conventional admissions tests have predictive limits that warrant the consideration of non-test-driven criteria until new and improved mental tests with smaller racial differences are available for use by selective universities. In light of this research, UT’s admissions policy does not confer a racial “preference.” Instead, UT adopts a constrained and constitutionally narrowly-tailored attentiveness to race that does not harm whites who apply to the University of Texas as undergraduates.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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<sup>60</sup> *Id.* at 344.